CL-0475

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

***RREEF Infrastructure (G.P.) Limited and***
***RREEF Pan-European Infrastructure Two Lux S.à r.l.***

Claimants

and

***Kingdom of Spain***

Respondent

**ICSID Case No. ARB/13/30**

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# DECISION ON RESPONSIBILITY AND ON THE PRINCIPLES OF QUANTUM

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***Members of the Tribunal***
Professor Alain Pellet, President
Professor Pedro Nikken
Professor Robert Volterra

***Secretary of the Tribunal***
Mr. Gonzalo Flores

*Date:* 30 November 2018

## REPRESENTATION OF THE PARTIES

*Representing RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l.*:

c/o Ms. Judith Gill QC*
Mr. Jeffrey Sullivan*
Ms. Marie Stoyanov
Ms. Virginia Allan
Mr. Ignacio Madalena
Ms. Lauren Lindsay*
Mr. Tomasz Hara
Ms. Stephanie Hawes

**Allen & Overy LLP**
One Bishops Square
London E1 6AD
United Kingdom

* no longer with the firm

*Representing the Kingdom of Spain*:

c/o Mr José Manuel Gutiérrez Delgado
Mr Antolín Fernández Antuña
Mr Roberto Fernández Castilla
Ms Patricia Froehlingsdorf Nicolás
Ms Mónica Moraleda Saceda
Ms Elena Oñoro Saínz
Ms Amaia Rivas Kortázar
Ms María José Ruíz Sánchez
Mr Diego Santacruz Descartín
Mr Javier Torres Gella

**Abogacía General del Estado**
Ministry of Justice of the
Government of Spain
Calle Ayala 5
28001, Madrid
Spain

**TABLE OF [SELECTED] ABBREVIATIONS/DEFINED TERMS**

| | |
|---|---|
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings [2006] |
| BDO First Report | BDO Group Expert Economic-Financial Report on the RREEF Solar Thermal Plants and Wind Farms, dated 14 July 2016 |
| BDO Report duplicating Brattle's Rebuttal Report | BDO Group Expert Report Duplicating Brattle's "Rebuttal Report: Financial Damages to RREEF", dated 8 February 2017 |
| BDO Report on Tribunal Requests | BDO Group Report on Tribunal Requests, dated 5 March 2018 |
| BDO Working Papers | Working papers accompanying BDO Report duplicating Brattle's Rebuttal Report, dated 8 February 2017 |
| Brattle Memorandum | Brattle Group Response to Tribunal Requests, 5 March 2018 |
| C-[#] | Claimants' Exhibit |
| CJEU | Court of Justice of the European Union |
| CL-[#] | Claimants' Legal Authority |
| Claimants' Observations on Additional Documents | Claimants' Observations on Additional Documents, 26 March 2018 |
| Claimants' Response to Spain's Comments on State Aid Decision | Claimants' Response to the Respondents Comments on the European Commission's Decision, 5 February 2018 |
| CM | Claimants' Memorial on the Merits dated 21 November 2014 |
| CNE | National Energy Commission |
| CPHB | Claimants' Post Hearing Brief dated 5 May 2017 |
| CPI | Consumer Price Index |

| | |
|---|---|
| CR | Claimants' Reply on the Merits dated 22 December 2016 |
| CRR | Claimants' Response to Respondent's Submission on Tribunal's Information Request, dated 26 March 2018 |
| CS | Claimants' Submission on Tribunal Request, dated 5 March 2018 |
| CSP | Concentrated Solar Power |
| DCF | Discounted Cash Flow |
| Decision on Jurisdiction | The Tribunal's Decision on Jurisdiction of 6 June 2016 |
| ECT | Energy Charter Treaty |
| FIT | Feed in Tariffs |
| Hearing | Hearing on the Merits held on 20-24 March 2017 |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965 |
| ICSID Institution Rules | ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceeding |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |
| IDEA | *Instituto para la Diversificación y Ahorro de la Energía* |
| IRR | Internal Rate of Return |
| MITYC | Ministry of Industry, Tourism and Commerce |
| MOA | Margin of Appreciation |
| PEIF | RREEF Pan-European Infrastructure Fund L.P. |

| | |
|---|---|
| PER | Renewable Energy Plan |
| PFER | Renewable Energy Promotion Plan |
| R-[#] | Respondent's Exhibit |
| RAIPRE | *Registro Administrativo de Instalaciones de Producción de Energía Eléctrica [en régimen especial]* |
| RCM | Respondent's Counter-Memorial on the Merits dated 15 July 2016 |
| RE | Spain's Renewable Energy power generation sector |
| REEF Infra | RREEF Infrastructure (G.P.) |
| Respondent's Comments on State Aid Decision | Respondents Comments on European Commission Decision on the State Aid, 30 January 2018 |
| Respondent's Observations on Additional Documents | Respondent's Observations on Additional Documents, 26 March 2018 |
| RL-[#] | Respondent's Legal Authority |
| RPHB | Respondent's Post Hearing Brief dated [date] |
| RR | Respondent's Rejoinder on the Merits dated 3 February 2017 |
| RREEF Pan-European Two | RREEF Pan-European Infrastructure Two Lux S.à r.l. |
| RRR | Respondent's Response to Tribunal Request for Additional Information, 05 March 2018 |
| RRS | Respondent's Reply to Claimants' Submission to Tribunal's Request for Additional Information, 26 March 2018 |
| SES / SEE | Spanish Electricity Sector |
| Tr. Day [#] [Speaker(s)], [page:line] | Transcript of the Hearing |

| | |
|---|---|
| Treaty | Energy Charter Treaty |
| Tribunal | Arbitral tribunal constituted on 31 July 2014 |
| TVPEE | Tax on the Value of the Production of Electric Energy |
| VCLT | Vienna Convention on the Law of Treaties |
| WACC | Weighted Average Cost of Capital |
| YBILC | Yearbook of the International Law Commission |

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## I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Energy Charter Treaty which entered into force on 16 April 1998 (the "ECT" or "Treaty") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, which entered into force on 14 October 1966 (the "ICSID Convention").

2. The Claimants are RREEF Infrastructure (G.P.) Limited ("RREEF Infra" or the "First Claimant") and RREEF Pan-European Infrastructure Two Lux S.à r.l. ("RREEF Pan-European Two" or the "Second Claimant"), jointly referred as "the Claimants" or "RREEF."

3. RREEF Infra is a private limited liability company incorporated in 2005 under the laws of Jersey. RREEF Pan-European Two is a private limited liability company (*Société à responsabilité limitée*) incorporated in 2006 under the laws of Luxembourg.

4. As set forth under the Tribunal's Decision on Jurisdiction, RREEF specialises in infrastructure investments, with experience across different sectors, including the power generation sector. RREEF is a member of the Deutsche Bank Group, and in 2013, RREEF was re-branded and now operates together with Deutsche Bank's asset and wealth management divisions, under the unified name Deutsche Asset & Wealth Management.

5. The First Claimant is the general partner of RREEF Pan-European Infrastructure Fund L.P. ("PEIF"). PEIF holds 100% of the share capital in RREEF Pan-European Infrastructure Lux S.à r.l. ("RREEF Pan-European") and an indirect 100% equity stake, through RREEF Pan-European, in the Second Claimant.

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

7. The Claimants and the Respondent are collectively referred to as the "Parties". The Parties' representatives and their addresses are listed above on page (i).

8. This dispute relates to renewable energy generation installations in Spain.

## II. OVERVIEW OF THE DISPUTE AND REQUESTS FOR RELIEF

9. At its core, the dispute concerns allegations by the Claimants that the Respondent, through acts and omissions of its organs, agencies and entities, has caused substantial losses to the Claimants' investment in the Spanish Electricity System ("SES") and violated its international obligations under the ECT. The SES comprises power generations, transportation, distribution and marketing of electrical energy. This case relates to power generation through renewable energy, and in particular, wind and CSP.

10. According to the Claimants, they invested in Spain's Renewable Energy power generation sector ("RE") attracted by the stable economic regime available to investors, governed, among others, by Royal Decree 661/2007, Royal Decree Law 6/2009 and Royal Decree 1614/2010. Thereafter, Spain modified the regulatory framework for the SES, by adopting a series of measures that changed the conditions for the investors' remuneration of their investments in the wind and Concentrated Solar Power ("CSP") sectors. These measures included Law 15/2012, RDL 2/2013, RDL 9/2013, Law 24/2013, RD 413/2014 and the Ministerial Order IET/1882/2014 of 14 October 2014, jointly referred to hereinafter as the "disputed measures".

11. According to the Claimants, such modifications constitute breaches of the Respondent's obligations under Article 10(1) of the ECT to provide Fair and Equitable Treatment and to guarantee its commitments under the umbrella clause embodied in the last subparagraph of Article 10(1) of the ECT, entitling the Claimants to full restitution under the Treaty and international law. They further claim compensation for all losses suffered as a result of the Respondent's breaches. In particular, the Claimants request that the Tribunal:

> " (a) Declar[e] that Spain has breached Article 10(1) of the ECT; and
>
> (b) Order[] that Spain:
>
> (i) provide full restitution to the Claimants by re-establishing the situation which existed prior to Spain's breaches of the ECT, together with compensation for all losses suffered before restitution; or

(ii) pay the Claimants compensation for all losses suffered as a result of Spain's breaches of the ECT; and

in any event:

(iii) pay the Claimants pre-award interest at a rate of 2.07% compounded monthly; and

(iv) pay post-award interest, compounded monthly at a rate to be determined by the Tribunal on the amounts awarded until full payment thereof; and

(v) pay the Claimants the costs of this arbitration on a full-indemnity basis, including all expenses that the Claimants have incurred or will incur in respect of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants; and

(vi) any such other and further relief that the Tribunal shall deem just and proper.[1]

and that:

The Tribunal [] dismiss (i) Spain's claim concerning the installed capacity of the CSP Plants; and (ii) the remaining objection as to jurisdiction (the Tax Objection)."[2]

12. The Respondent in turn holds that the modifications to the SES were adopted in compliance with its international obligations, including the Treaty. For the Respondent, the regulatory changes were necessary to correct situations of over remunerations, and ensure the economic sustainability of the SES, affected among others, by the Tariff Deficit. The disputed measures sought to guarantee a reasonable rate of return in the context of a sustainable SEE. The Respondent also ascertains that the Spanish regulatory framework did not incorporate a stabilization "clause" guaranteeing the non-modification of the regime. Instead, the Claimants were aware that their investments' remuneration method was subject to regulatory changes.

[1] CM, para. 584; CR, para. 816.
[2] CR, para. 816.

13. On this basis, the Respondent requests that the Tribunal:

> "a) Declare its lack of jurisdiction to hear the claim concerning an alleged infringement by the Kingdom of Spain of Article 10 (1) of the EC Treaty by introducing the Tax on the Value of Electric Power Production (IVPEE) By Act 15/2012.
>
> b) Dismiss all the claims of the Claimant regarding the other contested measures, since the Kingdom of Spain has not in any way failed to comply with the ECT, in accordance with what is stated in Sections (A) y (B) of section II and III of this Statement.
>
> c) Subsidiarily, all claims for compensation of the Claimant should be dismissed as they are not entitled to compensation in accordance with Section IV of this Statement and
>
> d) Order that the Claimant pays all costs and expenses arising from this arbitration, including administrative expenses and the fees of the Court's Arbitrators, as well as the fees of the legal representation of the Kingdom of Spain, its experts and advisers, and any other costs or expenses that may have incurred, all of which include a reasonable interest rate from the date these costs are incurred until the date of their actual payment."[3]

## III. PROCEDURAL HISTORY

14. On 22 October 2013, ICSID received a request for arbitration from RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. against the Kingdom of Spain.

15. The Request was filed on the basis of Article 26(4)(a)(i) of the Energy Charter Treaty (the "ECT") dated 17 December 1994, which entered into force on 16 April 1998 for Luxembourg, the United Kingdom and the Kingdom of Spain, Article 36 of the ICSID Convention, and Article 1 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceeding (the "ICSID Institution Rules").

16. On 22 November 2013, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.

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[3] RR, para. 1174.

17. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with Article 37(2)(b) of the ICSID Convention.

18. The Tribunal is composed of Professor Alain Pellet, a national of France, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Professor Robert Volterra, a national of Canada, appointed by the Claimants; and Professor Pedro Nikken, a national of Venezuela, appointed by the Respondent.

19. On 31 July 2014, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"). Ms. Natalí Sequeira, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

20. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 29 September 2014 in Paris.

21. On 21 October 2014, the Tribunal issued Procedural Order No. 1 setting forth the matters discussed at the first session, including the procedural timetable and the agreement that the proceedings were to be conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006.

22. On 14 November 2014, the European Commission filed an Application for leave to intervene as non-disputing party pursuant to ICSID Arbitration Rule 37(2).

23. On 21 November 2014, the Claimants filed their Memorial on the Merits, accompanied by

- Witness Statements of:
  - Mauricio Bolaña dated 20 November 2014,
  - Harold D'Hauteville dated 19 November 2014,
  - Walter Manara dated 19 November 2014, and
  - Andrew M. Morris dated 21 November 2014;

- Expert Reports by:
  - Brattle Group Regulatory Report dated 21 November 2014, with exhibits BRR-0001to BRR-0059, and
  - Brattle Group Quantum Report dated November 2014, with exhibits BQR-0001 to BQR-0101;
- Exhibits C-0016 to C-0177;
- Legal Authorities CL-0001 to CL-0090;
- Appendix 1 – Table of Defined Terms,
- Appendix 2 – Dramatis Personae.

24. On 9 January 2015, the Respondent filed a request to bifurcate the proceedings. On 23 January 2015, the Claimants filed observations on the Respondent's request.

25. On 5 February 2015, the Tribunal issued Procedural Order No. 2 concerning the European Commission's Application to file a written submission as a non-disputing party pursuant to ICSID Arbitration Rule 37(2), after giving each party an opportunity to file observations. The Tribunal found that "that the European Commission's Application for leave to intervene [was] inadmissible".

26. On 7 February 2015, the Tribunal granted the Respondent's request for bifurcation of the proceedings. Accordingly, the Respondent's objections to jurisdiction would be addressed as a preliminary question and suspended the proceedings on the merits.

27. On 18 February 2015, the Tribunal issued Procedural Order No. 3, setting forth the reasoning for its decision on bifurcation.

28. On 4 March 2015, the Tribunal issued Procedural Order No. 4 establishing a new procedural calendar to address the Respondent's objections to the jurisdiction of the Tribunal.

29. On 19 June 2015, the Tribunal issued Procedural Order No. 5 deciding on the Parties' requests for document production.

30. On 7 July 2015, the Tribunal issued Procedural Order No. 6 concerning a request for confidentiality of certain documents to be produced by the Parties.

31. On 14 January 2016, after receiving the Parties' observations, the Tribunal issued Procedural Order No. 7 rejecting the European Commission's second application to intervene as a non-disputing party, which had been filed on 9 December 2015.

32. On 7 March 2016, the Tribunal issued a decision on the Respondent's jurisdictional objections.

33. On 24 March 2016, the Tribunal fixed the procedural calendar for the merits phase.

34. On 6 June 2016, the Tribunal issued its Decision on Jurisdiction setting forth the reasoning for its determination of 7 March 2016 (the "Decision on Jurisdiction"). The Decision on Jurisdiction is incorporated to this Decision and constitutes integral part hereof. In its Decision, the Tribunal decided that:

> "(1) The Tribunal takes note of the Claimants' abandonment of their claim concerning the modification of the Excise Duties Act of 28 December 1992 ("Excise Duties Act") by Article 28 of Act 15/2012.
>
> (2) The Respondent's objection based on Article 21 ECT is joined to the merits. This decision does not prejudge any position of the Tribunal as to the admissibility of this objection as a preliminary issue or a question of substance.
>
> (3) The questions of the composition and value of the compensable rights allegedly breached by the Respondent are joined to the merits.
>
> (4) All other objections are rejected and the Tribunal has jurisdiction for deciding on the dispute submitted by RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. on 18 October 2013, subject to paragraph 232 (1) above.
>
> (5) The submissions of the Claimants concerning the measures adopted after their Request for Arbitration are admissible and the Tribunal can exercise jurisdiction over them.
>
> (6) The Tribunal will take the necessary steps for the continuation of the proceedings toward the merits phase.
>
> (7) The decision regarding the costs of arbitration is deferred to the second phase of the arbitration on the merits."

35. A detailed description of the procedural steps leading to the Decision on Jurisdiction are included in Section II, thereof.

36. On 15 July 2016, the Respondent filed its Counter-Memorial on the Merits, accompanied by the following:

- Witness Statement of:
  - Carlos Montoya dated 14 July 2016, with exhibits[4];
- Expert Report by:
  - BDO Economic and Financial Report dated 14 July 2016, with exhibits B-0001 to B-0079;
- Exhibits R-0085 to R-0277;
- Legal Authorities RL-0060 to RL-0094.

37. On 29 July 2016, the Parties filed a request for production of documents. On 12 August 2016, the Parties filed responses and objections to the request for production of documents. On 2 September 2016, the Parties filed applications to the Tribunal to decide on the production of documents.

38. On 21 September 2016, ICSID informed the Parties and the Tribunal that, due to a reorganization of the Centre's workload, Ms. Mairée Uran Bidegain, ICSID Team Leader/Legal Counsel, would act as Secretary of the Tribunal.

39. On 23 September 2016, the Tribunal issued Procedural Order No. 8 concerning objections to a request for production of documents.

40. On 22 December 2016, the Claimants filed their Reply on the Merits, accompanied by:

- Second Witness Statements of:

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[4] Mr Montoya's First Statement was accompanied by the following: W-0005, W-0010, W-0011, W-0017, W-0017bis, W-0018, W-0026, W-0033, W-0034, W-0037, W-0039, W-0041, W-0042, W-0043, W-0045, W-0051to W-0059, W-0101 to W-0113, W-0114 (I) to W-0114 (III), W-0115, W-0116, W-0117 (I), W-0117 (II), W-0118 (I), W-0118 (II), W-0119, W-0121, W-0123, W-0125, W-0127, W-0129, W-0131, W-0133, W-0135 to W-0138, W-0140, W-0234, W-0236, W-0237 (I), W-0237 (II), W-0308 to W-0313, W-0416, W-0417, W-01001, W-01012, W-01022, W-01024 to W-01027, W-01029, W-01030 (I), W-01031 to W-01038, W-01043 (I) to W-01043 (XII), W-01095, W-01101 (I) to W-01112 (I), W-01112 (II), W-01113 to W-01116, W-01117 (I), W-01118, W-01119 (I), W-01120 (I), W-01121 (I), W-01122 to W-01131.

- Mauricio Bolaña dated 15 December 2016,
- Harold d'Hauteville dated 22 December 2016,
- Walter Manara dated 22 December 2016, and
- Andrew Morris dated 22 December 2016;

▪ Expert Reports by:
  - Dr. Thomas Mancini dated 16 December 2016, with exhibits TRM-0001 to TRM-0130,
  - Brattle Group Rebuttal Regulatory Report dated 22 December 2016, with exhibits BRR-0060 to BRR-0148,
  - Brattle Group Rebuttal Quantum Report dated 22 December 2016, signed 22 November 2016, with exhibits BQR-102 to BQR-0140.1-14, BQR-0141;

▪ Exhibits C-0216 to C-0297;

▪ Legal Authorities CL-0216 to CL-0237.

41. On 8 February 2017, the Respondent filed its Rejoinder on the Merits, accompanied by the following:

▪ Witness Statements of:
  - Daniel LaCalle dated 7 February 2017, with exhibits LC-0001 to LC-0004.
  - Carlos Montoya (Second), dated 3 February 2017, with exhibits;[5]

▪ Expert Reports by:
  - BDO Financial Damages Rebuttal Report dated 8 February 2017, with exhibits B-0080 to B-0124,
  - Professor Jesús Casanova Kindelán dated 7 February 2017, with exhibits JCK-0001 to JCK-0016,
  - Dr. Jorge Servert dated January 2017, with exhibits JSR-0001 to JSR-0010 and JSRC-0001 to JSRC-0035;

▪ Exhibits R-0278 to R-0417;

▪ Legal Authorities RL-0095 to RL-0114.

42. On 7 March 2017, the Tribunal held a Pre-Hearing Conference, by telephone, with the Parties, and the Secretary of the Tribunal.

[5] W-0001 to W-0003, W-0024, W-0028, W-0038, W-0423, W-0424, W-0427, W-0428, W-0432 to W-0434, W-0435 (I), W-0435 (II), W-0451, W-0454 to W-0469, W-0471, to W-0483, W-0484 (I), W-0484 (II), W-0485 to W-0487, W-0488 (I) to W-0488 (IV), W-0489 to W-0493, W-01136, W-01139 to W-RF.0046, W-RF.0081 to W-RF.0161, W-RF.0163 to W-RF.0168, W-RF.0831 and W-RF.0837.

43. On 12 March 2017, the Tribunal issued Procedural Order No. 9, deciding on certain organizational issue for the hearing on the merits as well as on the incorporation of additional documents into the record.

44. A hearing on the Merits was held in Paris from March 20-24, 2017 (the "Hearing"). The following persons were present at the Hearing:

*Tribunal*:

| | |
|---|---|
| Alain Pellet | President |
| Pedro Nikken | Arbitrator |
| Robert Volterra | Arbitrator |

*ICSID Secretariat*:

| | |
|---|---|
| Mairée Uran Bidegain | Secretary of the Tribunal |

*For the Claimants*:

| | |
|---|---|
| Ms. Judith Gill QC | Allen & Overy LLP |
| Mr. Jeffrey Sullivan | Allen & Overy LLP |
| Ms. Marie Stoyanov | Allen & Overy LLP |
| Mr. Ignacio Madalena | Allen & Overy LLP |
| Ms. Lauren Lindsay | Allen & Overy LLP |
| Mr. Tomasz Hara | Allen & Overy LLP |
| Ms. Stephanie Hawes | Allen & Overy LLP |
| Ms. Amy McMullen | Allen & Overy LLP |
| Mr Mauricio Pizarro Ortega | Allen & Overy LLP |
| | |
| Mr. Alejandro Matus | RREEF Infrastructure; |

*For the Respondent*:

| | |
|---|---|
| Mr. Diego Santacruz Descartín | State's Attorney Office. Ministry of Justice |
| Ms. Mónica Moraleda Saceda | State's Attorney Office. Ministry of Justice |
| Mr. Javier Torres Gella | State's Attorney Office. Ministry of Justice |
| Mr. Antolín Fernández Antuña | State's Attorney Office. Ministry of Justice |
| Ms. Amaia Rivas Kortázar | State's Attorney Office. Ministry of Justice |
| Ms. Raquel Vázquez Meco | IDAE |
| Mr. Juan Ramón Ayuso Ortiz | IDAE |
| Mr. Alfonso Olivas la Llana | IDAE |

*Court Reporters*:

| | |
|---|---|
| Mr. Trevor McGowan | The Court Reporter Ltd |
| Mr. Paul Pelissier | D-R Esteno |
| Ms. Luciana Sosa | D-R Esteno; |

*Interpreters*:

Ms. Amalia Thaler de Klem
Mr. Mark Viscovi
Mr. Jesús Getan Bornn

45. During the Hearing, the following persons were examined:

*On behalf of the Claimants*:

Mr Walter Manara
Mr Andrew Morris
Mr Harold Hauteville

| | |
|---|---|
| Dr Thomas Mancini | TR Mancini Consulting |
| | |
| Mr Carlos Lapuerta | The Brattle Group |
| Mr Richard Caldwell | The Brattle Group |
| Dr José Antonio García | The Brattle Group |
| Mr Jack Stirzaker | The Brattle Group; |

*On behalf of the Respondent*:

Mr Carlos Montoya
Mr Daniel Lacalle

Dr Jorge Servert
Dr Jesús Casanova Kindelán

| | |
|---|---|
| Mr Manuel Vargas González | BDO |
| Mr Eduardo Pérez Ruiz | BDO |
| Mr David Mitchell | BDO |
| Ms Susan Blower | BDO. |

46. On 3 April 2017, each Party filed the list of questions that it considered to be before the Tribunal for purposes of Article 48 of the ICSID Convention.

47. On 6 April 2017, the Tribunal issued Procedural Order No. 10, in which it directed the Parties (a) to submit post-hearing briefs in which they were asked to also answer several questions posed by the members of the Tribunal at the end of the Hearing and recorded in Procedural

Order No. 10, and (b) to agree on a procedure and deadline for the filing of transcript corrections and costs statements.

48. On 5 May 2017, the Parties filed simultaneous post-hearing briefs. The Claimants post-hearing brief was accompanied by legal authorities CL-238 to CL-241.

49. On 11 May 2017, the Claimants filed a request for leave to introduce the award issued on 4 May 2017 in *EISER Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36) (the "*Eiser* Award"), as a new legal authority on the record. On that same day, the Respondent objected to its introduction, and requested an opportunity to provide comments on the *Eiser* Award, in accordance with Section 16.3 of Procedural Order No. 1 in case the Claimants' request was granted.

50. On 22 May 2017, the Tribunal granted the Claimants' request to introduce the *Eiser* Award and invited the Parties to consult and agree on a method for the introduction of the *Eiser* Award and a timetable for the Parties' respective simultaneous observations.

51. On 24 May 2017, the Parties provided the Tribunal with their agreement on the issues identified in the preceding paragraph.

52. On 30 May 2017, the *Eiser* Award was introduced into the record, as legal authority CL-242.

53. On 2 June 2017, in accordance with the Parties' agreed upon procedure and timeline, the Claimants submitted their observations on the *Eiser* Award.

54. On 6 June 2017, the Parties filed simultaneous submissions on costs.

55. On 9 June 2017, the Respondent filed its observations on the *Eiser* Award.

56. On 13 July 2017, the Claimants requested the admission of a new document in the record.

57. On 21 July 2017, the Parties agreed on the admission of new documents in the record.

58. On 25 July 2017, the Tribunal confirmed the Parties' agreement.

59. On 7 August 2017, the Claimants and the Respondent submitted comments on the new documents.

60. On 23 November 2017, the Respondent filed an application to introduce a decision issued by the European Commission on the "State Aid Framework for Renewable Sources" of the Kingdom of Spain (the "State Aid Decision"). The Claimants' filed their response to the Respondent's Application on 30 November 2017. On 2 January 2018, the Tribunal denied the Respondent's request.

61. On 10 January 2018, the Respondent filed a request for reconsideration of the Tribunal's decision of 2 January 2018. On 16 January 2018, the Claimants filed their objection to the Respondent's request.

62. On 16 January 2018, the Tribunal requested additional information from the Parties regarding their investments, namely:

> "1. Their respective calculations of the anticipated total return on the investments, both taking into account and not taking into account the disputed measures, over the lifetime of the investment;
>
> 2. Updated information from the submissions of the Reply and Rejoinder of any events such as sales of the investments or others, affecting the Claimants' investments in the Andasol and Arenales Plants or the Dédalo Project;
>
> 3. A breakdown of the valuation offered by each Party, divided by head of claim and disputed measure, of the damages allegedly resulting from the Respondent's purported violation of the ECT, including the alleged retroactivity of the new regime."

63. On 18 January 2018, the Respondent filed its observations to the Tribunal's request, including various requests regarding (i) time and dates for the submission of the additional information; (ii) the holding of a hearing to present the new information; and (iii) to order the Claimants to provide the Respondent with all the documents relating to the sale of the Plants and related information.

64. On 24 January 2018, the Tribunal reconsidered its decision of 2 January 2018 and granted the Respondent's request to introduce the State Aid Decision into the record, also setting up a schedule for the Parties to submit their observations.

65. On 29 January 2018, the State Aid Decision was introduced into the record [as legal authority RL-115].

66. On the same date, the Claimants filed their observations to the Tribunal's request of 16 January 2018 and on the Respondent's observations and requests of 18 January 2018.

67. On 30 January 2018, the Respondent filed its comments on the State Aid Decision. On 5 February 2018, the Claimants filed their response to the Respondent's comments on the State Aid Decision.

68. On 12 February 2018, the Tribunal decided on the Respondent's request regarding the Tribunal's letter of 16 January 2018, confirming the schedule for the submission of the additional information and the type of information to be disclosed by the Claimants. The Tribunal further rejected the remainder of the Respondent's request.

69. On 13 February 2018, the Respondent filed a request for reconsideration of the Tribunal's communication of 12 February 2018. On 16 February 2018, the Claimants filed their observations to the Respondent's request.

70. On 28 February 2018, the Tribunal decided on the Respondent's request of 13 February 2018.

71. On 2 March 2018, the Claimants filed a request for leave to introduce into the record, the award issued on 15 February 2018 in *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain* (SCC Arbitration (2015/063)) (the "*Novenergia* Award").

72. On 5 March 2018, the Parties filed their first round of submissions in response to the Tribunal's request for additional information of 16 January 2018.

73. On 9 March 2018, the Respondent filed its observations on the Claimants' request. The Respondent did not object to the introduction of the *Novenergia* Award and requested the admission of three additional documents, including the Judgment of the CJEU of 6 March 2018, *Slovak Republic v. Achmea* BV, C-284/16, ("*Achmea*"), *Blusun S.A. v. Italian Republic* (ICSID Case No. ARB/14/3), Award, 27 December 2016 ("*Blusun*"); *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs. Gisela Wirtgen and JSW Solar (swei) GmbH & Co. KG v. The Czech Republic,* Award, 11 October 2017, ("*Wirtgen*").

74. On 14 March 2018, the Claimants submitted their objections to the Respondent's request of 9 March 2018.

75. On 20 March 2018, the Tribunal granted both the Claimants and the Respondent's request for leave to introduce into the record the documents mentioned in their respective requests of 2 March 2018, and 9 March 2018.

76. On 22 March 2018, the Claimants submitted the *Novenergia* Award, which was introduced into the record, as legal authority CL-243. On the same date, the Respondent submitted the three documents mentioned in the 9 March 2018 request, which were introduced into the record as legal authorities RL-116, RL-117 and RL-118.

77. On 26 March 2018, both Parties submitted their individual observations on legal authorities CL-243, RL-116, RL-117 and RL-118.

78. On that same dates, the Parties submitted their final submission in response to the Tribunal's Request of 16 January 2018 regarding additional information.

79. On 22 June 2018, the Claimants filed a request for leave to introduce into the record, two awards:

- *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Award, 16 May 2018, ICSID Case No. ARB/14/1, ("*Masdar*");
- *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, Award, 15 June 2018, ICSID Case No. ARB/13/31, ("*Antin*").

80. On 9 July 2018, the Respondent, on invitation from the Tribunal, replied to the Claimants' request indicating that it did not object to the introduction of the *Masdar* and *Antin* awards into the record.

81. On 13 August 2018, ICSID informed the Parties and the Tribunal that Mr. Gonzalo Flores, Deputy Secretary-General of ICSID, would act as Secretary of the Tribunal.

82. On 13 August 2018, the Tribunal took note of the parties' agreement and invited the Claimants to introduce the *Masdar* and *Antin* awards on the case record.

83. In accordance with the Tribunal's directions, the Claimants submitted copies of the *Masdar* and *Antin* awards and provided comments on these two new documents on 21 August 2018. The Respondent submitted its observations on the awards on 28 August 2018.

## IV. FACTUAL BACKGROUND

84. The Tribunal provides below a general overview of the factual background that has led to this dispute, to the extent it is substantiated and is material for the determinations in this Decision. In doing so, it will adopt a chronological timeline when possible, referring to the evidence presented by the Parties and describing the Parties' positions with regard to disputed facts.

85. This section is not intended to be an exhaustive description of all facts underlying this dispute. Some facts will also be addressed, to the extent relevant or useful, in the context of the Tribunal's legal analysis of the issues in dispute. The Tribunal has nonetheless considered the evidence in full, as adduced by the Parties in this arbitration.

86. On the basis of the materials adduced by the Parties, the Tribunal describes below: (A) the SES and the applicable regulatory framework, and (B) the Claimants' investments in the Respondent.

## A. THE SPANISH ELECTRICITY SYSTEM

### (a) Spain's Energy Policy and the Relevant International Framework

87. In 1992, Spain signed the United Nations Framework Convention on Climate Change ("UNFCCC").[6] In 1998 the European Union and Spain, as a Member State, signed the 1997 Kyoto Protocol, an international instrument negotiated to implement the UNFCCC.[7] Under this international framework, Spain, with many other nations, committed to a reduction of greenhouse emissions, through among others, the allocation of important resources to that effect.

88. To participate fully in this international effort to reduce greenhouse emissions, the European Union ("EU") adopted Directive 2001/77/EC "on the promotion of electricity produced from renewable energy sources in the internal electricity market" ("2001 Directive").[8] The 2001 Directive set obligations for the EU Member States, including the obligation to set indicative targets for future consumption of electricity produced from renewable energy sources.[9] The Respondent's national indicative targets "for the contribution of electricity produced from renewable energy sources to gross electricity consumption by 2010" was 29.4%.[10] The Directive also recognized that Member States may use support schemes to contribute to the

[6] United Nations Framework Convention on Climate Change, 1771 United Nations Treaty Series 107; 31 International Legal Materials 849 (1992), 9 May 1992 (entered into force on 9 May 1992, and for Spain in 1994) (UNFCCC) (C-18).
[7] Kyoto Protocol to the United Nations Framework Convention on Climate Change, United Nations Document FCCC/CP/1997/7/Add.1, Dec. 10, 1997; (entered into force on 16 February 2005 for the EU and Spain) (C-19). In the context of the negotiations of the 1997 Kyoto Protocol, the EU presented a White Paper. (See Communication from the Commission, "Energy for the Future: Renewable Sources of Energy", White Paper for a Community Strategy and Action Plan, COM (97) 26 November 1997 ("EU 1997 White Paper") (C-50).
[8] The 2001 Directive reflected global indicative targets of 12% of gross national energy consumption by 2010 and of 22,1% indicative share of electricity produced from renewable energy sources in total Community electricity consumption by 2010, that had been recorded in the EU 1997 White Paper. Directive 2001/77/EC of the European Parliament and of the Council, on the promotion of electricity produced from renewable energy sources in the internal electricity market, 27 September 2001 (published on 27 October 2001) ("Directive 2001/77/EC") (C-20) (R-45), Art. 3.4.
[9] Directive 2001/77/EC (C-20) (R-45), Art. 3.2.
[10] Directive 2001/77/EC (C-20) (R-45), Annex. The 2001 Directive was supplemented on 26 June 2003. Directive 2003/54/EC of the European Parliament and of the Council, about common standards for the internal market in electricity, 26 June 2003 (published on 15 July 2003) (R-46).

achievement of national indicative targets and promote the use of renewable energy resources.[11]

89. It is undisputed between the Parties that, compared to conventional power generation technologies, RE projects are not cost-competitive, at either the whole sale or retail level.[12] Moreover, renewable energy investments are, at the outset capital-intensive, and the ongoing operating costs are relatively low.[13]

90. For this and other reasons, to attract investments, many States put in place regulatory incentives to level the playing field amongst energy investors in the conventional and the renewable energy sector. This includes for example, the Feed-in-Tariff ("FIT") mechanism, implemented in Spain to, among others, achieve the "indicative targets" referred to in paragraph 88 above and at issue in this arbitration. The FIT can take the form of a fixed tariff (set at a rate above normal electricity market prices) or a premium (paid on top of market prices for the sale of each unit, or kilowatt hour (kWh) of energy produced and fed into the power grid).[14]

91. In August 2005, and considering, among others, its obligations under the international instruments mentioned above, Spain approved its 2005-2010 the *Plan de Energías Renovables* ("PER" by its Spanish acronym) (Renewable Energy Plan).[15] The PER was prepared by the *Instituto para la Diversificación y Ahorro de la Energía* ("IDAE") and constituted an amendment to the 2000-2010 Renewable Energy Promotion Plan ("PFER" by

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[11] Directive 2001/77/EC, 27 September 2001 (C-20) (R-45), Art. 4

[12] CM, paras.19, 72-73; RCM, para. 117; Tr. Day 1 (Sullivan), 24:17-24.

[13] Tr. Day 1 (Sullivan), 19:23-20:7.

[14] Miguel Mendonça, David Jacobs & Benjamin Sovacool, Powering the Green Economy in The Feed-In Tariff Handbook (Earthscan, 2010), 1 January 2010 (C-48); Govinda R. Timilsina, Lado Kurdgelashvili & Patrick A. Narbel, "A Review of Solar Energy: Markets, Economics and Policies (2011), The World Bank, Development Research Group, Environment and Energy Team" (C-44), pp. 27-28.

[15] Ministry of Industry, Tourism and Commerce & IDAE, Plan de Energías Renovables en España 2005-2010 "Renewable Energy Plan in Spain", August 2005 ("PER 2005-2010") (C-43) (R-135); see also, Ministry of Industry, Tourism and Commerce & IDAE, "Summary of the Spanish Renewable Energy Plan 2005-2010", August 2005 (C-58).

its Spanish acronym).[16] Like the PFER, the PER established a series of targets by technological area, to promote the use of renewable energy sources and were an indication of the future development of the different renewable technologies. Thus, the PER contained the underlying economic data used by the government to determine its regulatory framework. The purpose of the renewable planning documents and their place in the Respondent's regulatory process is explained as follows by one of the Claimants' advisors at the time of the making of the investments:

> "In order to comply with the Kyoto target and the EU 202020 scheme, the Spanish Government drafts medium to long term planning documents (5 to 10 years) aimed at identifying the technologies that have the potential (both technical and economic) to contribute significantly to achieving the aforementioned targets. The renewable energy planning documents - Plan de Energías Renovables (PER) - set out the specific growth projections for each technology and breaks it down by autonomous region. Based on the documents, the Government sets a tariff (published in the form of a Royal Decree) for each technology depending on the level of growth that is required from each technology.
>
> Renewable energy planning documents are the best indicators of the future development of the different renewable technologies".[17]

92. The PER indicated that there had been an important growth on energy consumption, "a significant increase, although insufficient to achieve the ambitious targets that had been set. At end-2004, an accumulated fulfilment of 28.4% had been achieved on the global target of increasing renewable sources, anticipated for 2010." [18]

[16] The PER was a revision to the 2000-2010 Renewable Energy Promotion Plan ("PFER") approved in Spain on 30 December 1999. The PFER established a series of targets by technological area that would enable renewable energy sources help Spain meet at least 12% of total primary energy demand by 2010 (i.e., the global indicative target) and assessed the public funds needed to implement the required promotion plan Spain. Under the PFER, Spain appears to have envisaged that to reach its targets for CSP, 10% of the investment would come from subsidies, 20% would come from promoters and 70% from "outside financing". Plan for the Promotion of Renewable Energies 2000-2010, December 1999 ("PFER 2000-2010") (R-134), p. 22.

[17] Pöyry Management Consulting, "Current State and Future Trends of Solar Power in Spain: An ILEX Energy Report to RREEF Infrastructure", March 2011 ("Pöyry Energy Consulting Report 2") (C-87), p. 26.

[18] PER 2005-2010 (C-43), p. 8.

93. The PER further acknowledged that to boost investments in RE, economic profitability of the investments and access to finance, were important components.[19] With regard to the profitability or return on investments of the "project types" the PER estimated a "Internal Rate of Return (IRR), measured in current currency values and for every project type" at "around 7%, with own resources (prior to funding) and post-tax."

94. With regard to the access to finance, the PER estimated that 77.1 % of the overall financing required for its implementation would be debt finance (18.198 billion), while public aid and equity investment would be the source for the remaining 2.9% (680,939) and 20% (4.720 billion), respectively.[20] The financing needs were calculated taking into consideration the different technologies, as well as "the technical and economic parameters for each one of them, giving rise to the formulation of corresponding project types by technologies."[21] In addition, with regard to the project types, the PER indicated that:

> "**4.5 Project types by technology**
>
> Starting from the proposed energy goals, we have determined the funding needs for every technology based on its profitability, defining a number of project types for our calculation model.
>
> These project types are characterised by technical parameters related to their size, equivalent working hours, cost per unit, periods of operation, service life, operating and maintenance costs and final sale prices per unit of energy. Furthermore, we have applied a number of assumptions on funding and a series of financial aids or measures designed according to the requirements of every technology.
>
> Below are the files for each one of the project types considered in the different technological sectors and whose figures have served as the basis for the financial and economic calculations of the Plan for the 2005-2010 period."[22]

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[19] PER 2005-2010 (R-135) (see also C-43), Section 4.3.
[20] PER 2005-2010 (C-43) (R-135), Sections 4.2-4.3.
[21] PER 2005-2010 (R-135) (see also C-43), Section 4.2.
[22] PER 2005-2010 (R-135), Section 4.5.

95. Against this background, Spain made efforts to encourage investments in RE by promoting itself as an attractive destination for renewable energy investments.[23] These efforts appear to have been carried out by the Ministry of Industry, Tourism and Commerce (the "Ministry"), in conjunction with a State-owned company for the Promotion and Attraction of Foreign Investment, known as InvestInSpain.[24]

96. On 23 April 2009, the EU approved Directive 2009/28/EC on the promotion of the use of energy from renewable sources (the "2009 Directive").[25] Articles 3(1) and (3)(4) of the 2009 Directive set a new target whereby by 2020 the European Community would seek to obtain 20% (instead of 12%) of its total gross final energy consumption requirements from renewable sources and a minimum target of 10% for each Member State. Under Article 4 of the 2009 Directive, each Member State was required to adopt a National Action Plan for the implementation of the Directive and its targets (or PANER for its Spanish acronym).

97. On 30 June 2010, Spain adopted its PANER and confirmed a target of 20% of gross final energy demand being generated through renewable sources by 2020.[26] The PANER indicated, in relevant part:

> "The economic framework, currently implemented by Royal Decree 661/2007 of 25 May 2007 regulating electrical energy production under the Special Regime, and Order ITC/3519/2009 of 28 December 2009 reviewing access fees as from 01 January 2010 along with the tariffs and premiums corresponding to special regime installations, provide for electricity generation remuneration levels that afford a reasonable return on investment. In determining those levels, account is taken of the specific technical and economic aspects of each technology, installed capacity and

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[23] See e.g., Manuela García presentation, "Opportunities in Renewable Energy in Spain", 15 November 2007 ("Manuela García Presentation of November 2007") (C-230); Manuela García presentation of November 2008 (C-73); Ministry of Industry Tourism and Commerce presentation, "Legal framework for renewable energies in Spain", 1 November 2009 ("November 2009 MITYC Presentation") (C-247).

[24] InvestinSpain appears today to have been dissolved and its functions replaced by ICEX Spain Trade and Investment, a public corporation. "About Us", InvestInSpain website, Undated (C-72). The Parties disagree on whether the statements and presentation of InvestInSpain can be attributable to the Kingdom of Spain. See RR, paras. 610-611.

[25] Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, 23 April 2009 (published on 25 June 2009) ("2009 Directive") (C-22) (R-47). See also Annex I to 2009 Directive, setting Spain's commitments.

[26] National Action Plan for Renewable Energy in Spain, Plan de Acción Nacional de Energías Renovables 2011-2020, 30 June 2010 ("PANER 2011-2020") (R-136), Section 3.1.

the date operation commenced, in all cases using criteria of system economic sustainability and efficiency.
[…]

**Review of remuneration**

Royal Decree 661/2007 provides for reviews of remuneration amounts every four years, which may be modified on the basis of technological developments within the sectors, market behaviour, degree of compliance with renewable energy targets, percentage of demand covered by special regime facilities and their effect on the technical and economic management of the system, while always guaranteeing reasonable rates of return. In any event, these reviews take account of cost trends associated with each technology with three objectives in mind: to see that renewable technologies become as competitive as possible with Ordinary Regime generation, to foster a technological development balance and to see that the remunerative scheme moves in the direction of minimising socio-economic and environmental costs.
[…]

**Future developments in support schemes for electricity generation from renewable energies**

Electrical energy production under the special procedure is founded on three basic principles, namely legal certainty, feasibility and regulatory stability.

Any present or future economic remuneration system to support the generation of electricity from renewable sources will be based on the aforementioned principles, and the necessary mechanisms will be devised to dovetail technological improvements and market developments with incentives for electricity generation from renewable sources in order to meet the targets and objectives by the established deadlines.

Technical parameters and investment costs incurred will be considered in determining remuneration with a view to providing a reasonable rate of return referenced to the cost of money on the capital market in accordance with the provisions of the Electricity Sector Act.

Also, effective administrative supervision is required to assure that gains from the development of these technologies in terms of relative cost competitiveness are passed on to society, thus minimising the speculative risks posed in the past by excessive rates of return, which not only hurts consumers but is also damaging to the industry in general in terms of the perception people have of it. Therefore, it will be necessary to devise sufficiently flexible and transparent systems that permit the issue and

> reception of economic and market signals so as to minimise the risks associated with investment and its remuneration and those caused by fluctuations in the energy markets."[27]

98. From 2010 onwards, there was a drop in electricity demand.[28] According to the Respondent, SEE revenues at that time came exclusively from the Spanish consumer. Accordingly, the reduction in demand resulted in a substantial reduction in income available to the SEE to address its costs, including the remunerations regimes provided under the FIT model, as subsidies.[29]

99. By the end of 2011, the electricity deficit represented over EUR 3,000 million and an accumulated tariff debt of more than USD 22 billion and electricity tariff for consumers were some of the highest in Europe.[30] That amount had reached 26 billion by 2013.[31]

100. According to the Respondent, relying on sources unverified by the Tribunal but uncontested by Claimants, the price of electric bills for consumers has increased considerably in the past 10-15 years: a consumer paid on their electric bill EUR 370 per year in 2003 and went on to pay in 2012 a total of EUR 669. Between 2007 and 2014, the electricity in a household in Spain has increased by 61.55% while the increase in price for the European Union reached 21.99%.[32]

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[27] PANER 2011-2020 (R-136), pp. 112, 115, 117, 118.
[28] Submission of Asociación Empresa Eólica (AEE) to the National Energy Commission during the hearing at the Advisory Council for Electricity on the Royal Decree Proposal regulating and amending certain aspects relating to the special regime, 30 August 2010 (R-181), p. 2; Pöyry Energy Consulting Report 2 (C-87); See also Royal Decree-Law 14/2010, of 23 December, on the establishment of urgent measures for the correction of the tariff deficit in the electricity sector, 23 December 2010 (published on 24 December 2010) ("RDL 14/2010") (R-107), Preamble.
[29] RCM, paras. 84-90.
[30] Transcription of the Speech by Mariano Rajoy in his inaugural address as President of the Government, Spanish Congress, www.lamoncloa.gob.es, 19 December 2011 (R-207).
[31] Law 24/2013, of the electricity sector, 26 December 2013 (published on 27 December 2013) ("Law 24/2013") (C-32) (R-38), Preamble.
[32] RCM, paras. 90-92.

101. On 7 March 2012, the CNE issued report 2/2012, recommending certain measures to address the evolution of the tariff deficit and ensure the economic and financial stability of the Electricity System, at the request of the Ministry of Energy.[33]

102. On 20 July 2012, Spain signed a Memorandum of Understanding with the European Union, regarding among others, Spain's 2012-2015 financial stability and the adoption of certain measures of macroeconomic control. Under this MoU Spain committed to "address the electricity tariff deficit in a comprehensive way."[34]

**(b) The National Legal and Regulatory Framework**

103. In light of Spain's Energy policy and the international framework set forth above, the Respondent adopted a series of measures, applicable to the RE sector in Spain. Some of those measures are at issue in this proceeding and thus will be described in some detail below in two parts. First, the Tribunal provides a non-exhaustive list of the regulatory measures adopted by the Respondent prior to the enactment of the disputed measures (i). Second, the Tribunal provides a short description of the disputed measures, to the extent relevant to its analysis (ii).

104. Before doing so, the Tribunal describes herein its understanding of the hierarchical relationship between the norms described below, as this may prove relevant to its analysis of the Claimants' claims, in Section VI below.

- Under the Spanish Legal System, the 1978 Spanish Constitution is supreme.

- Subordinated to the Constitution are the Laws, which are either Organic (approved by Congress by absolute majority and concern certain matters set forth in the Constitution not relevant for this dispute) or Ordinary (approved by simple majority and relating to all other matters). Of the same rank as the Laws are Royal-Decree-Laws ("RDL"). These

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[33] National Energy Commission, "Report on the Spanish Electricity Sector", 7 March 2012 (C-149). The Report by the National Energy Commission of 2012 states that the debt of the system amounted on 6 March 2012 to EUR 21,812 million. National Energy Commission, "Report on the Spanish energy sector", 7 March 2012 (R-147), p. 8.
[34] Memorandum of Understanding signed with the European Union, 20 July 2012 (RL-61), para. 31.

are regulations that may be enacted by the executive branch in situations of extraordinary need or urgency, and are subject to parliamentary validation.

- Subordinated to the Laws and RDLs, are the Royal-Decrees ("RD"). RD implement matters regulated by Law (or by RDL). They emanate from the executive power, are inferior in rank to Laws and may not contravene the terms of the Law they seek to implement, and must be interpreted within the context of the Law being implemented.

- Finally, the Spanish legal system includes Ministerial Orders, emanating from one or more ministries, and further below are Resolutions, emanating from lower administrative bodies, relating to technical issues.[35]

### *1. The Initial Measures*

105. On 27 November 1997, Spain adopted Law 54/1997 (the "1997 Electricity Law"), reforming the framework of the electricity sector in Spain, which had been, until that point, a government priced-controlled regulated system.[36] The 1997 Electricity Law deregulated the transmission, distribution, generation and supply of electricity, introducing competition in some of these activities with the aim of enhancing the efficiency of the SEE.

106. With respect to electricity generation, a 1994 Law had established a distinction between two regulatory remuneration regimes. First, the *Ordinary Regime*, applicable to conventional power generators, such as coal-fired power plants. Second, a *Special Regime* applicable to generators producing energy from other sources.[37] The 1997 Electricity Law continued with this distinction and determined that all generators "with an installed power capacity that does

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[35] RCM, paras. 52-53; see also Tr. Day 1 (Santacruz), 212:20-216:12. This hierarchy appears to be undisputed by the Claimants.

[36] Law 54/1997, on the Electric Power Sector, 27 November 1997 (published on 28 November 1997) ("1997 Electricity Law") (C-35) (R-9). Claimants also exhibited a 2008 version of the 1997 Electricity Law (version as of 1 January 2008) (C-36).

[37] Law 40/1994, on regulation of the National Electricity System, 30 December 1994 (published on 31 December 1994) (R-92), Art. 21 (Ordinary Regime) and Art. 26 (Special Regime). See also Royal Decree 2366/1994, on the production of electrical energy by hydraulic and cogeneration facilities, and other facilities supplied by resources or sources of renewable energy, 9 December 1994 (R-237), regulating the Special Regime.

not exceed 50MW," producing electricity from "the non-consumable renewable energy" shall be subject to the Special Regime.[38] Under the Ordinary Regime, remuneration derived from the wholesale market price of electricity. Under the Special Regime, generators were subsidized with a premium above the wholesale market price. Article 30(4) of the 1997 Electricity Law read:

> "In order to establish premium quotas the following factors shall be considered: the tension level of delivery to the grid, the actual contribution to the improvement of the environment, the saving on primary energy and energy efficiency as well as the costs incurred from investment, in order that reasonable remunerative tariffs may be established related to the cost in assets on the capital market."[39]

107. The 1997 Electricity Law, also determined that all energy generators, under both the Ordinary and the Special Regime, needed to be registered before a *Registro Administrativo de Instalaciones de Producción de Energía Eléctrica* ("RAIPRE"), created under Article 21(4) of the Law. In addition, the application of the Special Regime was subject to the approval of the authorities of the relevant Autonomous Region in Spain.

108. The 1997 Electricity Law was implemented through a series of Royal Decrees, including Royal Decree 2818/1998 of 23 December 1998 ("RD 2818/1998"), Royal Decree 436/2004 of 12 March 2004 ("RD 436/2004"), and Royal Decree 661/2007 ("RD 661/2007") of 25 May 2007, which further defined the remuneration scheme for generators qualifying for the Special Regime under Article 27 of the 1997 Electricity Law. In particular:

- RD 2818/1998, recognized that generators qualifying under the Special Regime had the right to be connected to and to supply electricity to the national grid.[40] It also fixed the mechanism to calculate the premium[41] which was subject to revisions every four years.[42]

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[38] 1997 Electricity Law, (C-35) (C-36) (See also R-9), Art. 27(1).
[39] 1997 Electricity Law, (C-35) (C-36) (See also R-9), Art. 30(4). The Law further set forth particular obligations for Special Regime generators, including reporting obligations (Art. 30(1)), and recognized certain rights, including priority of dispatch of energy produced from renewable energy (Art. 30(2)(a)).
[40] Royal Decree 2818/1998, on electricity production in installations supplied by renewable energy, waste incineration or combined heat and electric resources or sources, 23 December 1998 (published on 30 December 1998) ("RD 2818/1998") (C-56) (R-114), Arts. 18-20.
[41] RD 2818/1998 (C-56) (R-114), Arts. 23, 28.
[42] RD 2818/1998 (C-56) (R-114), Art. 32.

This Royal Decree also confirmed that renewables needed to register on a subsection of the administrative register created by the 1997 Electricity Law.

- RD 436/2004, further defined the FIT Regime by repealing RD 2818/1998 and setting forth a new methodology to calculate the economic regime for electric power generation under the Special Regime. Pursuant to RD 436/2004, qualifying installations could choose between a regulated fix tariff or a premium payment per kWh of energy produced over and above the wholesale market price.[43] The values of the fixed tariff and the premium were calculated by reference to a percentage of the *tarifa eléctrica media o de referencia* (average rate or reference rate) fixed by the government, subject to change on an annual basis and tied to market fluctuations.[44] Moreover, the levels of the regulated tariff and premium varied depending on the type of technology (*i.e.*, renewable energies, biomass or other kind of bio fuel). Pursuant to RD 436/2004 all incentives and supplements provided under Section 3 of RD 436/2004, "shall apply solely to the plants that commence operating subsequent to the date of the entry into force referred to in the paragraph above and shall not have a backdated effect on any previous tariffs and premiums."[45]

- RD 661/2007, superseded RD 436/2004, and implemented the amendments to the 1997 Electricity Law, ordered by Royal Decree Law 7/2006 (as explained below). In accordance with PER 2005-2010, RD 661/2007 provided for increased installed capacity targets for the different technologies, including a target of 500 MW for CSP and 20,155 for wind technologies.[46] The Preamble underscored certain goals:

> "In view of the behaviour of the prices in the market, where certain variables which were not considered in the cited compensation system for the special regime have, over recent times, acquired greater importance, the economic circumstances established by Royal Decree 436/2004, of 12 March, make

[43] Royal Decree 436/2004, establishing the methodology for the updating and systematisation of the legal and economic regime for electric power production in the special regime, 12 March 2004 (published on 27 March 2004) ("RD 436/2004") (C-64) (R-116), Art. 22.
[44] RD 436/2004 (C-64) (R-116), Arts. 23, 24.
[45] RD 436/2004 (C-64) (R-116), Art. 40.3.
[46] Royal Decree 661/2007, regulating the activity of electricity production under the special regime, 25 May 2007 (published on 26 May 2007) ("RD 661/2007") (C-24) (R-118), Arts. 37, 38.

> it necessary to modify the compensation system and de-link it from the Mean Electricity Tariff, or Reference Tariff, which has been used to date.
> […]
> The economic framework established in the present Royal Decree develops the principles provided in Law 54/1997, of 27 November, on the Electricity Sector, guaranteeing the owners of facilities under the special regime a reasonable return on their investments, and the consumers of electricity an assignment of the costs attributable to the electricity system which is also reasonable, although incentives are provided to playing a part in this market since it is considered that in this manner lower government intervention will be achieved in the setting of prices, together with better, more efficient, attribution of the costs of the system, particularly in respect of the handling of diversions and the provisions of supplementary services."[47]

Given the importance of this Royal Decree to the issue here at stake, paragraphs 109 to 114 below further explain the content of this regulation.

109. With regard to the incentives, RD 661/2007, maintained the generators' option of choosing between a Fixed Tariff and a Premium on an annual basis,[48] but it also established limits on the maximums and minimums for such Premiums (cap and floor),[49] and expressed the tariffs in actual amounts per kWh, adjusted for inflation on a yearly basis in accordance with the consumer price index.[50] According to the Respondent, the level of these tariffs and remunerations schemes were set forth on the basis of the calculations set forth on the PER 2005-2010.[51]

110. In addition, RD 661/2007, provided for the possibility to combine solar energy and fossil fuels, by permitting qualifying CSP installations subject to the Special Regime to employ equipment which uses natural gas. It set a limit on the percentage of fuel that could be used, whether under the Fixed-tariff option (up to 12% of the annual production could be electricity generated with fuel) or the Premium option (limit set to 15%).[52]

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[47] RD 661/2007 (C-24) (R-118), Preamble.
[48] RD 661/2007 (C-24) (R-118), Art. 24.
[49] RD 661/2007 (C-24) (R-118), Art. 36.
[50] RD 661/2007 (C-24) (R-118), Art. 44.1.
[51] Tr. Day 1 (Santacruz), 228:11-229:10, 233:21-25.
[52] RD 661/2007 (C-24) (R-118), Art. 2(1)(b).

111. Articles 4 to 15 further defined the administrative requirements to be included in the Special Regime and confirmed the obligation to be registered under the RAIPRE before the authorities of the Autonomous Communities where the plant was located. The RAIPRE registration, consisted of two phases: an initial registration and a final registration.[53]

112. Article 17 enunciated the rights of producers under the Special Regime to receive either fixed tariffs or premiums, depending on their choice, subject to obtaining a final RAPIRE registration before the final dates set forth in Article 22.

113. For its part, Article 22 indicated that once certain RE technologies, including CSP and wind technologies, reached 85% of Spain's target capacity, a time limit of at least 12 months would be fixed within which installations would need to obtain its RAIPRE registration to enjoy the benefit of RD 661/2007's economic regime. Thereafter, new installations would be unable to access the tariffs and incentives established under RD 661/2007.

114. Article 44(3) regulated the updates and reviews of tariffs as follows:

> "During the year 2010, on sight of the results of the monitoring reports on the degree of fulfilment of the Renewable Energies Plan (PER) 2005-2010, and of the Energy Efficiency and Savings Strategy in Spain (E4), together with such new targets as may be included in the subsequent Renewable Energies Plan 2011-2020, there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to the costs associated with each of these technologies, the degree of participation of the special regime in covering the demand and its impact upon the technical and economic management of the system, and a reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets. Subsequently a further review shall be performed every four years, maintaining the same criteria as previously.
>
> The revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed."

[53] RD 661/2007 (C-24) (R-118), Arts. 11, 12. RAIPRE registration had been composed of these two phases since RD 2818/1998.

115. On 23 June 2006 (*i.e.*, before the adoption of RD 661/2007), Royal Decree Law 7/2006 had set forth "urgent measures for the energy sector" ("RDL 7/2006"). "Article 1. Twelve" of RDL 7/2007, amended Article 30 of Law 54/1997, by affording qualifying installations receiving remuneration under the Special Regime, priority of access to the transmission and distribution networks.[54] Its second transitory provision also specified that:

> "*Application of previous dispositions and of the review of the average rate.*
>
> Until that which is foreseen in sections one to twelve of article 1 can be developed, in accordance with that established in the penultimate dispositions of this Royal Decree-law:
>
> 1. Electrical energy production installations with an installed power that is equal to or less than 50MW, that when Act 54/1997 entered in force, on November 27, were accepted by the scheme foreseen by Royal Decree 2366/1994 on December [9], on production of electrical energy by hydraulic installations, of cogeneration and others stored by renewable sources or resources, as well as those referred to in the second additional disposition to the mentioned Royal Decree, shall maintain the mentioned scheme.
>
> 2. The review of the average rate made by the Government shall not be applied to the prices, bonuses, incentives and rates that are part of the compensation for the electrical energy production activity in the special scheme."

116. By 2009, Spain had enhanced the development of renewal energy investments.[55] The system had also created a Tariff Deficit which exceeded EUR 20 billion by 2009. The Tariff Deficit is a shortfall of revenues in the electricity system which arises when the income generated by the SEE is insufficient to cover the costs associated to the system.[56]

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[54] Royal Decree-Law 7/2006, adopting urgent measures in the energy sector, 23 June 2006 (published on 24 June 2006) (C-68) (see also R-105), Art. 2, Second transitory disposition.

[55] By 2009, electricity generation from renewable sources accounted for 24.7% of Spain's gross electricity production. In 2009 in particular, it represented 12% in terms of gross final energy. The National Renewable Energy Action Plan or "PANER" for its Spanish Acronym, was adopted after a public consultation process. PANER 2011-2020 (R-136), Section 2.1.2, pp.16-17.

[56] See Royal Decree Law 6/2009, which adopted certain measures within the Energy Industry and approved the discount rate, 30 April 2009 (published on 7 May 2009) ("RDL 6/2009") (C-74) (R-106), Preamble. According to Pöyry Energy Consulting, "[t]his situation was caused by the reluctance of the Spanish Government to increase end user tariffs which

117. Against this background, on 30 April 2009, Spain adopted Royal Decree Law 6/2009 ("RDL 6/2009") further amending certain provision of the 1997 Electricity Law.[57] RDL 6/2009, was aimed primarily at tackling Spain's tariff deficit and sought to establish a path to eliminate the tariff deficit by 1 January 2013.[58] Pursuant to Article 1 of RDL 6/2009, the government set up a "securitisation fund", known as the *Fondo de Titulización del Déficit del Sistema Eléctrico* (Fund for the Securitisation of the Electricity System Deficit), in charge of financing payments made to satisfy collection rights (invoices) arising from unpaid electricity settlements, and addresses thereby the tariff deficit.[59] Article 4 of RDL 6/2009, established a "Pre-Assignment Registration" requirement, for all installations intending to qualify for the RD 661/2007 economic regime and that fulfilled certain conditions. Once registered in the Pre-Assignment Registration, the installation had 36 months to obtain its final RAIPRE registration and start selling electricity in accordance with Article 4(8).[60] RDL 6/2009 did not modify the economic and regulatory regime put in place by RD 661/2007.

118. RDL 6/2009 authorized the State to introduce annual restrictions on the number of registered installations that could start operating if Spain's RE targets were exceeded:

> "If to the contrary, the power associated with the registered projects were to be greater than the envisaged objective, the economic regime established in the aforementioned Royal Decree 661/2007, of 25 May shall apply and shall be extinguished with the registered facilities. In this case, by agreement of the Council of Ministers, at the behest of the Minister of Industry, Tourism and Trade, annual restrictions may be established to the execution and entry-into-service of the registered facilities and the prioritisation thereof so as not to compromise the technical and economic sustainability of the system, conveniently extending, as the case may be, the maximum deadline established in article 4.8 of this Royal Decree-Law.

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would compensate the additional generation costs. These higher than expected generation costs came from different sources, being the increase in gas prices linked to Brent and the increasing penetration of renewable energy, namely wind and Solar PV (although only in 2008 and 2009), the key drivers." Pöyry Energy Consulting, "Spanish Bespoke Solar Report – Arenales and Casablanca Projects: A Report to RREEF", July 2010 ("Pöyry Energy Consulting Report 1") (C-79), p. 34.

[57] RDL 6/2009 (C-74) (R-106).

[58] See RDL 6/2009 (C-74) (R-106), Preamble.

[59] See RDL 6/2009 (C-74) (R-106), Art. 1. In addition, Art. 2 also set forth a bono social, or reduced tariffs, for low income consumers in need, considering public service nature of electricity supply.

[60] RDL 6/2009 (C-74) (R-106), Art. 4(8).

> 2. A new legal-economic framework shall be approved by Royal Decree for facilities registered in the Remuneration Pre-assignment Administrative Registry, once the remunerative regime currently in force is exhausted. The objectives of this new Royal Decree will be to establish a sufficient and adequate economic regime to encourage the entry-into-service of this type of facility, promoting research and development in the industry which make it possible to reduce the costs of the facilities, improve their operations and contribute to the increase of the industry's competitiveness."

119. Such restrictions were introduced on 19 November 2009 by a Resolution of the Secretary of State for Energy ("November 2009 Resolution").[61] The November 2009 Resolution provided, among others, a staggering timeline for the entry into operation of wind and CSP facilities that were pre-registered and thus a staggering connection of the installations to the electricity grid on an annual basis.[62] The installations would be given access to the grid on a deferred basis, in January 2011, January 2012, and January 2014, depending on the date at which they had obtained the final RAIPRE registration.[63]

120. The November 2009 Resolution indicated that, at that point, the power generated by RE facilities registered by RAIPRE under RDL 6/2009, far exceeded the objectives delineated in the PER 2005-2010 and reflected in Articles 37 and 38 of RD 661/2007. In particular, 104 applications were submitted for thermoelectric solar technology for a total power of 4,499 MW (compared to the 500 MW objective), and 536 applications for wind technology, for a power of 13,462 MW (compared to the 20,155 MW objective).[64] Thus, the power requested for the thermoelectric solar and wind technologies, added to the already installed power, exceeds the power targets contained in RD 661/2007.

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[61] Resolution of the Secretary of State for Energy, publishing the Agreement of the Council of Ministers of 13 November 2009, which proceeds to order the projects or facilities submitted to the administrative register for pre-allocation of remuneration for electricity generation facilities, provided for in Royal Decree Law 6/2009 of 30 April, which adopts certain measures in the energy sector and approves the discount rate, 19 November 2009 (published on 24 November 2009) ("November 2009 Resolution") (C-75) (R-132).
[62] November 2009 Resolution (R-132), Section VI.
[63] See the Claimants' position in this respect: CM, para. 188. However, according to the Respondent, the staggering led to possibility that plants in Phase 2, 3 and 4, could be affected by the tariff review, set forth under Art. 44(3) of 661/2007 (RCM, para. 326).
[64] November 2009 Resolution (C-75) (R-132), Sections II, III.

121. On 19 November 2010, the Government adopted Royal Decree 1565/2010, regulating energy generated from solar photovoltaic and wind technology.[65]

122. On 7 December 2010, the Respondent introduced Royal Decree 1614/2010 ("RD 1614/2010").[66] RD 1614/2010 defined the application of the FITs to CSP and wind installations by:

- Limiting the number of hours per year, during which wind and CSP were entitled to receive payment subject to the FIT. All electricity produced above the operating hour limit would not benefit from the subsidy but instead could sell the electricity at market price (Article 2).

- Specifying that for CSP plants, the Premium option was only available after the first 12 months of operation (with fixed-tariff becoming the only available during that year), and requiring operating plans under the premium regime to switch to a fixed tariff for 12 months (Article 3).

- Confirming that CSP and wind installations that had obtained the definitive registration in the RAIPRE on or before 7 May 2009, and CSP and wind installations that at the time of entry into force of RDL 6/2009 met the requirements for registration in the Pre-Assignment Register, shall not be affected by the revisions of tariffs, premiums and upper and lower limits referred to in Article 44(3) of RD 661/2007. (Article 4 (CSP), Article 5(3) (wind)).[67]

123. On 23 December 2010, Spain adopted Royal Decree Law 14/2010 ("RDL 14/2010"), establishing certain urgent measures to correct the tariff deficit.[68] The Parties are in dispute as to whether wind and CSP plants were also covered by this measure. The Respondent alleges that this RDL meant a reduction of the remuneration to be received by all generators, including CSP and wind, as they were all obliged to contribute to address the tariff deficit through a toll for access to the transmission and distribution networks.[69] This, according to

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[65] Royal Decree 1565/2010, which regulates and modifies certain aspects pertaining to the electrical energy production activity under a special regime, 19 November 2010 (published on 23 November 2010) (R-121).
[66] Royal Decree 1614/2010, regulating and modifying certain aspects relating to the production of electricity based on photovoltaic solar and wind technologies, 7 December 2010 (published on 8 December 2010) ("RD 1614/2010") (C-21) (R-122).
[67] RD 1614/2010, (C-21) (R-122), Arts. 2-4.
[68] RDL 14/2010 (R-107).
[69] RCM, paras. 406-415; RR, paras. 412-418, 632.

the Respondent, meant a reduction in the profitability or return on investments of CSP plants.[70] The Claimants allege that this regulation affected mainly photovoltaic generators[71] and in any case, even if it affected CSP and wind technology, the impact was minimal.[72]

124. On 4 March 2011, the government issued Law 2/2011 on Sustainable Economy, confirming among others its 20% national goal for participation of renewable energies in gross energy consumption for the year 2020. The text (issued the same year the Claimants invested in Spain) describes some of the underlying policies and actions to be taken by the government to reform the energy sector as a whole, including the Special Regime.[73]

125. On 27 January 2012, Spain enacted Royal Decree Law 1/2012, eliminating the economic incentives for new power generators plants, including those using renewable energy sources and suspending the "remuneration pre-assignment procedures".[74]

126. The Spanish Supreme Court has rejected the assumption "that the legal situation outlined by Royal Decree 661/2007 must remain virtually unmodified or unchanged over the 30 following years".[75] Moreover, the judges "do not consider, in effect, that the above Royal Decree considers a tariff regime for ever, nor that the Government, when exercising their legal power of authority, or the legislator, using their legislative authority, may not adapt or modify this regime to new circumstances (economic, productive, technological or of any other nature) that may arise in such an extended period of time".[76] The Constitutional Court of Spain endorsed the case-law from the Supreme Court.[77]

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[70] Tr. Day 1 (Santacruz), 250:5-20.
[71] CM, para. 189.
[72] Tr. Day 3 (Hauteville/Stoyanov), 20:12-18; 36:18-24.
[73] Law 2/2011 on Sustainable Economy, 4 March 2011 (published on 5 March 2011) (R-96) Arts. 77-79.
[74] Royal Decree-Law 1/2012, implementing the suspension of the remuneration pre-assignment procedures and the elimination of economic incentives for new electrical energy production installations based on cogeneration, renewable energy sources, and waste, 27 January 2012 (published on 28 January 2012) (R-108), Arts. 1-3.
[75] Third Courtroom of the Supreme Court, Judgment, RCA 259/2012, 25 June 2013 (R-165).
[76] Supreme Court, Judgment, 63/2016, 21 January 2016 (R-170).
[77] Constitutional Court, Judgments, 5347/2013, 17 December 2015; 5852/2013, 18 February 2016; 6031/2013, 18 February 2016 (R-169; R-171; R-172).

### *2. The Disputed Measures*

127. On 27 December 2012, Spain enacted Law 15/2012 on Tax Measures for Energy Sustainability ("Law 15/2012"). This legislation imposed a 7% levy on all income obtained by all generators, renewable or otherwise.[78] The "nature" of this "Tax on the Value of the Production of Electric Energy" ("TVPEE"), was described in Article 1, as follows:

> "The tax on the value of the production of electricity is a levy of a direct and real nature which taxes the production of electricity and its incorporation into the electricity system, measured at the power station bus bars, through each of the facilities featured in article 4 of this Law".[79]

128. Law 15/2012 also modified Article 30 of Law 54/1997, by suppressing the premium for electricity produced by CSP plants using fossil fuel such as natural gas, as follows:

> "The electricity that is attributable to the use of a fuel in a generation facility that uses as its primary energy any of the non-consumable renewable energies shall not be subject to the premium economic regime, other than in the case of hybrid facilities which use non-consumable and consumable sources of renewable energy, in which case the electricity attributable to the use of the consumable source of renewable energy is subject to the bonified [*sic*] economic regime.
>
> To this end, by order of the Minister of Industry, Energy and Tourism, the methodology for calculating the electricity attributable to the fuels used shall be published."[80]

129. Finally, Law 15/2012, introduced measures to enlarge the source of financing of the SEE. Thus, thereafter, those sources included not only the revenue from the access fees and other

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[78] Law 15/2012, concerning tax measures to ensure energy sustainability, 27 December 2012 (published on 28 December 2012) ("Law 15/2012") (C-26) (R-06), Arts. 1-11.

[79] Law 15/2012 (C-26) (see also R-06), Art. 1. Of note, Article 4 defines the "taxable event" for the TVPEE, as the generation and incorporation of electrical energy into the Spanish electricity system. Article 6 specified that the levy was to be calculated on the basis of "the total amount that corresponds to the tax payer for the production of electricity and its incorporation into the electricity system, measured at power station bus bars, for each facility" during the corresponding taxable period. In addition, Art. 28 of Law 15/2012 introduced modifications on the Tax on Hydrocarbons that affect, among other products, electricity produced by CSP plants using natural gas.

[80] Law 15/2012 (C-26) (see also R-06), First Final Provision, Two, p. 16.

regulated prices paid by consumers, but also certain earmarks of the Respondent's National Budget.

130. On 1 February 2013, the government adopted Royal Decree Law 2/2013 (the "RDL 2/2013") concerning "urgent measures within the electricity system and the financial sector". [81] The Preamble explained the background of this Decree Law as follows:

> "Data made public by the National Energy Commission in its report 35/2012, of 20 December, […] made manifest the appearance of new deviations in the cost and revenue estimates caused by different factors, both for the closure of 2012 and for 2013 which, in the current economic context, would make it almost unfeasible to fund such costs with the electricity fees and the elements expected to derive from the General State Budget.
>
> To a great extent these deviations are due to a greater increase in the cost of the special regime on account of an increase in operating hours which was greater than expected, to an increase in remuneration values due to their being indexed to the Brent price, and to a decrease in revenue from fees due to a very marked fall in demand which was consolidated during this tax year.
>
> The alternative that was raised would be a new increase in the access fees paid by consumers of electricity. This measure would directly affect household economies and company competitiveness, both in a delicate situation given the current economic situation."

131. Articles 1 to 3 of RDL 2/2013 further scaled back the FIT available to RE generators. In particular, Article 1 reduced the inflation adjustments for the FIT by delinking the adjustments to the consumer price index, and instead linking it to the "Consumer Price Index (CPI) at constant taxes excluding unprocessed foods or energy products." Article 2 reduced to "0" the value of the Premium set forth under RD 661/2007, and Article 3 left current and new CSP and wind plants with the possibility to sell the electricity either at the wholesale market price or subject to the Fixed Tariff option.

[81] Royal Decree Law 2/2013, concerning urgent measures within the electricity system and the financial sector, 1 February 2013 (published on 2 February 2013) (C-27) (see also R-111).

132. On 12 July 2013, Royal Decree Law 9/2013 on the adoption of urgent measures to "guarantee the financial stability of the electricity system" was enacted ("RDL 9/2013"). [82] RDL 9/2013, expressly derogated RD 661/2007.[83] It also eliminated the FIT available under the Special Regime and provided instead a specific remuneration ("Special Payment") calculated in accordance with certain criteria, measured from the perspective of allowing a "standard installation" to obtain a "reasonable return". Moreover, RDL 9/2013 changed the remuneration regime which was previously calculated on the basis of production (rate per kW produced) to a regime based on efficiency criteria (investment costs, operating costs, revenues). Article 1 of RDL 9/2013 amended Article 30(4) of the 1997 Electricity Law, as follows:

> "Additionally, subject to the terms that the Council of Ministers might adopt pursuant to Royal Decrees, in relation to the remuneration for the generation of electricity calculated according to market price, installations may receive a specific remuneration ['the Special Payment'] composed of an amount per unit of installed capacity. Such amount shall cover, as appropriate, the investment costs of a standard installation that cannot be recovered through the sale of energy, as well as an amount for the operation of the installation to cover, as the case may be, the difference between exploitation costs and the revenues obtained from the participation of such a standard installation in the market.
>
> For the calculation of that specific remuneration, the following elements shall be considered, based on the installation's regulatory operational life and by reference to the activities carried out by an efficient and well administered business:
>
> a) The standard revenues for the sale of generated energy valued at market price of production;
>
> b) The standard exploitation costs;
>
> c) The standard value of the initial investment.
>
> To that effect, the costs or investments determined by laws or administrative regulations that do not apply to the Spanish territory shall not be considered

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**82** Royal Decree Law 9/2013, by which urgent measures are adopted to guarantee the financial stability of the electricity system, 12 July 2013 (published on 13 July 2013) ("RDL 9/2013") (C-31) (R-37).
83 RDL 9/2013 (C-31) (R-37), Sole repeal provision.

> in any case. In the same manner, only those costs and investments related to the activity of electric energy generation can be taken into account.
> […]
> This remuneration regime shall not exceed the minimum required level to cover the costs that are necessary for installations to compete on an equal footing with the rest of the technologies in the market in order to allow those installations to obtain a reasonable return, by reference to the standard installation, as the case may be. Notwithstanding the above, exceptionally the remuneration regime might also include an incentive to investments and timely execution of an installation, if this was going to result in a significant cost reduction for the Spanish islands or the extra-peninsular territories' electricity systems.
>
> Such reasonable return will be based on, before taxes, the average returns in the secondary market of the State's ten-year bonds plus the adequate differential.
>
> The parameters of the remuneration regime can be revised every six years."

133. With regard to the "reasonable return" the First Additional Provision, also stated:

> "For the purposes of that which is envisaged in the penultimate paragraph of article 30.4 of Law 54/1997, of 27 November, for installations which on the date on which this Royal Decree-Law were to be entitled to a premium economic regime, the reasonable return shall be referenced, before tax, to the average yield during the ten years prior to this Royal Decree-Law coming into effect from ten-year Government Bonds in the secondary market, increased by 300 base points. All of which is without prejudice to the review envisaged in the last paragraph of the aforementioned article."

134. On 17 October 2013, Spain adopted Law 15/2013, charging to the General State Budget certain costs of the SES, including those resulting from the economic incentives put in place to promote electrical energy production from renewable energy sources. On this basis, an extraordinary credit was granted for the sum of EUR 2,200,000,000 in the budget of the Ministry of Industry, Energy and Tourism.[84] This is not one of the measures that form the basis of the Claimants' claim, and thus is not covered under the definition of "disputed measures." It is included herein in chronological order, for the sake of completeness.

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[84] See Law 24/2013 (C-32) (R-38), Preamble.

135. On 26 December 2013, Law 24/2013 ("Law 24/2013") was enacted as the new electricity law, superseding Law 54/1997. The principle of economic and financial sustainability of the electricity system was described as being "a guiding principle in the action of the public administrations" under this law. Law 24/2013 eliminated the distinction between the Ordinary and Special Regimes, deciding instead that given the level of penetration of electricity generated from renewable technologies in the SES, renewables producers were on the same footing as conventional power generators, save to the extent that express provision was made. The Preamble explained as follows the reasons for adopting a new electricity law:

> "The causes of this imbalance lie in the excessive growth of certain costs' items owing to energy policy decisions without ensuring their correlative income from the system. This has all been exacerbated by the lack of growth in electrical demand, essentially the consequence of the economic crisis.
>
> Despite the fact that tolling increased by [one hundred and] twenty two percent between 2004 and 2012, positioning the electricity price in Spain well above the European Union average, this was not enough to cover the system's costs. This imbalance has reached the point where the accumulated debt of the electrical system is currently in excess of twenty six billion Euros, the structural deficit of the system stands at ten billion per annum and the failure to correct the imbalance has introduced the risk of the bankruptcy of the electrical system.
>
> Law 54 enacted on November 27th 1997 has proven insufficient to ensure the financial balance of the system, amongst other reasons because the remuneration system for regulated activities has lacked the flexibility required for its adaptation to major changes in the electrical system or in the evolution of the economy.
>
> Hence, the experience of the last decade has made it clear that the economic and financial instability of the electrical system, brought about by the tariff deficit, has prevented the assurance of a stable regulatory framework which is necessary for the smooth carrying out of an activity like the electrical business which is very capital intensive.
>
> […]
>
> The widespread awareness of the tariff deficit situation and the consequent threat to the very feasibility of the electrical system has led to the need to make major changes to the remuneration regime for regulated activities. In view of the progressive deterioration in the sustainability of the electrical system, the legal entities in the latter could no longer legitimately trust the

> maintenance of the parameters which had degenerated into the situation described and any diligent operator could anticipate the need for these changes.
>
> For activities with regulated remuneration, the Law reinforces and clarifies the principles and criteria for establishing the remuneration regimes to which end the necessary costs will be considered to carry out activity by an efficient, well-managed company through the application of homogeneous criteria throughout Spain. These economic regimes will allow appropriate returns to be obtained with regard to the activity risk."

136. In addition, the law confirmed and further developed the principles set out in RDL 9/2013, including the Special Payment remuneration scheme subject to revisions every six years, with the base line predictions reviewed every three years.[85] Law 24/2013 also provided renewable installations priority of dispatch over non-renewable generators where electricity was offered at the same price "without prejudice to the requirements pertaining to the maintenance of system reliability and safety, under the terms determined in the regulations by the Government".[86]

137. On 6 June 2014, Spain adopted Royal Decree 413/2014 (the "RD 413/2014"),[87] implementing the regime adopted under RDL 9/2013 and confirmed by Law 24/2013. Thus, this decree developed the mechanism to implement the priority of dispatch for renewable sources generators[88] as well as the Special Payment, among other features.[89] In particular, Article 11 of RD 413/2014 describes some of the characteristics of this Special Payment as follows:

> "2. This remuneration regime shall apply to the production installations that use renewable energy sources, high-efficiency cogeneration and wastes that do not reach the minimum level necessary to cover the costs which would allow them to compete at an equal level with the rest of the technologies in the market and to obtain a reasonable return regarding the standard installations applicable for each case.

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[85] Law 24/2013 (C-32) (R-38), Arts. 14.4, 14.7.
[86] Law 24/2013 (R-38) (see also C-32), Art. 26.2.
[87] Royal Decree 413/2014, regulating the production of electricity from renewable energy sources, cogeneration and waste, 6 June 2014 (published on 10 June 2014) ("RD 413/2014") (C-33) (R-127).
[88] RD 413/2014 (C-33) (R-127), Art. 6.2.
[89] RD 413/2014 (C-33) (R-127), Art. 11.

> 3. The granting of this specific remuneration regime shall be established through procedures of competitive concurrence which will be adjusted to the principles of transparency, objectivity and non-discrimination.
>
> 4. For the determination of the specific remuneration regime applicable for each case, every installation, depending on its characteristics, shall be assigned a standard installation.
>
> 5. The specific remuneration for each installation shall be obtained from the remuneration parameters of the standard installation that corresponds to it and the characteristics of the installation itself. […].”

138. Moreover, the specific remuneration regime is set considering a standard installation with an operational life of 25 years, being “efficient” and “well-managed”, as already indicated in RD 413/2014.[90] Each installation was assigned a corresponding standard installation according to its characteristics.[91] Furthermore, tariff payments received prior to the inception of the new regime are counted towards the total remuneration that an installation might receive over its deemed operational life, to determine whether the plant has received a reasonable return. If the installation has surpassed the “reasonable return” marker (*i.e.*, 7.398%), it will not receive further subsidies. Its owner will not be asked to return the funds surpassing this marker either.[92] Article 19 reads in relevant part:

> “1. The value on which the reasonable return of the standard installation shall hinge will be calculated as the average yield of ten-year Treasury Bonds in the secondary market of the 24 months prior to the month of May of the year prior to the start of the regulatory period increased in a differential.
>
> The reviews of the value on which reasonable return shall hinge will be applicable in what is left of the regulatory useful life of the standard installation.
>
> 2. Before 1 January of the last year of the corresponding regulatory period, the Ministry of Industry, Energy and Tourism shall present to the Council of Ministers a draft bill that will include a proposal for the value

[90] RD 413/2014 (C-33) (see also R-127), Art. 13.2-3. The regime is reviewed every six years, with the income estimates of income resulting from electricity sale, reviewed every three years (Art. 15).
[91] RD 413/2014 (C-33) (R-127), Art. 14.
[92] Tr. Day 2 (Moraleda), 179:9-180:6.

> of the differential indicated in the previous section during the next regulatory period, pursuant to the criteria established in Article 14.4 of Act 24/2013 dated 26 December. […].”

139. A few days later, on 16 June 2014, Ministerial order IET/1045/2014 (the “June 2014 Order”), approved the remuneration parameters for “standard installations” engaged in the production of electricity from renewable energy sources.[93] The Preamble explained:

> “This order finalizes the changes to the remuneration model for renewable energy, co-generation and wastes, granting financial stability to the system in a definitive manner, at the same time as it guarantees a reasonable return on the installations. These installations will continue to receive additional revenue over and above what they receive from the market until the end of their operational life, as long as they have not obtained this level of return. Furthermore, the importance of this order resides in the fact that it concerns the determination of useful operational life and the quantification of the initial value of the investment, insofar as it concerns parameters that may not be revised.”

140. On 16 October 2014, Ministerial Order IET/1882/2014 dated 14 October 2014 entered into effect. It established the methodology for calculating the electrical energy attributable to the use of fuels in solar thermoelectric power plants and confirmed the obligation to repay the remuneration that had resulted from the production of energy with natural gas, between 1 January 2013 and 12 July 2013 (*i.e.*, date of entry into force of RDL 9/2013), as already set forth under RD 413/2013.[94]

141. The new regime provides revenues which are no longer correlated only to the actual production of the installation. It becomes less profitable for significant installations like the Claimants’ CSP plants but can sometimes generate more revenue stream in certain conditions.[95]

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[93] Order IET/1045/2014, approving the remuneration parameters of standard installations that apply to specific installations for the production of electricity from renewable energy sources, co-generation, and wastes, 16 June 2014 (published on 20 June 2014) (C-34) (R-39).
[94] Order IET/1882/2014, which establishes the methodology for calculating the electrical energy attributable to the use of fuels in solar thermoelectric power plants, 14 October 2014 (published on 16 October 2014) (C-120), First Transitional Provision. See RD 413/2014 (C-33) (R-127), Ninth additional provision.
[95] See Tr. Day 3 (Gill/Montoya), pp. 93-98.

## B. THE CLAIMANTS' INVESTMENT IN SPAIN

142. RREEF first invested in Spain in February 2011, in a project known as the "Dédalo Project" by indirectly acquiring an equity interest in three project companies with activities in the wind power sector. Subsequently, in July 2011, RREEF indirectly invested in a project for the development of a 49.9 MW CSP Plant, in Andalucía, known as the "Arenales Plant." Also in June 2011, RREEF indirectly invested in two other CSP plants, also in the south of Spain. The plants, referred to by the Claimants as the "Andasol Plants" were already operational at the time of the investment.

143. The Tribunal briefly describes below the due diligence and information gathering processes for the making of the investments (1), to then describe the particulars of each investment, to the extent relevant for the Tribunal's Decision (2).

### (a) Pre-Investment Phase and Due Diligence

144. In 2007, RREEF was approached for the first time by Deutsche Bank Madrid, in connection with the Dédalo Project, as identified below.[96] The project was put on hold in 2008 due to lack of financing available and considering the financial crisis.[97] Negotiations resumed in March 2010, and RREEF started looking again at potential business opportunities in the renewable energy sector in Spain.

145. In mid-2010, RREEF assessed again its possibility of investing in the Dédalo Project and the Arenales Plants,[98] and engaged in discussions with financial advisors, investment bankers and developers.[99] According to the Claimants, "although RREEF was engaged in three different projects, with three different project teams and different advisors running them, essentially the information was all pooled."[100] They are thus described here below together in chronological order.

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[96] Witness Statement of Mr Walter Manara, 19 November 2014 ("Manara WS1"), para. 21.
[97] Manara WS1, para. 32 (See also para. 30); Tr. Day 1 (Gill), 83:9-13.
[98] See infra Section IV(B)(b)(2) for a full description of the Arenales Project.
[99] Witness Statement of Mr Andrew Morris, 21 November 2014 ("Morris WS1)" paras. 40-41; Witness Statement of Mr Harold Hauteville, 19 November 2014 ("Hauteville WS1"), paras. 21-23.
[100] Tr. Day 1 (Gill), 79:14-17.

146. One of these advisors was Pöyry Energy Consulting ("Pöyry"), a global consulting and engineering company, who issued a report in July 2010, commissioned by the Claimants. The focal point of the report was the "forecasts of wholesale electricity and gas prices, and individual capture price projections for Arenales and Casablanca projects for the period up to 2035 under the existing RD 661/2007 tariffs structure."[101] The report contains a brief analysis of Spain's PER 2005-2010 and the PANER 2011-2020, as well as the regulatory framework under RD 661/2007 and RDL 6/2009.[102] Pöyry considered that while the global financial crisis had created some uncertainty in the industry, the FIT remuneration scheme provided "sound project economics."[103] It also acknowledged the difficulties arising from Spain's Tariff Deficit, which it described as "one of the major problems that has haunted the Spanish energy industry since 2001 […]."[104]

147. In 2010, prior to the issuance of RD 1614/2010, the Ministry of Industry, Tourism and Commerce (the "Ministry") held consultations with the CSP and wind industry associations in which it discussed potential regulatory changes. The Parties disagree on the characterization of these consultations. According to the Claimants, the discussions were negotiations that meant to appease CSP and wind technology investors, after important regulatory changes had affected the photovoltaic industry.[105] For the Respondent, these consultations were part of the mandatory process for the enactment of regulations set forth under Law 50/1997, where different stakeholders, including industry associations, are invited to give their views before the regulation is issued in final form.[106] The Respondent further

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[101] Pöyry Energy Consulting Report 1 (C-79), Executive summary. The report focusses on the Arenales and Casablanca CSP projects. RREEF later on decided not to invest in Casablanca.
[102] Ibid., pp. 25-36, 41, 44-45.
[103] Ibid., p. 41.
[104] Ibid., p. 34.
[105] Tr. Day 1 (Gill), 73:6-74:2.
[106] RR, paras. 371-374.

alleges that the Claimants are not part of either of the two associations which concluded the agreement and thus it is unclear why they believe to be bound by it.[107]

148. On 2 July 2010, the Government issued a press release reflecting the outcome of the discussions (the "July 2010 Agreement").[108] The document reads in relevant part:

> "The wind power technology subsidies prescribed in RD 661/2007 will be reduced by 35% until 1 January 2013. On their part, solar thermal plants will be deprived of access to the market price + subsidy option for one year of operation, in which they can only access the regulated rate as prescribed in RD 661/2007, whichever is smaller.
>
> It has also been agreed to delay the entrance into operation of the solar thermal plants with regards to the date foreseen in the ordination of the projects presented as of the pre-registration of Royal Decree Law 6/2009.
>
> Furthermore, the number of hours to which they have the right to compensation over the market price is limited for wind power and solar thermal plants, taking into account the different technologies and the provisions of the Renewable Energies Plan 2005-2010 for the calculation of the profitability of the facilities.
> […]
> This agreement furthermore assumes the reinforcement of the visibility and stability of the regulation of these technologies in the future, guaranteeing the current incentives and rates of RD 661/2007 for the facilities in operation (and for those included in the pre-registration) starting in 2013."[109]

149. On 27 July 2010, SJ Berwin LLP ("SJB") rendered a "preliminary due diligence report" regarding RREEF's potential investment in the Arenales Project, in which it made a brief summary of the applicable regulatory regime, considering the pre-assignment register under

[107] Tr. Day 2 (Moraleda), 76:1-6.
[108] Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release: The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks, 2 July 2010 ("July 2010 Agreement") (C-23). The Parties are in dispute as to the nature of this document. While the Claimants allege that it reflected an "agreement" between the RE industry associations, the Respondent alleges that it simply reflects the consensus reached during negotiations held during the application of a mandatory consultation process for the issuance of all royal decrees provided for under Article 24 of Law 50/1997. See CM, paras. 178-181; and RCM, paras. 369-372.
[109] July 2010 Agreement (C-23).

RDL 6/2009, as well as the terms of the July 2010 Agreement.[110] SJB issued a second report on 16 November 2010 ("Second SJB Report"), assessing, among others, the regulatory regime for wind-generated energy from the viewpoint of the Dédalo project.[111] With regard to the "developments of the legal regulatory framework" the Second SJB Report stated the following:

> "In 2009, the Spanish Government started a restructuring process of the renewable energy sector, with the objective of the preservation of the technical and economic stability of the system. This process, which has not been completed yet, has resulted in restrictions on the development of new projects as well as in a reduction of economic rights (tariffs).
>
> […] Said draft legislation may make it possible to get an idea of what the outcome of amendments to current legislation will be, though, it is difficult to provide an accurate picture of how the regulatory regime for renewable energies is going to finally look due to the strong lobbying that is taking place on this issue.
>
> […] Further to the report from the CNE, even though is not binding, the MITYC may make additional amendments to the draft. As such, it could be possible that any change as regards the reductions of the subsidies to wind and solar thermoelectric energy, as well as to the limitation of the number of hours of energy produced that will have access to the current economic regime of Royal Decree 661/2007, will not be included in this draft and will be processed afterwards by the MITYC."

150. Sometime before the issuance of the Second SJB Report, the Government of Spain made available – first to Deutsche Bank Madrid ("DBM") [112] (RREEF's holding entity) and then to the public at large – a draft of a Royal Decree, which mirrored some of the agreements reflected in the July 2010 Agreement. Subject to very few modifications, the draft, became Royal Decree 1614/2010, discussed in detail in Section IV(A)(b)(1), above.

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[110] SJ Berwin LLP, Preliminary Legal Key Findings Review relating to Project CSP Spain, 27 July 2010 ("First SJB Report") (C-80), pp. 53-54. See also Schedule 9: Regulatory. The report indicated that the "[r]eview does not constitute a legal opinion or an audit", p. 198.

[111] SJ Berwin LLP, Preliminary Key Findings Legal Review relating to Project Dédalo II, 16 November 2010 ("Second SJB Report") (C-81), pp. 62-63.

[112] Email exchange between, amongst others, Javier Rapallo (Deutsche Bank Madrid) and Juan Abascal Heredero (Ministry of Industry, Tourism and Commerce), 4 October 2010 (C-154).

151. On 25 March 2011, at RREEF's request, Herbert Smith LLP produced a memorandum analysing the "potential impact on the legal certainty (*seguridad jurídica*)"[113] of "the regulatory framework for CSP Projects in Spain."[114] The HS memorandum further confirmed that the economic regime would remain stable during the operational life of those installations already registered in the RAIPRE.[115] It stated:

> "Therefore, the provision [Article 44.3 of RD 661/2007] establishes the *untouchability* of the regulated tariff and the caps and floors, whereby the review thereof cannot affect – according to the provision itself – the sites placed into operation before 1 January of the second year after the year of the review, i.e., before 1 January 2012.
>
> (E) However, that provision only mentions the tariff and the caps and floors not the premium. Therefore, in principle, by not mentioning premiums, the Ministry of Industry has interpreted that RD 661/2007 does not protect the premiums enjoyed by installations, whereby future legislation could alter and reduce them (without touching the tariff or caps and floors)."[116]

152. When assessing the potential regulatory risks, Herbert Smith acknowledges that Spanish legislation "contains a precedent whereby RD 661/2007 retroactively changed (reduced) the remunerative regime established in Royal Decree 436/2004, and this modification was allowed by the Supreme Court" but considered that RD 1614/2010 "strongly protects the current remuneration and the cap of operating hours for the installations mentioned and installations have a document from the Ministry that indicates the remuneration." HS concluded that "[i]n theory, the Government could (although highly improbable) in the future approve a new provision having the same (Royal Decree) or a higher rank (Act) to modify the protection currently afforded in RD 1614/2010."[117]

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[113] Herbert Smith LLP (Madrid), Project Greco – Memorandum on the Legislative Changes in Spain Governing the Generation of Energy under the Special Regime, Particularly in Connection with Installations that Use Thermal Processes to Transform Solar Energy into Electricity (Solar Thermal), 25 March 2011 ("Herbert Smith Memorandum") (C-86).

[114] CM, para. 36. The Claimants assert that they engaged Herbert Smith LLP, encouraged by the fact that one of the members of the HS team was the former State Attorney General, at the Secretariat of State for Energy. CM, para. 225; see also Hauteville WS1, para. 43.

[115] Herbert Smith Memorandum (C-86), paras. 2.2.1(D); 2.2.3(A)3.

[116] Ibid., pp. 3, 4 (emphasis in original).

[117] Ibid., pp.11-12.

153. In March 2011, Pöyry provided an additional report on "Current State and Future Trends of Solar Power in Spain." In the section analysing the sustainability of the SES, Pöyry concludes:

> "In 2007 the Government changed RD436/2004, which involved the Special Regime, with the introduction of RD 661/2007. At that time the retroactivity measure was also a matter of debate. Despite the fact that some feel that RD 661/2007 already introduced retroactivity, we feel that this Royal Decree also complied with the need to provide a stable framework. It is true that the new scheme affected existing plants (i.e., Wind farms), but it is also true that the actual impact of the retroactivity was left to the generators' will. Due to the fact that RD 661/2007 provided the right to remain under the fixed tariff set in the prior RD 436/2004 for the rest of the operating life of the project, the Government again showed its commitment to keep the legal framework, providing stability and fair play towards investor's past decisions.
>
> It should be noted that the subsequent legal changes that occurred to the Spanish renewable industry have not changed the fact that the Government has always declared that one of the key parameters to change the premium would be the cost incurred by investors.
>
> The recently approved Royal Decrees introduce for the first time retroactive changes to the legal framework clearly reducing the investor confidence. […]
>
> Pöyry is of the opinion that […] the zero tariff deficit target is unlikely to be met by the end of 2012. We foresee that a more realistic scenario is the one in which this target is be met by 2014-2015 through yearly TPA increases in the range of 10%.
>
> If the zero tariff deficit target by end of 2012 is postponed, it will open up the opportunity to more deficit generation. Considering the Government behaviour, it is likely that future changes might be implemented if considered needed. RDL 14/2010 is aimed at tackling the lack of funds in the electricity system, reducing the revenue of renewable generators as well as introducing additional revenue sources (i.e., grid tolls). We feel that the Government is in a position to continue with the same energy policy, if considered a requirement, including implementation of further reductions in remuneration to renewables and non-renewable technologies."[118]

[118] Pöyry Energy Consulting Report 2 (C-87), pp. 135-136,139.

154. On 11 May 2011, Pöyry issued an additional report, this time analysing the question of the Tariff Deficit, at RREEF's request.[119] The document noted, *inter alia*, that "*it is interesting to realise that the electricity system has allowed a lot of different subsidies to influence the market but what it seems clear is that the trend is for these subsidies to be reduced or disappear.*"[120]

155. The Parties' disagree generally on whether the due diligence reports mentioned in the above-referenced confirmed the stability of the FIT regime put in place thorough RD 661/2007 (Claimants) or whether they demonstrated that changes to the regulatory changes were foreseeable and should have been foreseen by the Claimants among others in light of the situation of the Respondent's Tariff Deficit (Respondent)[121].

156. In May 2011, representatives of DBM, RREEF and Antin (a separate investor, who was considering investing in the Andasol Plants, alongside RREEF), met with an official of the Ministry's legal department, Mr. Miguel Vizcaino,[122] as well as with various government officials of the *Comisión Nacional de Energía* ("National Energy Commission") (the "CNE"), seeking information regarding the regulatory regime applicable to RE.[123]

157. The Claimants have submitted to this arbitration contemporary accounts of RREEF's takeaways from that meeting, including through the witness statement of Mr. Bolaña, the Antin representative present at the meeting.[124] These memoranda analyses the opportunity to invest in the SES (1); the conduct of due diligence operations (2); the valuation of the

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[119] Pöyry Management Consulting, Spanish Electricity Tariff Deficit – A Note from Pöyry Management Consulting to RREEF, 11 May 2011 (C-88).
[120] Ibid., p. 8. See also p. 20.
[121] See e.g., RCM, paras. 440-460; Tr. Day 1 (Gill), 78:12-103:2.
[122] Email exchange between Deutsche Bank Madrid, Herbert Smith Madrid, Lazard, Antin and RREEF, planning the meeting with the Ministry of Industry, Tourism and Commerce, 17-18 May 2011 (C-90).
[123] Email from Lazard to RREEF, Antin and Deutsche Bank Madrid, providing the proposed agenda for the meeting with the Ministry of Industry, Tourism and Commerce, 24 May 2011 (C-93).
[124] Witness Statement of Mr Mauricio Bolaña, 20 November 2014, paras. 18, 20. Antin initiated a separate ICSID arbitration against the Kingdom of Spain. See Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain (ICSID Case No. ARB/13/31).

investment(3); and the mounting of investment projects, for various projects including Dédalo[125] and Arenales (4).[126]

158. According to this evidence, the government official had provided "[c]onfirmation that the current decree provides a long term, stable regulatory framework […] [although], this has to be taken with some caution, ('nothing is written in marble') but any changes/adjustments in the future would not be to the detriment of current investors."[127]

**(b) The Claimants' Investments in Renewable Energy**

***1. The Dédalo Wind Project***

159. RREEF Pan-European Two, the second claimant in this case, acquired – through its wholly owned subsidiary, Plateau Green Energy B.V. – a 49% equity interest in 3 project companies (the "Dédalo companies"), for a total consideration of EUR 96.8 million.[128] The Dédalo companies developed five wind power parks with a total installed capacity of 216 MW.[129]

160. On 11 December 2009, before RREEF's investment in this project and before the parks' construction work was finalized, the Dédalo wind parks got registered in the Pre-Assignment Register.[130] The Dédalo wind parks achieved final registration with the RAIPRE on 28 December 2010[131].

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[125] Pan-European Infrastructure Fund, Investment Committee Review – Project Dédalo, 4 May 2010 (C-94); Pan-European Infrastructure Fund, Investment Committee Review – Project Dédalo, 16 November 2010 ("PEIF – November 2010 Review") (C-103), p. 9.

[126] RREEF Pan-European Infrastructure Fund, Investment Committee Review – Arenales Solar PS, S.L., 10 May 2013 (C-157).

[127] Email exchange between RREEF, Antin, Lazard and Deutsche Bank Madrid, providing a summary of the meeting with the Ministry of Industry, Tourism and Commerce, 20 May 2011 ("Email exchange of 20 May 2011") (C-91).

[128] Private Contract for Purchase and Sale of Company Shares Representing 49% of the Share Capital of Bajoz Eólica, S.L.U.; Hornija Eólica, S.L.U.; and Esquilvent, S.L.U. and Assignment of Credits between Inversiones Empresariales Vapat, S.L.U. and Plateau Green Energy, B.V., 4 January 2011 (formalized into public deed on 14 February 2011) (C-16).

[129] The five wind projects are San Lorenzo C, San Lorenzo D, Esquileo, Dehesilla I and Dehesilla II, near Valladolid in Castilla León.

[130] Pre-Assignment Register Certificates for the Wind Parks, 11 December 2009 (C-82).

[131] RAIPRE Certificates for the Wind Parks, 28 December 2010 (C-9).

161. The documents produced for RREEF's Investment Committee to make its final decision suggest that it might have been RREEF's intention to sell its investment in the wind farms by 2017.[132]

### *2. The Arenales CSP Plant*

162. In July 2011, the Claimants invested in a project for the development and final construction of an installation located in Morón de la Frontera, Sevilla, Andalucía. The installations were not yet operational at the time of the investment.[133]

163. RREEF's indirect investment in the Arenales project consisted of the acquisition through the Second Claimant's wholly-owned Dutch subsidiary, Fronterasol B.V., of a 49% equity stake in Arenales Solar. The other 51% was owned by OHL Industrial, S.L., a Spanish contractor, and by Solar Millennium AG, which would retain 25% and 26% shareholdings in Arenales Solar, respectively.[134] The cost of the acquisition was EUR 12.9 million (with an associated commitment to invest up to EUR 56.1 million to fund the construction of the Arenales Plant).[135]

164. Before RREEF's investment, the Arenales Project had gone through the required steps in the registration process.

165. First, the Arenales Project was listed in the Pre-Assignment Register from 11 December 2009.[136]

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[132] PEIF – November 2010 Review (C-103), p. 11.
[133] The Parties are in dispute as to whether this was a greenfield project or not. The Respondent contests the Claimants' statement that this was a greenfield project (See Tr. Day 2 (Moraleda), 87:8-15).
[134] Notarised Investment Agreement by and between OHL Industrial, S.L.; Solar Millennium AG and Fronterasol, B.V, 28 June 2011 (C-17).
[135] KPMG, RREEF Pan-European Infrastructure Fund L.P., PowerPoint presentation on "Valuation of Arenales as at 31 December 2012", 20 March 2013 (C-108), p. 7.
[136] Pre-Assignment Register Certificate for the Arenales Plant, 11 December 2009 (as notified to Arenales Solar on 18 December 2009) (C-168).

166. Second, on 2 December 2010, before the Government passed RD 1614/2010, Arenales Solar addressed a communication to the Directorate General of Energy Policy and Mines: (i) waiving its right to commence to supply electricity into the grid before 1 April 2013; (ii) accepting the hour-based limitation under the Draft decree that became RD 1614/2010; and (iii) requesting confirmation of the economic regime that would be applying during the installations' "operational lifetime."[137]

167. Third, on 1 March 2011, the Ministry of Industry, Tourism and Commerce issued a Resolution accepting the waiver mentioned in the preceding paragraph in respect of the Arenales Plant (the "March 2011 Resolution").[138]

168. Pursuant to the Pre-Registration resolution, and the assigned classification, the Arenales Plant could not start operations until 2013 and had to be registered with RAIPRE by 31 December 2013 to qualify for the RD 661/2007 economic regime.

169. On 25 September 2013, the Arenales Plant obtained definitive registration with RAIPRE.[139] It became operational in October 2013.

170. The installed capacity of the Arenales Plant is in dispute between the Parties. In particular, the Respondent contends that the Arenales Plant has an installed capacity that is higher than 50 MW (in particular, it claims a nominal installed capacity of 55 MW),[140] which the Claimants reject.[141] Only plants with an installed capacity of 50 MW could be awarded the Special Regime under RD 661/2007.[142]

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[137] Letter of Waiver for the entrance into operation within the Phase assigned to "Arenales" through a Resolution by the Directorate General of Energy Policy and Mines, and a request for the Resolution for the communication of the compensation conditions during the operating life of the facility (Letter of Waiver and Resolution), 2 December 2010 (C-105).
[138] Resolution from the Ministry of Industry, Tourism and Commerce accepting the waiver to release electricity before a certain date in respect of the Arenales Plant, 1 March 2011 ("March 2011 Resolution") (C-107).
[139] RAIPRE Certificate for the Arenales Plant, 25 September 2013 (C-83).
[140] RR, paras. 42, 1045-1074. See C-173; See Tr. Day 2 (Moraleda/Morris), 241:18-244:12.
[141] CR, paras. 777-816.
[142] RDL 661/2007, Art. 2.

171. The Parties are also in dispute as to the reasonability of the investments costs of the Arenales Plants. The Respondent points out that they exceed the costs of the Andasol Plants by EUR 80 million, even though they were built much later in time, and are thus unreasonable.[143] The Claimants argue that they were reasonable and caused by factors that led to higher fixed costs than the Andasol Plants, such as the need to find costly water and gas provision solutions, complicated civil works and so on.[144]

### *3. The Andasol CSP Plants*

172. The Andasol Plants are two CSP plants located in Granada, Andalucía in the south of Spain. Each has an installed capacity of 49.9 MW (Andasol-1 and Andasol-2). They were already operational at the time of the Claimants' investments and according to Mr. Hauteville, one of the Claimants' witnesses, they are able to supply solar electricity for up to 170,000 people.[145]

173. The Andasol Plants were planned, and their financing secured, under the scheme of RD 436/2004.[146] They became operational in 2008.[147]

174. On 30 June 2011, REEFF executed a Share Purchase Agreement for a 45% equity stake of Andasol-1 and Andasol-2 through RREEF's wholly own subsidiary, Guadisol B.V.. RREEF's purchase price for the shares was EUR 86 million. Antin also acquired another 45% of the Andasol Plants. In addition, RREEF agreed a purchase price for the subordinated shareholders' loans of EUR 49 million.[148]

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[143] Tr. Day 3 (Montoya), 64:14-65:4.
[144] Tr. Day 2 (Morris), 221:11-222:15.
[145] Hauteville WS1, para. 39.
[146] RCM, para. 236; Tr. Day 3 (Montoya), 56:15-25.
[147] Tr. Day 3 (Montoya), 83:1.
[148] Agreement for the Sale and Purchase of 90% of the issued share capital of Andasol-1 Central Termosolar Uno, S.A. and Andasol-2 Central Termosolar Dos, S.A. and the partial assignment of subordinated shareholders' loans between Proto Primo, B.V.; Antin Energía Termosolar, B.V.; Cobra Sistemas y Redes, S.A.; Cobra Solar Del Sur, S.L.; and Cobra Gestión de Infrastructuras, S.A., 30 June 2011 (C-110).

175. The Andasol Plants were duly registered with RAIPRE by December 2009, before the Claimants' investment in the project. In particular, Andasol-1 was registered with RAIPRE on 24 April 2009.[149] Given the timing of the registration, it needed not fulfil any pre-registration requirements. Andasol-2 was registered with the Pre-Assignment Register on 15 October 2009[150] and with RAIPRE on 22 December 2009.[151]

176. RREEF undertook a due diligence process, including on the technical, financial, tax, accounting, legal and regulatory aspects, of both the Arenales and the Andasol Projects. This was conducted in parallel. The information acquired in one project was applied to the other.[152]

177. RREEF planned to sell[153] and did sell its stake in the Andasol Plants on 26 July 2017 for 77.7M.[154]

## V. JURISDICTION: THE TAX OBJECTION

178. On 27 December 2012, Spain adopted Act 15/2012 "on taxation measures for energy sustainability", creating a new tax on the value of the production of electric energy ("TVPEE").

179. In the jurisdictional phase of these proceedings, the Parties debated at length whether the TVPEE may be considered a taxation measure, and as such, excluded from the scope of Article 10 of the ECT by application of Article 21(1) of the Treaty. As the Tribunal put it, what is in dispute between the Parties is whether the measures included in Law 15/2012 are *bona fide* taxes; if not "the tax carve-out does *not* apply".[155]

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[149] RAIPRE Certificates for the Andasol-1 Plant and the Andasol-2 Plant, 24 April 2009 and 22 December 2009 ("RAIPRE Certificates for Andasol Plants 1-2") (C-8).
[150] Pre-Assignment Register Certificate for the Andasol-2 Plant, 15 October 2009 (notified on 30 October 2009) (C-76).
[151] RAIPRE Certificates for Andasol Plants 1-2 (C-8).
[152] CM, para. 264; Tr. Day 1 (Gill), 79:12-21.
[153] Tr. Day 3 (Hauteville), 32:7-8.
[154] CS, para. 31.
[155] Decision on Jurisdiction, para. 194 (emphasis in original).

180. In its Decision on Jurisdiction the Tribunal decided to join the Respondent's objections based on ECT Article 21, to the merits. The Tribunal will thus rule on this objection in the present Decision.

a. *The Decision on Jurisdiction*

181. In its Decision on Jurisdiction, the Tribunal held the following:

> "195. […] The consequence of a finding by the Tribunal that the measures included in Act 15/2012 have not been taken bona fide could have two consequences:
>
> - either the Tribunal would decide that the Respondent cannot[156] avail itself of the exemption provided for in Article 21(1) [of the ECT] and find the Application [of the taxation carveout] inadmissible in this respect;
>
> - or it could consider that the institution of the new tax is in violation of the standards guaranteed to the investors under Article 10 of the ECT calling for reparation, as is expressly requested in the Claimants' Memorial.
>
> 196. In both cases, a careful investigation of the circumstances and of the effects of the challenged measures is needed. Such investigation cannot be made at the present preliminary stage."[157]

b. *The Parties' Positions*

182. The Tribunal lists below the main arguments raised by the Parties with regard to the Tax Objection. The Parties' arguments have been summarized in detailed in Section VII of the Tribunal's Decision on Jurisdiction, which constitutes an integral part of this Decision.

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[156] The text of the Decision on Jurisdiction sent to the Parties inadvertently reads "cannot"; this obviously is a typing mistake which, if maintained, would make the alternative envisaged by the Tribunal irrelevant.
[157] Decision on Jurisdiction, paras. 195-196.

i. The Respondent's Position

183. The Respondent considers that the Tribunal lacks jurisdiction to hear the Claimants' claims arising out of the "Taxation Measures" adopted under Law 15/2012 because the Respondent has not consented to dispute relating to taxation measures being arbitrated. In particular, the Respondent contends that:

- The consent of the Kingdom of Spain is limited to potential violations arising from its obligations under Part III of the ECT. Since Part III does not impose any obligations with respect to Tax Measures adopted by Contracting Parties, the Tribunal lacks jurisdiction *ratione voluntatis* to decide the claim arising out of Law 15/2012.

- The ECT does not create rights nor impose obligations regarding Tax Measures, except for particular circumstances defined in Article 21 of the ECT. Article 10 of the ECT, on which the Claimants seek to base their allegations, is not concerned by the exceptions.

- The TVPEE is a "Tax Measure" for the purposes of the ECT.

- Tax Measures have to be presumed *bona fide*.

- TVPEE is a *bona fide* Tax Measure of general application.

ii. The Claimants' Position

184. For their part, the Claimants consider that the measures implemented through Law 15/2012 are not "Tax Measures" under Article 21. In particular:

- The 7% levy was "a backdoor tariff cut" formed as a tax to strip away and eventually abolish the incentives provided under RD 661/2007. This is because "[a]lthough on its face the 7% levy applied to both the ordinary regime producers, the conventional producers, and the special regime renewable energy producers, the effect of the measure was not equal between them. The ordinary regime producers could pass that additional 7% levy cost on to consumers by raising electricity prices. The special regime producers couldn't, and the reason they couldn't is because they were largely dependent upon payments that were independent of the market price […] those were fixed amounts; they could not be adjusted to effectively pass on the 7% levy."[158]

- Since the 7% levy was not a tax implemented in good faith, the ECT tax carve-out does not apply.

- Taxation Measures have to be *bona fide* and may not be presumed *bona fide.* Moreover, if there is *prima facie* evidence that the tax measure is not *bona fide*, the burden of proof switches to the other party.

- 7% levy is not a *bona fide* measure but a tariff cut intended to deprive the Claimants of their rights under the ECT.

c. *The Tribunal's Analysis on the Tax Objection*

185. In the view of the Tribunal, there can be no doubt that the 7% levy is clearly a tax. This is true, whether taking account of the definition given in Article 21, paragraph 7, of the ECT or giving it the usual meaning of the word in domestic laws. In this respect, the Tribunal shares the view expressed by the *Novenergia* tribunal:

> "519. For the Tribunal there is no doubt that the provisions of Law 15/2012 are provisions relating to a tax of the domestic law of a Contracting Party as set out by Article 21, section (7)(a)(i) of the ECT. Consequently, the Tribunal is convinced that Law 15/2012 is indeed a taxation measure in its nature, which on its face is subject to the carve-out from the protection of the ECT."[159]

186. The Tribunal accepts that, as explained by the *Isolux* tribunal, "the presumption that the IVPEE can be contemplated within the '*carve out*' provided by ECT Article 21(1) would

[158] Tr. Day 1 (Gill), 116:19-117:9; see also CR, para. 556; RR, para. 351.
[159] Novenergia v. Spain, SCC Case No. 2015/063, Final Award, 15 February 2018 ("Novenergia") (CL-243), para. 519.

remain destroyed if the tax measure was not promulgated in good faith."[160] However, as noted by the *Novenergia* tribunal:

> "the starting point, or the assumption, should always be that the taxation measure was in fact adopted in good faith.[161] The consequence of this assumption is that the Claimant bears the burden of proving to the Tribunal that Law 15/2012 was not enacted for the purpose of raising general revenue for the state, but for a different purpose, *i.e*. that the measure therefore was enacted *mala fide*."[162]

187. It is generally accepted that in international, litigation including in investment disputes:

> "the applicant must establish its case and that a party asserting a fact must establish it; as the [International] Court [of Justice] observed in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 'it is the litigant seeking to establish a fact who bears the burden of proving it' (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101)".[163]

188. Therefore, the question is not whether there exists a presumption that a tax is or is not promulgated *bona fide* but whether this precise tax was or not established *bona fide*. After having examined the arguments exchanged by the Parties in this respect, the Tribunal sees no reason to assume that, in the circumstances, the 7% levy is not a *bona fide* tax. The 7% levy is part of Spain's global policy concerning the protection of the environment. As explained in paragraph 3 of the Preamble of Act 15/2012, "[o]ne of the bases of this tax

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[160] Isolux Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153, Final Award, 17 July 2016 ("Isolux") (RL-95), para. 733.
[161] Novenergia (CL-243), n. 380: "Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russian Federation, SCC Case No. 24/2007, Award, 20 July 2012, para. 181".
[162] Novenergia (CL-243), para. 521; see also para. 524: "It is not easy to overthrow the presumption that a tax measure introduced by a state is enacted bona fide […]".
[163] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 2007, Judgment, 26 February 2007 (CL-9), p. 128, para. 204. See also Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports 2010, Judgment, 20 April 2010, p. 71, paras. 162-163; Argentina: Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/R, Report of the Panel, 25 November 1997, para. 6.40; Saipem S.p.A. v. People's Republic of Bangladesh (ICSID Case No. ARB/05/07), Award, 30 June 2009, para. 113; Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (CL-145), para. 215.

reform [is] the internalization of environmental costs arising from the production of electric energy […]" and, in effect, besides the "tax on the value of the production of electrical energy" levied in Title I, the "tax measures for energy sustainability" provided for in Law 15/2012 concern the regulation of two other new taxes respectively on production and on storage of spent nuclear fuel and radioactive waste (Title II) and Title III modifies Law 38/1992 on special taxes concerning natural gas supplies.[164] Moreover, as provided for in Article 4, the tax applies indiscriminately to all electricity producers.[165]

189. Finally, the Respondent submits that the Government of Andalucía's unconstitutionality appeal against the TVPEE and the relevant inquiry by the European Commission with respect to the compatibility of the said tax with EU law do not cast doubts as to the tax nature of the measure. In particular, the Respondent submits that the Spanish Constitutional Court and the European Commission have ratified the taxation nature and the legality of the TVPEE.[166]

190. It might be true that the Respondent could have used other means than a fixed tax levy to achieve its policy objective. But it is not for the Arbitral Tribunal to substitute itself to the Government of Spain in this respect. As noted by the *Eiser* tribunal:

> "The power to tax is a core sovereign power that should not be questioned lightly. The ECT Article 21(1) tax 'carve-out' and the corresponding provisions in many other bilateral and multilateral investment treaties reflect States' determination that tax matters not become a subject of investor-State arbitration, save perhaps in carefully limited circumstances. (ECT Article 21(5)(a) thus allows claims for expropriation effected through taxation, but subject to limiting procedures requiring consideration of the claim by national tax authorities.) The present case does not on the facts reach a situation where the tax enforcement measures are found to have been used as part of a pattern of behavior aimed at destroying Claimants

[164] Title IV modifies the text of the Water Law of 20 July 2001.

[165] Article 4 expressly refers to Law 54/1997 which defines both the general and the special regimes.

[166] Respondent's Memorial on Jurisdiction, pp. 68-69, paras. 289-296; Respondent's Reply on Jurisdiction, paras. 286-289. See Plenum of the Constitutional Court, Appeal of unconstitutionality number 1780-2013 presented by the Governing Council of the Junta de Andalucía in relation to Articles 4, 5 and 8 of Act 15/2012 (and other laws and rules), Judgment 183/2014, 6 November 2014 (R-36); E-mail from the European Commission to the Ministry of Foreign Affairs and Cooperation of the Kingdom of Spain, informing about the closure of Pilot Project 5526/13/TAXU (R-41).

> and therefore the Tribunal does not reach a view on the availability of such an exception, were such a case to be made out."[167]

191. The Tribunal recognizes that Article 21(1) is a carve-out from the Tribunal's jurisdiction. The Tribunal does not, therefore, take a decision over the legality of the levy, in the framework of the ECT, as such. However, this Tribunal considers that the levy is a cost impacting the return to the Claimants, in relation to their investments, and so it must be taken into consideration for the global assessment of the reasonable return to which the Claimants are entitled.

## VI. RESPONSIBILITY

192. The Claimants assert that the measures taken by the Kingdom of Spain resulted in several breaches of its obligation under the ECT, including: (a) the obligation to accord to the Claimants' investments fair and equitable treatment; (b) the obligation not to impair by unreasonable or discriminatory measures the use, enjoyment or disposal of the Claimants' investment; and (c) the obligation to respect the obligations previously entered into with respect to the Claimants' investments. The Tribunal examines, in turn, each of the Claimants' claims. To do so, it will examine in general the law applicable to the dispute and the general framework of the dispute (namely the object and purpose of the ECT, the State's regulatory power and the applicability of a margin of appreciation). It will then examine the applicable standard of each of the substantive protections allegedly infringed by the Respondent's measures, before examining the merits of each claim.

### A. APPLICABLE LAW

#### *1. Article 42 of the ICSID Convention*

193. The relevant provisions for determining the law applicable to the merits of this dispute are Article 42(1) of the ICSID Convention and Article 26(6) of the ECT.

[167] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/36), Award, 4 May 2017 ("Eiser") (CL-242), para. 270; see also Isolux (RL-95), para. 739 referring to Yukos Universal Limited (Isle of Man) v. Russian Federation, PCA Case No. AA/227, Award, 18 July 2014 (RL-36), para. 1407; and RosinvestCo UK Ltd. v. Russian Federation, SCC Case No. V079/2005, Award, 12 September 2010.

194. Article 42 of the ICSID Convention provides:

> Article 42
>
> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
>
> (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
>
> (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

195. Article 26(6) of the ECT provides that a tribunal shall "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law".

196. In the present case, the Parties have not authorized the Tribunal to decide *ex aequo et bono*. The Tribunal is therefore bound to decide on the basis of Articles 42 of the ICSID Convention and 26(6) of the ECT and of relevant "rules and principles of international law" when treaty rules are silent.

197. The Tribunal has been made aware by the Parties of awards given in cases with similarities with the present case.[168] While according them due attention, the Tribunal has formed its own opinion on the legal issues before it and has applied the applicable legal rules in light of the particular circumstances of the present case without feeling bound by any of the decisions of previous tribunals.

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[168] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, SCC Case No. V062/2012, Award, 21 January 2016 ("Charanne") (RL-69); Isolux (RL-95); Eiser (CL-242); Novenergia (CL-243); Masdar (CL-244); Antin (CL-245).

### *2. Relevance of EU Law*

198. As noted above,[169] on 29 January and 22 March 2018,[170] the Parties, with leave granted by the Tribunal, have produced five new documents on which they have offered further comments.[171] All of these comments mainly relate to the degree of relevance of EU law in the present case.

#### a. *The Parties' position*

##### i. The Respondent's Position

199. The Respondent notably bases itself on the State Aid Decision[172] and the *Achmea* Judgment.

200. In its Comments on the State Aid Decision, the Respondent's main arguments are as follows:

- The State Aid Decision is binding on Spain;
- EU law prevails over general international law rules;
- In particular, as stated in paragraph 164 of the State Aid Decision, "the principle of fair and equitable treatment cannot have a broader scope than the Union law notions of legal certainty and legitimate expectations in the context of a State aid scheme".[173]
- The new regime must be considered as a State aid within the meaning of Article 107(1) TFEU;[174]
- According to the Decision, referring to the case law of the CJEU, "a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been

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[169] See supra paras. 65, 76.
[170] Court of Justice of the European Union, Slovak Republic v. Achmea BV, Case C-284/16, Judgment, 6 March 2018 ("Achmea") (RL-116); Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3), Award, 27 December 2016 ("Blusun") (RL-117); Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs. Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic, PCA Case No. 2014-03, Final Award, 11 October 2017 ("Wirtgen") (RL-118).
[171] Respondent's Comments on State Aid Decision, 30 January 2018; Claimants' Response to Spain's Comments on State Aid Decision, 5 February 2018; Respondent's Observations on Additional Documents, 26 March 2018; Claimants' Observations on Additional Documents, 26 March 2018.
[172] European Commission Decision on State aid SA.40348 (2015/NN) - Spain, Support for electricity generation from renewable energy sources, cogeneration and waste, 10 November 2017 ("State Aid Decision") (RL-115).
[173] Respondent's comments on State Aid Decision, paras. 5, 35 (quoting State Aid Decision (RL-115), para. 164).
[174] See also Respondent's comments on State Aid Decision, paras. 18-25.

notified to the Commission" and "no investor could have, as a matter of fact, a legitimate expectation stemming from illegal State aid";[175]

- Therefore, the Claimants' alleged expectations in the present case are not legitimate, and "no investor could have *objective and reasonable expectations* to [the] preservation [of the Spanish support scheme] or to have an *acquired right* to an *ummodifiable* [*sic*] FIT over time, all along 40 years."[176]

201. In essence, the Respondent's position in respect to the *Achmea* Judgment was submitted in its letter of 9 March 2017 requesting the introduction of that Judgment into the record:

> "**The Ruling of the EUCJ on the C-284/16 (Achmea Case)** constitutes a decisive factor in the present Arbitral Procedure to be assessed and applied by the Arbitral Tribunal, as it affects not only to a Jurisdictional objection raised by the Respondent, already decided by the Tribunal, but also to the grounds of the present Case. In this regard, as the Kingdom of Spain has argued, international Law to be applied by the Arbitral Tribunal includes the appropriate Rules of International Treaties applicable either in Netherlands [*sic*] and Spain, as the Treaty on the Functioning of the European Union. This applicable International Law is interpreted by the Court of Justice of the European Union (hereinafter "CJEU"), whose Case Law is binding on Netherlands [*sic*] and Spain (Article 267 TFEU)."[177]

202. Commenting on all the new documents put into the record by the Parties on 26 March 2018,[178] the Respondent first explains that "European Union Law and principles constitute International Law that shall be applied by the Tribunal to decide all the issues in dispute in this proceeding" "with preference over any other international or national Law" since it "is an Intra-EU dispute" [179] in accordance with the case-law, notably the *Achmea* Judgment and the *Electrabel*, *Blusun* and *Wirtgen* Awards.[180] According to the Respondent, it is all the

[175] Respondent's comments on State Aid Decision, para. 20. State Aid Decision (RL-115), paras. 158, 164.
[176] See Respondent's comments on State Aid Decision, para. 14.
[177] Respondent's Letter, 9 March 2017, pp. 1-2 (emphasis in original).
[178] See supra n. 171.
[179] Respondent's Observations on Additional Documents, paras. 15-17.
[180] Citing e.g.: Achmea (RL-116), para. 34; Electrabel S.A v. the Republic of Hungary (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("Electrabel") (CL-24) (RL-10), paras. 4.122, 4.189, 4.195; Blusun (RL-117), para. 278; Wirtgen (RL-118), para. 174.

more indispensable for the Tribunal to apply EU law, including the legal acts of EU institutions,[181] in the present case that the dispute affects "a key institution of EU Law" regulated by EU Directive 2001/77/CE and Community guidelines on State Aid for environmental protection 2001/C 837/03.[182]

203. Returning to the alleged incompetence of the Tribunal, the Respondent contends that "the application of EU Law and principles to the present dispute determines the lack of jurisdiction of the Arbitral Tribunal to hear the present dispute"[183] since the ECT is an "international agreement concluded between Member States",[184] disputes over which can only be settled by the CJEU under Articles 267 and 344 TFEU.

204. On the substance, the Respondent maintains that it "is also important to determine the Legitimate Expectations of Investors who claim that a specific amount of State Aid is maintained immutable more than 30 years"[185] and that "EU Law shall be applied to assess the proportionality and reasonability of the disputed measures precisely because the Respondent had to respect the limits established by EU Law".[186] Moreover, referring, *e.g.*, to *Total v. Argentina*,[187] the Respondent states that EU Law cannot be ignored by the Tribunal since it "reflects the common tradition of 28 States".[188]

ii. The Claimants' Position

205. In their response to Spain's Comments on the State Aid Decision, the Claimants' position is the following: [189]

- The State Aid Decision does not concern the original regime, but only the new regime;
- Only the operative part of the State Aid Decision is binding;

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[181] Respondent's Observations on Additional Documents, 26 March 2018, paras. 33-37.
[182] Ibid., paras. 23-24.
[183] Ibid., paras. 38-47.
[184] Ibid., para. 42.
[185] Ibid., para. 52.
[186] Ibid., para. 63; see also Respondent's comments on State Aid Decision, paras. 26-33.
[187] Ibid., para. 69, citing Total S.A. v. Argentine Republic (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010 (RL-85), para. 130.
[188] Ibid., paras. 69-75.
[189] Claimants' Response to Spain's Comments on State Aid Decision.

- The jurisdiction objection is irrelevant since the Tribunal already decided on jurisdiction;
- In any case, EU Law does not impose on Spain to repeal the original regime;
- The State Aid Decision has no bearing on the Claimants' legitimate expectations and is not relevant to proportionality or transparency issues.

206. As for the *Achmea* Judgment, the Claimants consider that it is irrelevant since:

> "(a) the judgment makes it clear that it applies only to a treaty where the EU is not itself a Contracting Party, which is not the case of the ECT;[190]
>
> (b) there can be no incompatibility between the ECT (a treaty to which the EU is a Contracting Party) and EU law. As this Tribunal has already decided, should there ever be an inconsistency, the ECT would prevail;[191]
>
> (c) the ECT is binding on the EU and provides for arbitration of disputes concerning violations of the ECT as a result of EU measures that EU institutions might adopt. In other words, if a treaty claim can be brought against the EU under the ECT, and that is by definition not incompatible with EU law, it follows that the investor-State arbitration mechanism under the ECT is also not incompatible with EU law; and
>
> (d) unlike the Netherlands-Slovakia BIT, the ECT provides that investor-State disputes shall be decided in accordance with this Treaty (the ECT) and public international law, not the law of the host State (and EU law)."[192]

207. Furthermore, the Claimants criticize the *Achmea* Judgment on the ground that:

> "the ECJ draws an erroneous distinction between commercial and investment-treaty arbitration to explain that commercial arbitrations '*originate in the freely expressed wishes of the parties*' while the latter '*derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts disputes which may concern the application or interpretation of EU law*'.[[193]] This is clearly wrong. It reveals a serious lack of understanding of the very principle on which arbitration is grounded: the parties' consent to submit their disputes to individuals whose judgment they are prepared to trust. Arbitration clauses in investment treaties are as

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[190] Claimants' Observations on Additional Documents, para. 59(a), referring to Achmea (RL-116), para. 58.
[191] Claimants' Observations on Additional Documents, para. 59(b), referring Decision on Jurisdiction, para. 87.
[192] Claimants' Observations on Additional Documents, para. 59.
[193] Claimants' Observations on Additional Documents, para. 67, citing Achmea (RL-116), para. 55.

> freely entered into as they are in commercial arbitration. The source of the Tribunal's jurisdiction in investment-treaty arbitration is, as in commercial arbitration, based on the consent of all parties to the disputes, claimant-investor and respondent-State."[194]

b. *The Tribunal's Analysis*

208. The Tribunal notes that it has already dealt at some length with the issues raised again by the Respondent in respect with the relevance of EU law, when commenting on the documents brought into the record on 30 January and 22 March 2018. These issues were dealt with in the Tribunal's Decision on jurisdiction of 6 June 2016. Most notably, it considered in that Decision that:

> "74. However, this Tribunal has been established by a specific treaty, the ECT, which binds both the EU and its Member States on the one hand and non-EU States on the other hand. As for the latter, EU law is *res inter alios acta* and it cannot be upheld that, by ratifying the ECT, those non-EU States have accepted the EU law as prevailing over the ECT. The ECT is the '*constitution*' of the Tribunal and, to use the terminology of the UNCITRAL tribunal in *PV Investors v. Spain*, '*Article 26 of the ECT* […] s*ets out the parameters of the Tribunal's jurisdiction*'.[[195]] This is what the Parties to the ECT agreed amongst themselves; it is not within the jurisdiction of the Tribunal to alter this.
>
> 75. Therefore, in case of any contradiction between the ECT and EU law, the Tribunal would have to insure the full application of its '*constitutional*' instrument, upon which its jurisdiction is founded. This conclusion is all the more compelling given that Article 16 of the ECT expressly stipulates the relationship between the ECT and other agreements – from which there is no reason to distinguish EU law. It follows from this that, if there must be a '*hierarchy*' between the norms to be applied by the Tribunal, it must be determined from the perspective of public international law, not of EU law. Therefore, the ECT prevails over any other norm (apart from those of *ius cogens* – but this is not an issue in the present case). In this respect, this Tribunal fully agrees with the position of the tribunal in *Electrabel*.[196]"

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[194] Claimants' Observations on Additional Documents, para. 67 (emphasis in original).
[195] Decision on Jurisdiction, para. 74, citing The PV Investors v. The Kingdom of Spain, PCA Case No. 2012-14, UNCITRAL, Preliminary Award on Jurisdiction, 13 October 2014, para. 175.
[196] Decision on Jurisdiction, para. 75, citing Electrabel (CL-24) (RL-10), para. 4.112.

209. Although these findings do not appear in the operative part of the Decision on Jurisdiction, they constitute the necessary support for it and are therefore *res judicata.*[197] The Tribunal therefore considers that, as regards the relevance of EU law with regard to its jurisdiction, the discussion is closed and the relating issues will not be reopened at this stage.[198]

210. The Tribunal's reasoning on jurisdiction also has consequences in respect of the merits of the case itself: if there is an incompatibility or discrepancy between the ECT on the one hand and EU law on the other hand, the former must prevail.[199] This being said, the Tribunal also noted in its Decision on Jurisdiction that "to the extent possible, in case two treaties are, equally or unequally, applicable, they must be interpreted in such a way as not to contradict each other."[200] Moreover, the present Tribunal agrees with the Respondent that "EU Law reflects the common understanding of 28 countries in such an important matters as legitimate expectations [and, more generally, the interpretation of the ECT], that cannot be disregarded by the Tribunal […]"[201]

211. With this in mind, the Tribunal notes that the *Achmea* Judgment, which is at the centre of the debate between the Parties concerning the role and relevance of EU law, is inapposite in the present case: the applicable law in that case was the bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, that is an intra-EU instrument exclusively concluded between two EU Member States. This is not the case of the ECT which, as recalled above, "binds both the EU and its Member States on the one hand and non-EU States on the other hand"[202]. It would be highly

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[197] Polish Postal Service in Danzig, P.C.I.J. Series B, No 11, Advisory Opinion, 16 May 1925, p. 30. See also Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), I.C.J. Reports 2013, Judgment, 11 November 2013.
[198] See e.g., CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award, 12 May 2005 ("CMS") (CL-16), para. 126. See also Tokios Tokelés v. Republic of Ukraine (ICSID Case No. ARB/02/18), Award, 26 July 2007, para. 98.
[199] See Decision on Jurisdiction, in particular para. 74: "The ECT is the "constitution" of the Tribunal".
[200] Decision on Jurisdiction, para. 76.
[201] Respondent's Observations on Additional Documents, para. 69.
[202] See supra para. 208, quoting Decision on jurisdiction, para. 74.

improper to impose a sweeping modification of the ECT on EU non-member States using the pretext that it was eventually considered as being incompatible with EU law.

212. The Tribunal also recalls that when States (or, for that matter, international organisations) enter into incompatible commitments, the law of treaties does not offer any solution in terms of hierarchy between the treaties at stake: the issue must be dealt with on the ground of the law of State (and international organisation) responsibility[203]. Such an issue is beyond the jurisdiction of this Tribunal and could only been settled by means of negotiations or other means of peaceful settlement of dispute. If the EU or any of its Member States have violated the laws of State responsibility because it is a party to treaties that contain incompatible commitments, that is a matter for it to resolve.

213. To finish with this discussion concerning the relevance of EU law in the present case, the Tribunal feels obliged to disagree with the assertion of the CJEU concerning the alleged distinction between commercial and investment-treaty arbitration[204] In both cases, the source of the obligation to arbitrate is based on the consent of the parties to the dispute, whether States or private persons. As this Tribunal's decision in its Decision on jurisdiction made clear, both of the Parties in the present case gave their consent to arbitrate under the relevant documents, for the Respondent that being the ECT. No *post-hoc* decision of the CJEU can somehow undo that consent once given. If the European Commission considers that an EU Member State has violated EU law in relation to such consent, then that is an internal matter for EU law that does not affect the application of international law by the Tribunal instituted on the basis of the ECT.

[203] See Vienna Convention on the Law of Treaties, 23 May 1969 (entry into force 27 January 1980) ("VCLT") (CL-90), Art. 30, para. 5.
[204] Achmea (RL-116), para. 55.

## B. GENERAL FRAMEWORK: THE OBJECT AND PURPOSE OF THE ECT, THE STATE'S REGULATORY POWER AND THE APPLICABILITY OF A MARGIN OF APPRECIATION

### a. *The Parties' Positions*

#### i. The Claimants' Position

214. The Claimants assert that, as required by the Vienna Convention on the Law of Treaties ("VCLT"), the Tribunal must interpret the ECT in good faith and in accordance with the ordinary meaning given to its terms.[205]

215. In particular, the Respondent must act in accordance with the ECT's object and purpose, as presented in its Article 2 which states, in relevant part, that the Treaty:

> "establishes a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter".

216. The Claimants contend that the fundamental objective of the ECT is to facilitate transactions and investments in the energy sector by reducing political and regulatory risks.[206] The Claimants further identify the following "sub-objectives" which namely provide for: (a) operation of energy investments within a stable and equitable legal framework; (b) provision at national level for a transparent legal framework; and (c) minimisation of non-commercial risks for energy investments in so far as possible.[207]

217. Energy investments differ from other types of investments, in the sense that they "tend to involve high-value and long-term financial commitments in projects that cannot adapt their cost and financing structures to short-term changes in investment conditions and that are,

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[205] CR, para. 40, CPHB, para. 26.
[206] CM, paras. 394-396, 404-405.
[207] CPHB, para. 30.

therefore, particularly sensitive to legal and political changes and other associated risks."[208] Accordingly, the Claimants continue, in order to address the specific sectoral needs and achieve its goals, the ECT offers a "higher" or more robust level of protection than most bilateral treaties, and thus one "cannot equate the provisions of the ECT with just any other investment treaty or investment chapter in a free trade agreement."[209]

218. In response to Spain's argument that the ECT is not an insurance policy, the Claimants allege that "[i]t is precisely because the energy sector is strategic […] and highly regulated, precisely because the contracting parties knew that states may want to interfere or use their regulatory powers, that the ECT had to provide very extensive protections indeed."[210]

219. The ECT provides additional legal protections – at the international level – which would reduce, to the greatest extent possible, "non-commercial risks" of political and regulatory natures, thereby ensuring that legal frameworks remain stable for investors.[211] This interpretation, they allege, is supported by multilateral organisations and fora, as well as by the Energy Charter Secretariat's Reader's Guide to the ECT.[212]

220. The Claimants' further contend that the particular needs of the energy sector also justify that the latitude of regulatory action accorded to the States under the ECT is extremely limited, and much narrower than under BITs. This is reflected, they contend, in the very few express exceptions to the application of the treaty, in general, and to the substantive investment protections, in particular, that the text of the ECT itself recognizes.[213]

221. On the question of the State's right to regulate, the Claimants submit the following:

> "The 'right' to regulate refers to the extent to which a state can take decisions (including passing laws) without incurring international liability

[208] CM, para. 395.
[209] Tr. Day 1 (Stoyanov), 137:2-5; see also CM, paras. 397-398; CR, paras. 43, 45, CPHB, paras. 30, 33.
[210] Tr. Day 1 (Stoyanov), 141:16-22.
[211] CM, para. 394.
[212] CM, paras. 395-398.
[213] CM, paras. 399-404; Tr. Day 1 (Stoyanov), 146:5-12.

> and the obligation to pay damages. A state does not renounce its right to regulate by becoming a Contracting Party to ECT. Rather, a state is free to regulate, even in violation of its international obligations, but it must pay any affected investors compensation for those violations. The question for the Tribunal, therefore, is whether the ECT contains any exceptions which allow Spain to avoid liability (and the obligation to pay compensation for adverse regulatory actions)."[214]

222. The Claimants further contend that the ECT contains no exceptions applicable to this case since (a) Article 10 of the ECT, unlike Article 13 (Expropriation) does not provide for the so-called police powers defence and (b) the Contracting Parties to the ECT deliberately restricted their ability to regulate in the public interest without incurring liability. On this latter question, the Claimants points to Article 24(2)(b)(i) where it is specified that measures "*necessary to protect human, animal, or plant life or health*" will nevertheless incur an obligation to pay compensation, when those changes violate *inter-alia* Article 10 of the ECT.[215] In particular, it is the Claimants' position that "the contracting parties to the ECT decided that investor protections would trump the need to protect human, animal or plant life or health."[216]

223. Thus, the Claimants conclude that the Contracting States to the ECT "deliberately chose to restrict <u>significantly</u> the regulatory space preserved for signatories." and carefully circumscribed their right to regulate, save for six express exceptions to the application of the Treaty found in Article 24 of the ECT.[217]

224. With regard to the applicability of the "margin of appreciation" the Claimants posit that:

> "The MOA [Margin of Appreciation] relates to the appropriate standard of deference to be given, or the level of scrutiny to be applied, to a state's decisions. It is a concept that has been developed primarily in the context of applying the protections found in the European Convention on Human Rights. It may be relevant when a tribunal or court is scrutinising a decision

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[214] CPHB, para. 35 (emphasis in original).
[215] Ibid.
[216] Tr. Day 1 (Stoyanov), 146:24-147:2.
[217] CM, paras. 399-401; CPHB, para. 36 (emphasis in original).

> over which the state has particular technical or constitutional competence. The MOA comprises a spectrum, with high deference (low scrutiny) at one end, and low deference (high scrutiny) at the other end. The MOA is not a legal standard, but an analytical tool that can be adapted to the particular circumstances."[218]

225. The Claimants further contend that "the ECT does not expressly provide for a [Margin of Appreciation] analysis and neither party has suggested that it falls within an applicable rule of international law." On this basis, they conclude that "applying the [Margin of Appreciation] as an additional standard of review is neither '*necessary nor appropriate*'".[219]

226. Finally, referring to a question posed by one of the Members of the Tribunal, the Claimants note that Spain not only failed to raise a necessity defence, but they also failed to prove that the disputed measures responded to a "*pressing social need*" or that "Spain amended its laws and regulation to serve '*basic governance requirements for the public interest*'". In addition, the Claimants contend that even assuming arguendo that the Tariff Deficit could be considered a "*pressing social need*", this is not sufficient to avoid liability.[220]

ii. The Respondent's Position

227. The Respondent agrees with the Claimants that in order to interpret the substantive protections of the ECT, the Tribunal must rely on Article 31 of the VCLT and thus analyse the ECT in accordance with the common meaning of its terms in their context, and in light of the objective and aim of the Treaty.[221]

228. According to the Respondent, the context refers to the moment the ECT was negotiated and signed, and its aim was and remains to liberalize and promote a free energy market between Western countries and the countries of the so-called "Eastern bloc" after the fall of the Berlin

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[218] CPHB, para. 54.
[219] CPHB, paras. 55-56 (emphasis in original).
[220] CPHB, paras. 67-68 (emphasis in original).
[221] RCM, para. 749 (emphasis in original).

Wall, based on the principle of non-discrimination and market-oriented price formation.[222] Consequently, the Respondent contends, "the principal objective of the ECT regarding investor protection is to attain the implementation of a free market to be able to perform energy activities without discrimination on the grounds of the investor's nationality."[223] The Respondent rejects the Claimants' characterization of the ECT, as a treaty seeking to mainly protect investments. Only 7 of 50 articles are devoted to investment, and the protection of investments is simply a means to achieve the overall goal of an efficient energy market throughout Europe, based on market rules and non-discrimination.[224]

229. According to the Respondent:

> "The reluctance of states to limit their regulatory power in a sector as strategically important as energy leads the signatories of the ECT to differentiate between two moments: 1) the so-called 'making-investment process' (paragraphs (2) and (3) of article 10 of the ECT), in which the conditions for guaranteeing the objective of national treatment and most-favoured nation treatment were reserved for the signing of a 'supplementary treaty', that has still not been signed and 2) the moment after the realization of the investment, in which the guarantee of national treatment and the most-favoured nation clause apply to the foreign investor, albeit with certain limitations."[225]

230. The Respondent thus argues that once the investment is made, the best protection granted by the ECT to the investor and to the foreign investment is "national treatment" since the Treaty's ambition, as reflected in Article 2 of the Treaty, is to remove barriers to non-discrimination.[226] This is not to say however, that the Respondent is alleging that the Fair and Equitable Treatment ("FET") clause only protects investors against non-discrimination. It only alleges that this is one of the ECT's primary objectives, together with favouring market-led pricing.[227]

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[222] RCM, paras. 749-754.
[223] RCM, paras. 755, 775 (emphasis in original); see also RR, paras. 843-846.
[224] Tr. Day 2 (Moraleda), 34:16-25.
[225] RCM, para. 756 (emphasis in original).
[226] RCM, paras. 759-761.
[227] RR, paras. 837-842.

231. Moreover, for the Respondent, considering the context also entails a consideration of the subject matter. In this case, the subject matter of the ECT is investments in the energy sector, which is a highly strategic and well-regulated sector. As such, it would be unreasonable to consider that, by signing the ECT, the Contracting Parties accepted to provide investors with a kind of "insurance policy" that would prevent them from taking regulatory reforms in a strategic sector, and that would provide international investors better protection than national investors.[228] On this question, they reject the Claimants' allegations that the ECT offers a higher level of protection in comparison for example of BITs because of the nature of the investments being protected.[229]

232. In addition, the Respondent states that the guarantee of national treatment to investments reflected in Article 10(7) of the ECT is subject to a significant exception, embodied in ECT Article 10(8) of the Treaty, in the case of subsidies or public aid. This exception reads as follows:

> "The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other **financial assistance** or enters into contracts, for energy technology research and development, **shall be reserved for the supplementary treaty referred to in paragraph (4)**."[230]

233. According to the Respondent, this exception applies to the case since the Claimants claim the payment of subsidies or State aid for the production of electricity. Since the supplementary treaty referred to in the paragraph has not been signed yet, the Respondent concludes that there is still no obligation by the signatory States of the ECT to grant the investor "*national treatment*" for programs related to grants or financial assistance from the host State to the investor.[231]

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[228] RR, paras. 857, 861-862.
[229] Tr. Day 2 (Moraleda), 41:3-42:25.
[230] RCM, para. 762 (emphasis in original).
[231] RCM, para. 763.

234. The Respondent further contends that the "ECT does not set out any limits on the regulatory power of the States other than the minimum standards of international law, with an objective of non-discrimination. And it is even reiterated that such treatment does not prevail in matters of subsidies or public aid."[232] Accordingly, while the ECT establishes limits on the regulatory power to achieve the aforementioned level of protection for investments and for investors, it does not annul or even limit its regulatory authority.[233]

235. To the contrary, the Respondent contends, the State maintains its power to amend the relevant regulatory framework and exercise its power of macroeconomic control for reasons of public interest. This has been specifically recognized in the Guide to the Energy Charter Treaty, which is part of the official version of the ECT in Spain.[234]

236. The Respondent also asserts that the State retains "a certain margin of discretion" to modify both the remuneration system for renewables and the amount of the subsidy. This has been confirmed by judgments of the Supreme Court of Spain handed down between 2005 and 2009, on record in these proceedings.[235]

b. *The Tribunal's Analysis*

237. The Tribunal takes note of the Parties' agreement on the applicability of the "General Rule of Interpretation" embodied in Article 31 VCLT. It will apply this "general rule" in the present Decision when appropriate.

238. The "Purpose of the Treaty" is exposed in Article 2 which refers to "the objectives and principles of the [European Energy Charter adopted in the Concluding Document of The Hague Conference on the European Energy Charter signed at The Hague on 17 December

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[232] RCM, para. 778.
[233] RR, para. 848.
[234] RCM, paras. 772-775; RPHB, para. 44; RR, paras. 848-849.
[235] RPHB, para. 26 (referring to Judgement from the Third Chamber of the Supreme Court, EDJ 2005/237434, 15 December 2005 (R-153), Judgement from the Third Chamber of the Supreme Court, EDJ 2006/282164, 25 October 2006 (R-154), Judgement from the Third Chamber of the Supreme Court, EDJ 2009/307357, 9 December 2009 (R-8), Judgement from the Third Chamber of the Supreme Court, EDJ 2009/307349, 3 December 2009 (R-157)).

1991]". The object and purpose of the ECT must therefore be assessed in light of this instrument which is part of its context since it was made by the Parties in connection with the conclusion of the Treaty and accepted by them as an instrument related to the treaty.[236] The objectives of the Charter are expressed in Title 1 which articulates the following principles:

> "Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic co-operation, [the signatories] undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy."

239. In the opinion of the Tribunal, the Parties to the ECT were aiming at realizing a balance between the sovereign rights of the State over energy resources and the creation of a climate favourable to the flow of investments on the basis of market principles in this field.

240. Although the Tribunal recognizes energy investments are special as a matter of fact, in that they have commonalities and differences with other investments and in that there are economic, commercial, infrastructural, financial, market and other particularities that distinguish energy investments from other investments, the Tribunal is of the view that these peculiarities are taken into consideration and reflected in the relevant treaties in so far as is deemed appropriate by the negotiators. In the present case, the Tribunal must interpret the ECT by taking stock of the particular rules the Parties have deemed necessary to include into the Treaty in view of the specificity of the energy market.

241. This does not mean, however, that the ECT regulates fully and integrally all matters which can be relevant in the present case. As recalled above,[237] in conformity with Article 26(6) ECT and Article 42(1) of the ICSID Convention, in case the Treaty is mute, the Tribunal

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[236] Cf. VCLT (CL-90), Article 31(2)(b).
[237] See supra para. 195.

must decide the issues in dispute in accordance with other applicable rules and principles of international law as may be applicable. Hence, it is indeed not because the ECT does not expressly provide for the States' right to regulate, or because it does not formally recognize a margin of appreciation in their favour, that it must, nor can, be interpreted as excluding them.

242. In this respect, there can be no doubt that States enjoy a margin of appreciation in public international law and the exercise of such a power of appreciation must be more particularly recognized when States apply the ECT, whose common purpose is "to promote the development of an efficient energy market throughout Europe" in view of creating "a climate favourable to the operation of enterprises" and "to the flow of investments and technologies by implementing market principles in the field of energy." Such common goal may be reached by different ways, depending on the circumstances as appreciated by each State.

243. However, such a margin of appreciation is not without limits. In the first place, it can only be exercised in so far as the State Party does not violate the special legal regime, established by the ECT itself, that applies to the energy sector in and amongst the member States.

244. Moreover, as firmly established in the case-law, an international obligation imposing on the State to waive or decline to exercise its regulatory power cannot be presumed, given "the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[238] The regulatory power is essential to the achievement of the goals of the State, so to renounce to exercise it is an extraordinary act that must emerge from an unequivocal commitment; more so when it faces a serious crisis. As stated by the *Continental* tribunal, "it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose."[239] Such a commitment would touch on core competences of the State, to which it is inconceivable the State would implicitly renounce. A treaty obligation, whereby the State guarantees the

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[238] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000 (CL-50), para. 263.
[239] Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9), Award, 5 September 2008 (CL-19), para. 258.

stability of its legal order relinquishing the exercise of its regulatory power must be explicit and cannot be assumed through an implicit declaration, diluted in general expressions.

245. The *Blusun* tribunal gave a clear and complete assessment of the issue:

> "[T]ribunals have so far declined to sanctify laws as promises. For example, […] the tribunal in *Charanne* was clear:
>
> under international law ... in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest."[240]

The *El Paso* tribunal made a similar distinction, as follows:

> "Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze."[241]

246. The Tribunal will rely on these very general principles inasmuch as necessary in deciding on the various questions in dispute between the Parties.

247. However, before entering into the core legal and factual issues raised in the present case, a last preliminary point must be dealt with.

248. Article 10(7) ECT provides that:

> "Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable."

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[240] Blusun (RL-117), para. 367, quoting Charanne (RL-69), para. 510.

[241] Blusun (RL-117), para. 368, quoting El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15), Award, 31 October 2001 ("El Paso") (CL-22), para. 372.

However, with regard to "programmes under which a Contracting Party provides grants or other financial assistance", Article 10(8) reserves the modalities of application of this special treatment for the supplementary treaty to be concluded between the Parties in accordance with paragraph 4 of Article 10.

249. In the view of the Tribunal, there can be no doubt that the present case bears, at least in part, upon the payment of subsidies or State aid. Therefore, in the view of the Tribunal, Article 10(8) ECT applies in principle – or, more exactly, it would apply, had the "supplementary treaty" envisaged in paragraph 4 of Article 10 been concluded. But this is not the case. The Respondent draws from the non-conclusion of the "supplementary treaty" the radical conclusion that "there is still no obligation by the signatory States of the ECT to grant the foreign investor the '*national treatment*' in the matter of programmes" concerned by such payments.[242] The Tribunal disagrees: absent modalities expressly regulated by a treaty, general international law applies.

## C. Legal Standards of Protection (The FET and the Umbrella Clause)

250. It is the Claimants' position that, by taking various wrongful measures, the Respondent has caused substantial losses to their investments in Spain in violation of Article 10(1) of the ECT regarding FET. In particular, the Claimants allege that by enacting Law 15/2012, RDL 2/2013, RDL 9/2013, Law 24/ 2013, RD 413/2014 and the June 2014 Order, the Respondent has fundamentally altered the applicable legal and regulatory regime encompassed in RD 661/2007, upon which the Claimants relied on when investing in the Spanish RE sector.[243]

251. According to the Respondent, the Kingdom of Spain has always fulfilled its obligations and has not violated the standard of FET under the ECT. It is the Respondent's view that the new regulatory economic framework has been adjusted in compliance with Spanish law.

[242] RCM, para. 763.
[243] CM, paras. 419-421.

Moreover, the new legal and economic frameworks have been enacted in a predictable, reasonable and proportionate manner in accordance with Spanish law in order to serve the public interest and through the use of the State's regulatory power.[244] It also states that the Claimants' full restitution claim fails since the new measures respect the principle of reasonable return[245] of renewable energy plants. The primary objectives of the measures are the sustainability and balance of the Spanish Electricity System, to the extent that they guarantee no over-remuneration of investors in the form of State subsidies, after the drop of electricity demand in 2010. Finally, the Respondent highlights that it never committed to freeze a particular remuneration model in the favour of the Claimants.[246]

### (a) The Legal Standard

#### *1. Scope of the FET*

a. *The Parties' positions*

i. The Claimants' Position

252. According to the Claimants, the FET standard is an autonomous and independent standard. In particular, they consider that it is "additional" to the minimum standard of protection to be found under customary international law. They consider this interpretation to be consistent with the wording of Article 10 of the ECT, as well as with the ECT *travaux préparatoires*. In support of this latter statement, they note that an earlier draft of the ECT stated that FET shall be "*in accordance with the principles of international law and the relevant international obligations*" but the italicised words were removed in the final version.[247]

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[244] CR, paras. 33-35.
[245] It should be noted that both Parties use indistinctly in their pleadings the English expressions "reasonable return", "reasonable rentability" or "reasonable profitability" and Spanish expressions "retorno razonable" and "rentabilidad razonable".
[246] CR, paras. 26-29.
[247] CPHB, paras. 37-39 (emphasis in original), quoting Basic Agreement for the European Energy Charter, Draft 3, 31 October 1991 (CL-238), p. 31.

253. This becomes evident, so the Claimants contend, by applying the maxims of treaty interpretation contained in Articles 31 and 32 of the VCLT. If we look at the ordinary meaning of "fair" this is defined as "just, unbiased, equitable, impartial, legitimate," while "equity" is defined as "fairness; impartiality; even-handed dealing".[248] With regard to the context of the provision, the FET standard, when compared to other provisions, is an absolute standard that provides a fixed reference point regardless of the treatment others receive. The Claimants assert, that therefore "the FET standard in the ECT is violated even if the Claimants have received the same treatment as companies of Spanish nationality or from third-party States."[249] They rely for this proposition on the interpretations put forward by the tribunals in *Tecmed v. Mexico*, *Saluka v. Czech Republic*, *Azurix v. Argentina* and *Kardassopoulos v. Georgia*.[250]

254. The Claimants further submit that even if, *arguendo*, FET is equated to the minimum standard of treatment, Spain has still breached the FET, as the minimum standard has been said to require a "reasonably well-organised modern state" committed to "good governance."[251] According to the Claimants, the disputed measures fail to satisfy the levels of good governance to be expected of a reasonably well-organised modern State because the disputed measures were (a) unannounced, abrupt, retroactive, unprecedented in nature; (b) contrary to EU and international regulatory practice and good governance principles; and (c) were not the least harmful measures available to Spain.[252]

ii. The Respondent's Position

255. The Respondent rejects the Claimants' assertion that the ECT's FET standard goes beyond the minimum standard of treatment under customary international law.[253]

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[248] CM, para. 429.
[249] CM, para. 430.
[250] CM, paras. 432-434.
[251] CPHB, para. 40 (referring to AWG Group Ltd. v. Argentine Republic, UNCITRAL, Separate Opinion of Pedro Nikken (CL-239), para. 20).
[252] CR, paras. 92-98; CPHB, para. 40.
[253] RCM, paras. 787-788.

256. The Respondent further explains that since the main objective of the ECT is to guarantee non-discrimination of foreign investors, if a State's national treatment does not respect the minimum standard of treatment, then it is at this point that the protections of the Treaty pursuant to international law, kick-in.[254]

257. The Respondent further rejects the Claimants' contention that the ECT guarantees a higher level of protection and that the ECT contains an autonomous FET standard.[255]

b. *The Tribunal's Analysis*

258. The Parties have discussed at length the relationship between the FET, the minimum standard of protection and national treatment. Interesting as it may be, this discussion remains rather academic. Concretely, the Tribunal's position must be based primarily on Article 10 of the ECT. This provision guarantees FET to foreign investors, with the precision that this treatment will not be "less favourable than that required by international law" (an expression which can be assimilated to imposing the minimum standard of protection) (paragraph 1) together with national treatment (paragraph 3). In other words, the minimum standard as applied traditionally in international law is included in the FET which adds to it in favour of the investor.

259. Therefore, the Tribunal considers that the removal of the precision that the FET shall be "in accordance with the principles of international law and the relevant international obligations" from the final version[256] has no special significance: in any case: (1) the wording of the Treaty prevails on general principles and (2) the ECT being a treaty is anchored into international law and must be interpreted in accordance with that law.

260. The Tribunal is convinced that it is of no avail to cite the long litany of the case-law in which investment tribunals have tried to define the FET standard. Suffice it to say that there can be no doubt that (i) transparency, (ii) constant protection and security, (iii) non-impairment

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[254] Tr. Day 2 (Moraleda), 36:1-7.
[255] Tr. Day 2 (Moraleda), 41:17-42:1.
[256] See supra para. 252.

including (iv) non-discrimination and (v) proportionality and reasonableness, are elements of the FET – and certainly so under the ECT. Therefore, in any case, whether these requirements are generally included in the FET or not, they must be complied with by the Respondent as parts of it express treaty obligations under the ECT. Similarly, and while it is not expressly mentioned in Article 10(1), the Tribunal is of the opinion that respect for the legitimate expectations of the investor is implied by this provision and is part of the FET standard.

261. However, not all expectations of a foreign investor are "legitimate" and only legitimate expectations are protected under the FET principle. Therefore, all the investors' expectations do not imply an immutability of the conditions of the investment. Whilst an "expectation" is subjective, whether or not it is "legitimate" must be objectively assessed. To evaluate a claim to a legitimate expectation, it is necessary, therefore, to assess, first, what are the expectations of an investor and, second, whether those expectations are legitimate. The frustration of a legitimate expectation establishes a wrongful act by the State. The frustration of a non-legitimate expectation does not establish a wrongful act by the State.

262. Just because an investor may have an expectation of immutability of the conditions of an investment does not necessarily mean that such an expectation is objectively legitimate in any given circumstance. In order to appreciate the legitimacy (or illegitimacy) of the Claimants' expectations in the present case, it must be kept in mind that it is generally recognized that States are in charge of the general interest and, as such, enjoy a margin of appreciation in the field of economic regulations. As a result, the threshold of proof as to the legitimacy of any expectation is high and only measures taken in clear violation of the FET will be declared unlawful and entail the responsibility of the State.

263. To summarize, the Tribunal considers that:

- The FET principle includes, but goes beyond, the traditional "minimum standard" as conceived in the *Neer Case*;[257]

- It also includes the protection of the legitimate expectations of the investor at the time of the investment;

- An investor cannot legitimately expect that the conditions of its investment will necessarily be maintained immutable;

- As will be seen below,[258] the main criterion to be applied for the interpretation of the FET standard is that of reasonableness.

### *2. The Umbrella Clause*

264. Article 10(1) of the ECT provides that:

> "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

265. The Parties disagree on the purpose and scope of protection of the umbrella clause as encompassed in Article 10(1) of the ECT.[259]

#### a. *The Parties' Positions*

266. According to the Claimants, the purpose of an umbrella clause is to bring the host State's compliance with commitments assumed *vis-à-vis* investors under the protective "umbrella" of the ECT.

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[257] L.F.H. Neer and Pauline Neer v. Mexican United States, RIAA, 15 October 1926, Vol. IV, pp. 61-62: "[…] the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful [sic] neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".

[258] See infra paras. 460-472.

[259] RCM, para. 975.

267. While the Claimants argue that the umbrella clause covers not only contractual obligations but also obligations that the host State assumes through unilateral acts such as legislative or regulatory undertakings as well as any Spanish laws or regulations relating to the Claimants' investments,[260] the Respondent asserts that the umbrella clause covers obligations arising out of a contractual basis only and does not extend to other forms of commitments between the investors and the host State, except investment authorizations, licenses and permits. The Respondent further underlines that there are no specific commitments between the Kingdom of Spain and the Claimants or their investments.[261]

268. The Claimants disagree with the interpretation of arbitral cases and authorities cited by the Respondent regarding the fundamental meaning of the umbrella clause and consider them as misinterpretations and misleading analyses.[262] According to the Claimants, even if the umbrella clause were limited in its scope to encompass only contractual commitments, which they reject, the Claimants did obtain a bilateral administrative licence through the RAIPRE registrations issued to each plant by Spain.[263] The Claimants contend that, through the RAIPRE, Spain entered into a specific and binding bilateral contract *vis-à-vis* the Claimants and has clear obligations with regard to each of their investments.[264]

269. Conversely, the Respondent relies on a more restricted interpretation of the umbrella clause of Article 10(1) of the ECT in order to deny the existence of its violation *vis-à-vis* the Claimants' investment. In its submission, the Respondent invokes three different arguments

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[260] CR, para. 507; CM, paras. 494-499, citing the following rulings for the proposition that unilateral undertakings and legislative acts taken by States, may constitute obligations in relation to the particular investor-claimant: LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006 ("LG&E") (CL-33); Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Award, 22 May 2007 ("Enron") (CL-25); Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award, 28 September 2007 (CL-52).

[261] RCM, paras. 980-987.

[262] CR, paras. 564-565.

[263] CR, para. 558.

[264] CR, para. 575.

to deny that it has breached the umbrella clause of the ECT.[265] First, the interpretation made by the Claimants contradicts the literal sense of Article 10(1) of the ECT and the interpretation thereof by doctrine and arbitral case-law.[266] Second, the Respondent is not bound "*vis-à-vis*" the Claimants or their investment through unilateral acts. And finally, the obligations the Claimants claim to be protected by the umbrella clause do not exist under Spanish law.

i. The Claimants' Position

270. The Claimants submit that by enacting RD 661/2007 (and in particular Article 44(3)), RD 1614/2010 (in particular Articles 4 and 5(3)), issuing the RAIPRE certificates to each and all of the Project Companies and rendering the March 2011 Resolution addressed to Arenales Solar, the Respondent entered into binding obligations towards Claimants' investments, which it must now honour.[267]

271. In particular, pursuant to Article 17 of RD 661/2007, by signing, stamping and issuing the RAIPRE, the Respondent was qualifying the Andasol and Arenales Plants, and the Dédalo Wind Parks installations, for the Special Regime and confirming thereby that the Claimants had the right to those tariffs. The Claimants stress that the RAIPRE "is a favourable administrative act that contains an obligation on the [Kingdom of Spain] that is more binding than an obligation contained in a bilateral contract between an investor and the State". These are, so the Claimants contend, clear obligations with regard to each of its investments.[268]

272. Moreover, the Claimants highlight that the obligations of the Respondent towards the Project Companies can be traced back to RD 661/2007, which contained strong stabilisation commitments.[269] While the Claimants concede that RD 661/2007 contemplated adjustments

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[265] RCM, para. 973.
[266] RR, paras. 1016-1021.
[267] CM, para. 500; CR, para. 558.
[268] CR, para. 575.
[269] CR, paras. 568-569.

to the FIT every four years, the measure had nevertheless expressly provided that such changes would not affect duly registered existing facilities.[270] The Claimants further note that, in the March 2011 Resolution, the Ministry reiterated its commitment to the Arenales Solar by recognizing that the RD 661/2007 regime would be applied for the operational lifetime of the plant.[271]

273. While the Respondent argues that the March 2011 Resolution was a mere communication, the Claimants contend that it was a "favourable administrative act" binding on the government and subject to revocation under limited circumstances.[272]

274. As a result, the Claimants assert that by disregarding the obligations it entered into through *inter alia* RD 661/2007 (and in particular Article 44(3)), the July 2010 Agreement, RD 1614/2010 (in particular Articles 4 and 5(3)), the RAIPRE certificates and the March 2011 Resolution addressed to Arenales Solar, the Respondent breached the Umbrella Clause.

### ii. The Respondent's Position

275. Citing various authorities and arbitral precedents to support its argument, the Respondent advances a more restrictive interpretation of the umbrella clause of the ECT. It considers that the umbrella clause covers merely contractual obligations or specific commitments undertaken by the State with the investor or investment, within the framework of a contract or similar bilateral instruments (administrative contract, concession or licence).[273] This is confirmed by the cases quoted by the Claimants.[274]

276. The Respondent denies that, in the present case, an obligation between the host State and the investor exists, since no direct contractual relationship exists between the Claimants and the Respondent via a contract, concession or licence. In addition, the Respondent considers that

[270] CM, paras. 50, 502.
[271] CM, paras. 503-505.
[272] CR, para. 572.
[273] RCM, para. 986.
[274] RCM, paras. 988-987.

any alleged commitment (including the July 2010 Agreement, the RAIPRE registration or the March 2011 Resolution), should have been entered into with the Plants and not with the Claimants, as RREEF only has an indirect equity interest participation in the Plants.[275] The Respondent's rebuttal of the Claimants' umbrella clause allegations are threefold.

277. First, neither RD 661/2007 nor RD 1614/2010 created a "commitment" or "relationship" or "specific obligation" between the Respondent and the Claimants or with respect to any other foreign investors or investments. The Respondent relies for this proposition on the *Charanne v. Spain* and *Isolux v. Spain* awards.[276] Moreover there was no obligation to freeze the RD 661/2007 economic regime, a fact that was confirmed in the *Charanne* Award and which was not altered by Articles 4 and 5 of RD 1614/2010.[277]

278. Second, the July 2010 Agreement has no bearing on the interpretation of RD 1614/2010 and the *Asociación Empresarial Eólica* (the Spanish Wind Energy Association, AEE) and *Protermosolar* (CSP Association) did not consider RD 1614/2010 as providing for an immutable regime for existing installations. Moreover, the July 2010 Agreement was not breached with regard to either the Claimants or their investment.[278]

279. Third, for the Respondent, the so-called obligations under Spanish law, as alleged by the Claimants, do not exist.[279] The Respondent contends that the measures on which the Claimants rely are merely acts of information or communications; they cannot generate "petrification" of obligations over the remuneration regime.[280] As a result, the Respondent concludes that since no obligations arise from domestic law they cannot be covered by international law.[281]

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[275] RR, para. 39; Tr. Day 2 (Moraleda), 106:11-19.
[276] RR, paras. 1022-1026.
[277] RCM, paras. 998-1004.
[278] RR, para. 39.
[279] RCM, para. 1002.
[280] RCM, paras. 998-1004
[281] RCM, para. 1008.

280. In particular, they deny that the registry in RAIPRE could be considered a "license", reiterating that the RAIPRE is a mere administrative manifestation that does not generate commitments, as already declared by the *Charanne v. Spain* case.[282] The Respondent emphasizes that all facilities, including those under the Ordinary and the Special Regime, are registered in the Administrative Registry and the RAIPRE is simply a section of that Administrative Register.[283] RE installations have been registered under the RAIPRE's special section since RD 2818/1998 and this did not preclude subsequent decrees from being applicable to those installations; they have been subject to all regulatory changes since then.[284]

281. As to the March 2011 Resolution, the Respondent contends that it is not an administrative act but a mere communication to the Arenales Plant, confirming the application of the regulatory regime in force in its entirety (not only to two regulations as the Claimants assert), at that point in time.[285]

282. Neither the March 2011 Resolution nor the alleged statements from government employees could unilaterally generate the specific "obligations" or "commitments" referred to under the umbrella clause in Article 10(1). Thus, all the Claimants claim should be dismissed.

b. *The Tribunal's Analysis*

283. Here again the Tribunal will not enter in the intellectually interesting but practically fruitless discussion concerning the definition and scope of an umbrella clause in the abstract. Two things are clear in the present case and result directly from the terms of the ECT itself:

- the Respondent has a duty to comply with Article 10(1) ECT;
- this duty relates to the "any obligations it has entered into with an Investor".

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[282] RR, paras. 1030-1032.
[283] RR, paras. 480-481. The Respondent also contends that the Supreme Court of Spain has confirmed that there is no link between the right to receive subsidies and registration in RAIPRE, which is compulsory even for those facilities for which the special regime has been revoked. RR, para. 489, citing Supreme Court Ruling of 30 March 2012 (R-345). On this issue, see also Tr. Day 2 (Moraleda), 106:22-108:9.
[284] Tr. Day 2 (Moraleda), 107:8-18.
[285] Tr. Day 2 (Moraleda), 108:10-109:18.

284. On the one hand, the expression "any obligations" calls for a broad interpretation but, on the other hand, the phrase "it has entered into" seems to refer exclusively to bilateral relationships existing between the Respondent and the Claimants, to the exclusion of general rules; and the Spanish (*"las obligaciones que haya contraído con los inversores"*) or French (*"les obligations qu'elle a contractées vis-à-vis d'un investisseur"*) lead to the conclusion that the last sentence of Article 10(1) ECT only applies to contractual obligations. As noted in the award of 12 October 2005 in *Noble Ventures, Inc. v. Romania*, in respect to a very similar clause in Article II(c) of the Bilateral Treaty between the United States and Romania dated 28 May 1992:

> "[C]onsidering the wording of Art. II (2)(c) which speaks of 'any obligation [a party] may have *entered into* with regard to *investments*', it is difficult not to regard this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been 'entered into' by a host State with regard to an investment. The employment of the notion 'entered into' indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts."[286]

285. In the present case, the Tribunal accepts the Respondent's view according to which the RAIPRE do not add anything to the contractual relations entered by the Spanish Government with each of them; as accepted by the Respondent itself, these certificates "only manifest the registry of the installations in an administrative register that does not generate specific commitments".[287] As provided for in Article 14(1) of RD 661/2007, "the final registration of the facility in the Public Authority Register of production facilities under the special regime shall be a necessary requirement for the application of the economic regime regulated under this Royal Decree to such facility." However, this "requirement" does not constitute a commitment falling under the umbrella clause. It certainly implies that the investment is regulated by RD 661/2007 but not that the Respondent has entered into the obligations

[286] Noble Ventures, Inc. v. Romania, ISCID Case No. ARB/01/11, Award, 12 October 2005, para. 51; also quoted in Isolux (RL-95), para. 770.
[287] RR, para. 1030.

contained therein with the Claimants. *Mutatis mutandis* the same reasoning applies to RD 1614/2010.

286. But this is not the end of the question. Even if the rules enunciated in RD 661/2007 and RD 1614/2010 are not covered by the umbrella clause under the last sentence of Article 10(1) ECT, they are essential components of the domestic legal environment of the investment and the Claimants could legitimately expect the State would observe and enforce them in conformity with general rules of international law.

287. By way of conclusion on this point, the Tribunal is of the view that the umbrella clause contained in the last sentence of Article 10(1) ECT has no particular role to play in the present case but that the Respondent was expected nonetheless to observe and enforce domestic law as a part of the FET standard and basis for legitimate expectations.

### (b) The Alleged Violations of the Claimants' Rights

#### *1. Stability and Predictability*

288. Article 10(1) of the ECT, first sentence, provides in relevant part:

> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area."

a. *The Parties' Positions*

i. The Claimants' Position

289. The Claimants contend that, in addition to a State's obligation to provide a stable and predictable legal framework for investments, the first sentence of Article 10(1) of the ECT provides an independent and autonomous free-standing obligation to provide investments and investors stable conditions. In particular, the Claimants contend that there is an obligation

to maintain a stable legal framework once the investment is made. This obligation sits independently of the FET standard.[288]

290. The Claimants explain that their argument is based on the ordinary meaning of Article 10(1) while noting that no tribunal has determined before whether the stability commitment is freestanding.

291. The Claimants contend that:

- The New Regime represented a complete overhaul of the regulatory regime that was in place at the time the Claimants made their investments.[289]
- The Respondent's allegation that the New Regime complies with the principle of reasonable return, in and of itself confirms that Spain has not respected the stability and predictability of the legal framework, representing a breach of Spain's obligations to provide transparent conditions, as the Claimants did not base their investments on the notion of reasonable return.[290]
- The New Regime was not only implemented abruptly, through a lengthy and opaque transition, but it was also applied retroactively. This means that the New Regime applies to existing installations for the remainder of their useful life. Even if the regime did not affect the results or activities resulting from the pre-existing situation, which it does, (*i.e.*, the electricity already produced and sold on the market), the regulation would still be considered "retroactive" in accordance with the ordinary meaning of the word, and as provided under Spanish law.[291]

292. The Claimants reject the interpretation of "retroactivity" advanced by the Respondent. In particular, they contend that the New Regime "applies to existing installations and removes the right for the Installations to receive the RD661/2007 FIT for their operational lifetime in

[288] CPHB, paras. 72-77.
[289] CR, para. 470.
[290] CR, paras. 470-471.
[291] CR, paras. 472-484.

breach of Spain's promises." They further contend that "[t]he New Regime is also retroactive because it seeks to claw-back past remuneration: it takes into account past earnings to calculate an investor's remuneration going-forward" and retroactively reduces the project-level return.[292] Thus, the Claimants' conclude, the disputed measures affect the Claimants "acquired rights" given the existence of the claw-back under the New Regime, thereby violating its international law obligations.[293] The Claimants further state that even if the New Regime did not affect the energy it had already sold, it affected the energy that was projected to be sold in the future and thus it affected the Claimants expectations as recognized by the Respondent in a report from the CNE.[294]

The Claimants' position is that the changes made to the original legal framework resulting in an on-going uncertainty constitute a breach of the Respondent's obligations under the ECT and must be assessed in light of Spain's stabilization guarantees under Article 44(3) of RD 661/2007 and Articles 4 and 5.3 of RD 1614/2010, as the decision to invest is in large part based on assessments of the state of the law and the overall business environment.[295]

293. According to the Claimants' submissions, the Respondent not only made continuous changes to the legal framework on which they relied on when making the investments, but it also left them not knowing what regime they will be subject to.[296] The uncertainty the Claimants experienced results from a shift from the stable regime they relied on to an ambiguous regime, which impacts have not been fully measured yet.[297]

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[292] CPHB, paras. 145-146.
[293] CPHB, para. 149. According to the Claimants, "that's how the new regime works. They flatten the return at 7.398% for the lifetime of the investments; they look backwards. If you've earned above that in the past, you get lower than that in the future. […] That is a technical way to say it's not retroactive, when in fact it is." Tr. Day 2 (Sullivan), 145:12-25.
[294] Tr. Day 2 (Sullivan), 140:3-9, citing CNE Report 4/2004, regarding the Royal Decree proposal, which establishes the methodology for the updating and systematisation of the legal and economic regime for electricity production in the special regime, 22 January 2004 (R-142), and CNE Report 3/2007, regarding the Royal Decree proposal, regulating the activity of electricity production under the special regime, 14 February 2007 ("CNE Report 3/2007") (R-144), p. 18.
[295] CM, para. 465.
[296] CM, para. 462
[297] CM, para. 467.

294. In particular, the Respondent wrongfully subjected the Claimants to a "'roller-coaster' of constant and drastic changes in the applicable legal and regulatory framework" by modifying the RD 661/2007 in the first place and then by applying the changes retroactively to the Claimants' investments in 2012 and 2013, ultimately wiping out the RD 661/2007 economic regime in its entirety in July 2013.[298] This constitutes a breach of the FET standard.

295. Finally, the Claimants distinguish their case from the *Wirtgen* case:

> "in *JSW Solar,* Article 2(1) of the Germany-Czech Republic BIT merely obliges the contracting parties to '*accord investment fair and equitable treatment*'. It does not contain the same provision as in the ECT expressly requiring the Contracting Parties to encourage and create 'stable' conditions for Investors"[299]

ii. The Respondent's Position

296. The Respondent asserts that Article 10(1) does not contain a free-standing standard.[300] Relying on the award in *Plama v. Bulgaria,* the Respondent submits that the stable and predictable conditions must be assessed within the FET standard of the ECT.[301] The Respondent further considers Claimants arguments inapposite as they are based on seven awards that do not apply the ECT standard.[302]

297. Moreover, the Respondent relies on the *Isolux v. Spain* award to support its conclusion that the Article 10(1) of the ECT does not contain an autonomous standard.[303]

298. The Respondent alleges that the disputed measures were macroeconomic control measures adopted in compliance with international commitments and for legitimate reasons, including (a) preventing over-remuneration of investors consistent with the principle of a reasonable

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[298] CM, para. 463.
[299] Claimants' Observations on Additional Documents, para. 49.
[300] RPHB, para. 111.
[301] RCM, para. 870.
[302] RCM, para. 868.
[303] RR, para. 874.

rate of return; (b) ensuring the sustainability of the SES; (c) preventing that consumers assume the burden of paying higher prices to compensate for economic imbalances.[304]

299. Furthermore, the Respondent contends that the contested measures are not retroactive, since they do not affect acquired rights and only have effects towards the future. The Respondent alleges that "the contested measures are not retroactive (1) neither according to International arbitral Case Law, neither for the European Commission, (2) nor in accordance to Spanish Case Law, nor according to scientific doctrine, (3) nor according to the criteria the RE sector Associations nor for other investors, like Iberdrola, whose criterion is invoked by the Claimant[s]."[305]

300. According to the Respondent, for a regulation to be retroactive under international law, it must affect acquired rights. It further contends that the Claimants have no acquired rights to a future remuneration[306] because "under no circumstances do [the measures] require RE producers to return the subsidies previously received."[307] Instead, the New Regime:

> "allows taking into account the remuneration already received from the beginning of the operation of the facility, for the purpose of calculating the future subsidies to receive, apart from the incomes of the market, without therefore incurring retroactivity. With that it avoids the perception of over-retribution that could (i) distort the energy market and (ii) constitute State Aids contrary to European Union Legislation."[308]

301. The Respondent's position is that the only certainty a diligent investor could have is that the Respondent would take necessary measures to ensure the sustainability of the SEE and avoid over-remuneration situations, while respecting the principle of a reasonable rate of return.[309]

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[304] RCM, paras. 779-780; RPHB, para. 35.
[305] RR, para. 964; CM, paras. 885-889; RR, paras. 419-449. As to International Law, the Respondent refers to Nations Energy Inc., Electric Machinery Enterprises Inc., and Jaime Jurado v. Republic of Panama (ICSID Case No. ARB/06/19), Award, 24 November 2010 ("Nations Energy") (RL-82); and Charanne (RL-69) to support its argument. See RR, paras. 428-430, 963-964.
[306] CM, para. 889; RR, para. 965.
[307] RPHB, para. 108.
[308] RR, para. 966; see also RR, paras. 432-441.
[309] RCM, para. 875.

302. The Respondent further contends that the "reasonable rate of return" is a two-way mandate: the remuneration for the investor must be reasonable but the cost allocation that the said return represents for the consumer must also be reasonable, as set forth in the Preamble to RD 661/2007.

303. In this regard, the Respondent explains that the reasonable rate of return "cannot be infinite as its aim is to guarantee a level playing field for renewable energy producers but it cannot place them in a more competitive position than non-subsidised producers." Therefore, the Government's discretional power was in fact limited by the 1997 Electricity Law. This is "a rule with the force of law that allowed the Government to adapt the remuneration to changing circumstances by means of hierarchically inferior measures that are easily amended: the regulations."[310]

304. The Respondent further affirms that the disputed measures were adopted respecting the principles set forth in the 1997 Electricity Law, including the need to ensure sustainability and balance of the SES. Since the essential nature of the regulatory framework in which the Claimants invested has been maintained, the Respondent argues that it has not breached its obligation to provide "stable conditions" for the Claimants' investments.[311]

305. In this regard, the Respondent points to the reform of 2013, which maintained "the <u>subsidies</u> and the <u>priority of dispatch</u>, by allowing the following investments in RE to be recovered, [for] 'standard installations' [based on]: (i) investment costs, (ii) operation costs and also, (iii) to be obtained according to the cost of money on capital markets."[312]

306. Comparing the remuneration model established by the current regulation and the model in force when the Claimants made their investment, the Respondent concludes that the measures maintain the essential elements of the previous system and cover the investment costs of all

[310] RPHB, paras. 57, 59.
[311] RCM, para. 878; RPHB, paras. 59-60.
[312] RCM, para. 880; RPHB, para. 98.

the Claimants' investments, except for the Arenales plant, where the deviation in investment costs is due to the fact that the plant was "blatantly cost-inefficient."[313]

307. The Respondent further concludes the following:

> a. "It has maintained the concept of efficiency pursued by the SEE since 1997, which consists of providing electricity to Spanish consumers at the lowest possible cost.
>
> b. It has maintained the subsidies to renewable energies as a cost of the SEE and, therefore, linked to its economic sustainability.
>
> c. It has maintained and improved the priority of access and dispatch for REs [installations].
>
> d. It has maintained the basic structure of the Spanish remuneration model, consisting of allowing RE plants to reach a Reasonable Return by combining two elements: market price (pool) and a subsidy.
>
> e. It has maintained the characteristic attributes of the principle of Reasonable Return: its equilibrium and dynamism.
>
> f. It has restored the equilibrium of the SEE by eliminating situations that generated unjustifiable remunerations, such as the indexation of all the elements that integrate the subsidy or CPI or the adjustments arising from the pool plus premium option.
>
> g. It has maintained the dynamic character of Reasonable Return [which makes it possible to protect the value of the investment over time, consequently endowing it with greater stability]. Therefore, the reasonability of the return continues to be assessed in accordance with the price of money on the capital market (the price of the Spanish ten-year bond). […]
>
> h. It has maintained and improved the methodology historically followed by the SEE to establish the Reasonable Return, consisting of the determination of types of facilities and standards.
>
> i. It continues to provide RE plants with Reasonable Return. The return provided by the Spanish remuneration model is better than the discount

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[313] RPHB, paras. 76-78.

> rate (opportunity cost) of the sector and, specifically, better than the discount rate (opportunity cost) of the Claimant. Consequently, the return that continues to be provided by the Spanish system is reasonable."[314]

308. The Respondent then examines, and rejects, the Claimants' allegations regarding the purported retroactivity of the measures.[315] In this sense, the Respondent distinguishes between the immediate application of a regulation and its retroactive application affecting acquired rights. The Respondent submits that for a regulation to be retroactive it must affect acquired rights. This differs from regulations that apply to future events "in relation to legal situations under way" but that do not affect rights already acquired, as any remuneration previously received is intangible and not susceptible to any claim.

309. To advance its interpretation of "retroactivity", the Respondent relies on the cases *Nations Energy v. Panama*, *Charanne v. Spain* and *Isolux v. Spain,* as well as decisions from the Spanish Supreme Court.[316] The Respondent further refers to rulings of the Spanish Supreme Court handed in 2015 and 2016 declaring that the measures adopted on the basis of RD Law 9/2013 are not retroactive.[317]

310. In further support of this submission, the Respondent points to decisions of the Spanish Supreme Court on the legality of RD 413/2014 and Order IET/1045/2014 which analysed the possible infringement of the ECT. The decision claims that the new legal regime retains the essential lines of the previous legal regime.[318]

311. The Respondent asserts that the Claimants have never had an acquired right to a future remuneration by means of a fixed and unchanging FIT. In particular, the Respondent submits

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[314] RCM, para. 884; see also RPHB, paras. 81-85; RR, para. 958.
[315] RCM, para. 886.
[316] RCM, paras. 890-894 (see Opinion of the Permanent Commission of the Council of State 937/2013, 12 September 2013 (R-139)); RR, para. 439.
[317] RCM, paras. 896-899 (see Judgement of the Constitutional Court, dictated in constitutional appeal no. 5347/2013, 17 December 2015 (R-169); Judgement of the Constitutional Court, dictated in constitutional appeal no. 5852/-2013, 18 February 2016 (R-171); Judgement of the Constitutional Court, dictated in constitutional appeal no. 6031/-2013, 18 February 2016 (R-172)); RPHB, paras. 108-109.
[318] RCM, para. 882.

that it "had the discretional power, pursuant to [Law] 54/1997, to modify the economic regime of RE producers in order to adapt it to the changing economic and technical circumstances. Therefore, the RE producers could not have had an acquired right to the maintenance of the economic regime contained in a specific regulation."[319] In addition, "[t]he inexistence of an acquired right to the maintenance of the economic regime under RD 661/2007 was already discussed by the Supreme Court prior to the time the Claimants made their investment, and all the operators in the SES knew this."[320]

312. Thus, in the Respondent's view, no retroactive measures in relation to the framework of the RD 661/2007 have been adopted.[321] Moreover, the Respondent contends that taking into consideration Claimants' investments past cash flows to determine the project's reasonable return does not render the New Regime retroactive. The Respondent explains that to determine a project's total return one must consider all the present and future cash flows throughout the entire regulatory lifespan of the assets. Thus, even if past cash flows must be taken into account, it is "only for the purposes of calculating all the cash flows accrued and, under no circumstances, to require that income earned in the past be returned or to necessarily reduce income for the future."[322]

313. For that reason, the Respondent has not violated the duty of creating stable and predictable conditions.[323]

b. *The Tribunal's Analysis*

i. General considerations on the applicable law

[319] RPHB, para. 99.
[320] RPHB, paras. 101-105 (see Judgement from the Third Chamber of the Supreme Court, EDJ 2006/282164, 25 October 2006 (R-154); Judgement from the Third Chamber of the Supreme Court, EDJ 2009/307357, 9 December 2009 (R-8), Judgement from the Third Chamber of the Supreme Court, EDJ 2009/307349, 3 December 2009 (R-157).
[321] RCM, para. 887.
[322] RPHB, paras. 165-168.
[323] RCM, para. 899.

314. With regard to the autonomous character of the stability principle, once more, the Tribunal considers that the Parties have embarked in a lengthy discussion of an artificial issue (at least in the circumstances of this case): Spain, by virtue of Article 10(1) ECT, is under the obligation to "encourage and create stable […] conditions for Investors of other Contracting Parties to make Investments in its Area", whether this obligation is part of the FET or is autonomous.[324] And such an obligation cannot be read in isolation. In this respect, the present Tribunal fully concurs with the *Eiser* Award:

> "Taking account of the context and of the ECT's object and purpose, the Tribunal concludes that Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments."[325]

315. Stability is not an absolute concept; absent a clear stabilization clause, it does not equate with immutability. In this respect the Tribunal notes that the Claimants do not take such an extreme view.[326] However, the obligation to create a stable environment certainly excludes any unpredictable radical transformation in the conditions of the investments. The question therefore is whether the obligation of stability thus defined has been violated by the Respondent to the detriment of the Claimants.[327]

316. The Arbitral Tribunal accepts the general finding made by the tribunal in the *Eiser* case in this respect:

> "This does not mean that regulatory regimes cannot evolve. Surely they can. '[T]he legitimate expectations of any investor [...] [have] to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred

[324] See supra para. 260.
[325] Eiser (CL-242), para. 382; see also AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary (ICSID Case No. ARB/07/22), Award, 23 September 2010 (CL-93) (RL-66), para. 9.3.29; Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania (ICSID Case No. ARB/11/24), Award, 30 March 2015 ("Mamidoil") (CL-153) (RL-79), paras. 617-618. See also: Novenergia (CL-243), para. 646.
[326] See CM, paras. 439-440, citing ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16, Award, 2 October 2006 ("ADC") (CL-167), paras. 423-424.
[327] See below para. 323.

> on them by the law.' However, the Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value."[328]

317. As the ICSID tribunal in *Blusun* aptly noted:

> "362. A breach of an obligation to 'encourage and create stable, equitable, favourable and transparent conditions for Investors' including 'to accord at all times ... fair and equitable treatment' could be breached by a single transformative act aimed at an investment, or by a program of more minor measures, or by a series of measures taken without plan or coordination but having the prohibited effect.
>
> 363. But the fair and equitable treatment standard which, by virtue of the second sentence [of Article 10(1) ECT], is at the core of the obligation of stability under the first sentence has a relatively high threshold. The *El Paso* tribunal spoke of 'a total alteration of the entire legal setup for foreign investments', and added that 'all the different elements and guarantees just mentioned can be analysed as a special commitment of Argentina that such a total alteration would not take place.'[329] The tribunal in *LG&E* spoke of 'completely dismantling the very legal framework constructed to attract investors.'[330] The emphasis is on the subversion of the legal regime."[331]

318. The crucial regulation in the present case, the legal text essentially invoked by the Claimants, is RD 661/2007. No more than the ECT itself, this document contains a stability clause guaranteeing the immutability of the conditions of the investments. Article 44(3) of RD 661/2007 provides as follows:

> "During the year 2010, on sight of the results of the monitoring reports on the degree of fulfilment of the Renewable Energies Plan (PER) 2005-2010, and of the Energy Efficiency and Savings Strategy in Spain (E4), together with such new targets as may be included in the subsequent Renewable Energies Plan 2011-2020, there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to the costs associated with each of these technologies, the degree of participation of the special regime in covering the demand and its impact upon the technical and economic management of the system, and a

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[328] Eiser (CL-242), para. 382.
[329] Blusun (RL-117), para. 363, citing El Paso (CL-22), para. 517.
[330] Blusun (RL-117), para. 363, citing LG&E (CL-33), para. 139.
[331] Blusun (RL-117), paras. 362-363 (see also para. 369). See also Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7), Award, 8 July 2016, para. 426.

> reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets. Subsequently a further review shall be performed every four years, maintaining the same criteria as previously."

319. These provisions as well as those of Articles 4 and 5 of RD 1614/2010 show that adjustments were to be envisaged. The same holds true regarding the indications given in the name of the Respondent.

320. The Tribunal acknowledges that undertakings or assurances given by the State can be explicit or implicit.[332] However, as noted in *Blusun*, "informal representations can present difficulties, which is why tribunals have increasingly insisted on clarity and the appropriate authority to give undertakings binding on the state."[333]

321. In the present case, the Tribunal is of the view that none of the representations invoked by the Claimants can be considered as firm pledges not to change the conditions of the investments in such a way as to neutralize the clear possibility of modification resulting from Articles 4 and 5 of RD 1614/2010. Therefore, the Arbitral Tribunal agrees with the *Charanne* Award that, "in the absence of a specific commitment an investor cannot have the legitimate expectation that the regulation in place is going to remain unchanged." As a consequence, it is incumbent on this Tribunal to determine whether the changes in the regulations equate to a substantial change to the legal framework applicable to investors.

322. This calls for a general remark: in the view of the Tribunal, in the present case, the Claimants can prevail themselves of an acquired right to a general regime guaranteeing the essential advantages they could reasonably expect when they made their investments. The importance of the extent of the alterations suffered by the Claimants to the conditions of their investments must therefore be assessed taking into account the global balance of costs and benefits which

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[332] Electrabel (CL-24) (RL-10), para. 7.78; Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20), Award, 11 December 2013 (CL-29) (RL-100), para. 669; or Novenergia (CL-243), paras. 650-651.
[333] Blusun (RL-117), para. 371.

they could reasonably expect compared with that which can be expected on the basis of the ulterior modifications.

323. In a case similar to the present, an arbitral tribunal stated:

> "Claimants could not reasonably expect that there would be no change whatsoever in the RD 661/2007 regime over three or four decades. As with any regulated investment, some changes had to be expected over time.[334] However, Article 10(1) of the ECT entitled them to expect that Spain would not drastically and abruptly revise the regime, on which their investment depended, in a way that destroyed its value. But this was the result of RDL 9/2013, Law 24/2013, RD 413/2014 and implementation of the new regime through Ministry implementing Order IET/1045/2014.[335] As it was put in *Parkerings*: 'any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.'[336]."[337]

324. In the opinion of this Tribunal, the question whether or not the Respondent exercised its legislative power unfairly, unreasonably or inequitably in the present case cannot be answered at this stage of the reasoning: the answer depends (i) on the scope and content of the legitimate expectations of the Claimants when they made their investments and (ii) on whether or not the changes can be held as being reasonable and proportionate.

ii. On the retroactivity of the challenged measures

325. There is, however, one aspect of the case, on which the Arbitral Tribunal has no hesitation to find that the Respondent acted in breach of its obligation to respect the principle of stability

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334 Eiser (CL-242), para. 387, citing Tr. Day 3 (Meissner), 13:14-22.
335 Eiser (CL-242), para. 387, referring to Order IET/1045/2014, approving the remuneration parameters of standard installations that apply to specific installations for the production of electricity from renewable energy sources, co-generation, and wastes, 16 June 2014 (C-34) (R-39).
336 Eiser (CL-242), para. 387, citing Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8), Award, 11 September 2007("Parkerings-Compagniet") (RL-97), para. 332.
337 Eiser (CL-242), para. 387.

which, as recalled above,[338] is a required obligation under the ECT, in that the challenged measures are partly retroactive.

326. Although the new rules apply for the future, there is nevertheless an obvious element of retroactivity in the new regime. As recalled in *Mondev v. USA*:

> "The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties[339] and in the ILC's Articles on State Responsibility,[340] and has been repeatedly affirmed by international tribunals."[341]

327. The Respondent relies on *Charanne* and *Nations Energy* to claim that there can be no retroactivity when a norm only applies to the future effects of past events. These awards do not help its case. In *Charanne*, the Tribunal did not specifically address the issue of the claw-back under the New Regime. Considering the 2010 measures, it refused to see any retroactivity since "the 2010 regulations applied immediately, from their entry into force, to the plants already in operation, and that they did not apply retroactively to previous time periods."[342] Even more specifically, the Tribunal in *Nations Energy* explained that:

> "644. Such requirements only apply to the future and cannot have the effect of nullifying or revoking retroactively reduce deductions already made from income tax for previous years.
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> […]
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> 647. Law 6 would have been retroactive, and therefore contrary to the Constitution, *if it had come to reintroduce, into income tax, part of the*

[338] See supra para. 314.
[339] Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002 ("Mondev"), para. 68, citing VCLT Article 28 (CL-90).
[340] Mondev, para. 68, referring to International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, 12 December 2001, Article 13 (CL-86).
[341] Mondev, para. 68, referring to Amco International Finance Corp. v. Islamic Republic of Iran (1987) 15 Iran-US Claims Tribunal Reports 189, p. 215.
[342] Charanne (RL-69), para. 548.

> *deductions previously made*, or if it had cancelled such deductions due to lack of the expected declaration, or if it had deducted existing credits. This is not the case since Law 6 only affects the way in which appropriations are used in the future."[343]

328. The present case is different. Indeed, the Respondent's New Regime applies only for future remuneration, but it subtracts past remuneration (remuneration that was due under the previous regime) from the future remunerations. The Tribunal agrees with the Claimants that this measure has the effect of clawing-back past remuneration that is shareholders' acquired rights when this remuneration was realised.

329. In commercial practice, dividends are distributed periodically to shareholders. Once distributed, they are autonomous income, belonging to each shareholder as a consolidated profit and separate and distinct from the investment that generates them. They are the objects of autonomous rights to property of the shareholders. Shareholders have an acquired right over the dividends paid to them. The same holds true in the present case: the Claimants' profits are reduced by part of the benefits already realised before 14 July 2013 in order to contribute to funding future plants. In effect, the rights of the investors must be preserved not only in the past but also for the future. In the present case, this implicates the questions both of the extent to which the stability principle applies and of the content of the legitimate expectations of the Claimants.

330. However, and in any case, to the full extent that the contested measures have been applied retroactively, such retroactive application, contrary to the Respondent's obligations, must result in an appropriate compensation for the damage that breach caused to the Claimants.

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[343] Tribunal's translation from the Spanish: "644. Dichos requisitos sólo aplican hacia el futuro, y no pueden tener el efecto de anular o disminuir retroactivamente deducciones ya practicadas sobre el impuesto sobre la renta para años anteriores. […] 647. La Ley 6 hubiera sido retroactiva, y por tanto contraria a la Constitución, si hubiese llegado a reincorporar en el impuesto sobre la renta parte de las deducciones anteriormente practicadas, o si hubiese llegado a anular dichas deducciones por falta de la declaración prevista, o si hubiese suprimido créditos existentes. Este no es el caso pues la Ley 6 sólo afecta las modalidades de utilización de los créditos para el futuro." (emphasis added) Nations Energy (RL-82), paras. 644-647.

### 2. *The Claimants' alleged legitimate expectations*

a. *The Parties' Positions*

i. The Claimants' Position

331. Claimants contend that even if the ECT does not contain a stabilization clause, and Spain was permitted to make changes to its regime under the ECT, those changes must have been predictable and in line with investor's expectations.[344]

332. Moreover, the Claimants clarify that they do not consider that the obligation to accord FET means that a host State must completely freeze its regulatory regime. Instead, they consider that, pursuant to its obligation to accord fair and equitable treatment, the State accepts certain limitations on its power to alter the regulatory framework applicable to investments. This includes, *inter alia*, not enacting measures that would be unfair, unreasonable, and inequitable, or that would undermine an investor's legitimate expectations.[345] The Claimants rely on the findings by the tribunals in *CMS v. Argentina*, *Occidental v. Ecuador*, *LG&E v. Argentina and PSEG v. Turkey*, for the proposition that "one particularly important element of legitimate expectations is the protection from State action that threatens the stability of the legal and business framework upon which an investor reasonably relied on making its investment."[346]

333. For the Claimants, that legal framework typically consists of legislation, treaties and assurances contained in decrees or licenses, even if there is no specific undertaking to individual investors.[347] Accordingly, the Claimants submit that legitimate expectations may be based on general rules and host-State's laws can give rise to legitimate expectations, even absent a specific commitment.[348]

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[344] CR, paras. 467-469
[345] CM, paras. 439-440, citing ADC (CL-167), paras. 423-424.
[346] CM, paras. 441-443.
[347] CM, paras. 445-446.
[348] CPHB, para. 47.

334. In the Claimants' view, "Spain's responsibility for its violation of the FET standard arises regardless of its motives, and irrespective of any showing of bad faith" and conversely "a showing of good faith or legitimate cause on Spain's part does not excuse a violation of the FET standard."[349]

335. Moreover, the Claimants submit that:

> "[I]t is not disputed that a State *can* change its laws if it chooses to. The question is whether it was reasonable for RREEF to expect that Spain *would not* make severe and harmful changes to the FIT for existing investments in breach of the clear and repeated promises it made to RREEF. This is the notion of *could* versus *would*, which Spain has failed to address in this arbitration."[350]

336. According to the Claimants, the analysis of legitimate expectations is a "fact specific enquiry," which comports determining the following questions: first, whether the State's conduct and representation gave rise to expectations; second, whether the expectations are legitimate and reasonable; third, the investor must show that it relied on the State's conduct and representations; and, fourth, its expectations were frustrated by the measures in dispute.

337. First, with regard to their expectations, the Claimants allege that they were twofold and relate to: (a) the nature, amount and duration of the FIT offered under RD 661/2007 and RD 1614/2010; and (b) with respect to the stability of the RD 661/2007 economic regime.[351]

338. Regarding the nature, amount and duration of the FIT, the Claimants expected to be subject to the FIT regime at the time they made their investments, since the installations complied with the registration requirements. For Arenales Solar, their expectations that the FIT would apply for the operational lifetime of the installation was even confirmed, so the Claimants

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[349] CM, para. 436.
[350] CR, paras. 79-87; CPHB, para. 48.
[351] CM, para. 447.

contend, by a direct resolution from the Ministry.[352] Accordingly, the Claimants allege to have expected that:[353]

- The Project Companies would have a choice between selling electricity at a Fixed Tariff or at the Premium;
- The FIT would apply to all of the electricity produced, without any limitations on production;
- The FIT would apply for the entire operational life of the Installations;
- The CSP Plants would be able to employ equipment that uses natural gas to produce electricity and the electricity using natural gas would be subject to the FIT, with the threshold limitations set out in RD 661/2007;
- The CSP Plants would have priority of dispatch; and
- The FIT would be subject to inflation adjustments in accordance with the CPI.

339. On the stability of the regime, the Claimants expected that any changes to RD 661/2007 would only apply prospectively, *i.e.*, to the new installations, while existing installations would remain unaffected. They further assert that RD 661/2007 guaranteed that any review of the Fixed Tariff would not apply to existing installations and that in the case of the Premium option, although the amount of the Premium could change, the minimum revenue would not change, as any modification of the cap and floor would not apply to existing installations.[354]

340. Second, the Claimants consider that the legitimacy of their expectations is proved by international practice on FITs,[355] as well as by Spain's own internal documentation,[356] including:

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[352] CM, paras. 448, 453.
[353] CM, para. 448.
[354] CM, para. 451; RD 661/2007 **(**C-24) (R-118); RD 1614/2010, (C-21) (R-122), Arts. 4, 5(3).
[355] CPHB, paras. 79-122.
[356] See CPHB, para. 123, containing a list of selected relevant documentation.

- Documents prepared by the Ministry and the CNE;[357]
- Presentations prepared by InvestInSpain made to third party investors;[358]
- RAIPRE certificates issued to the Installations and the March 2011 Arenales Resolution;[359]
- In-person meetings between senior Spanish government officials and RREEF (and other RE investors) prior to RREEF making its investments. According to Claimants, at the time of the investments Spain's public officials provided specific assurances that the regime would remain unchanged for existing CSP and wind installations. In the course of several meetings, officials also stated that any future changes or adjustments "*would not be to the detriment of current investors*" and that the "*protection given under Article 4 is unique in Spanish regulatory history*" and only the CSP and wind technologies would benefit from this support.[360]

341. Third, the Claimants further assert that without the FIT stability commitments and "express promises and representations" made by Spain's public officials, they would not have invested in the Spanish RE sector.[361]

342. The Claimants reject Spain's argument that in accordance with Article 30.4 of the 1997 Electricity Law, referring to the concept of reasonable profitability, RREEF should have

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[357] CPHB, para. 12 (referring to CNE Report 3/2007 (R-144), p. 16; Ministry of Industry, Energy and Tourism, announcement of RD 661/2007, "The Government prioritises profitability and stability in the new Royal Decree on renewable energy", 25 May 2007 (C-226), pp. 1-2; CNE Report 30/2008, on royal decree for PV installations not subject to the economic regime defined by RD 661/2007, 29 July 2008 (C-235), pp. 4-5); CNE PowerPoint presentation, "Legal and Regulatory Framework for the Renewable Energy Sector", 29 October 2008 (C-236), pp. 2-7; Manuela Garcia Presentation of November 2008") (C-73) p. 21; CNE presentation, "Renewable Energy Regulation", February 2009 (C-241), pp. 19-25; November 2009 MITYC Presentation (C-247), p. 4; CNE presentation, "Renewable Energy Regulation in Spain, February 2010 (C-249), p. 29; State Council Report on draft RD 1614/2010, 26 November 2010 (C-256), p. 18).

[358] CPHB, para. 12 (referring to Manuela García presentation, "Opportunities in Renewable Energy in Spain", 15 November 2007 (C-230), pp. 4, 10 ,16, 30, 32; Manuela García presentation, "Opportunities in Renewable Energy in Spain", 16 November 2007 (C-231), pp. 4, 10, 16, 30, 32.

[359] CPHB, paras. 12, 125-128 (referring to RAIPRE Certificates for the Andasol-1 Plant and the Andasol-2 Plant, 24 April 2009 and 22 December 2009 (C-8); RAIPRE Certificates for the Wind Parks, 28 December 2010 (C-9); RAIPRE Certificate for the Arenales Plant, 25 September 2013 (C-83), March 2011 Resolution (C-107).

[360] CM, paras. 451, 454 (emphasis in original); CPHB, paras. 135-139 (See inter alia Email exchange of 20 May 2011 (C-91); Pan-European Infrastructure Fund, Investment Committee Review – Project Foto, 21 July 2011 (C-106)).

[361] CM, para. 454.

expected potential changes to the RD 661/2007, on the basis of a so-called concept of "dynamic" reasonable return on the investments. This would have required accepting that Spain could make changes if it determined that the installations profits were unreasonable as a result of changes in the cost of money on capital markets.[362] Moreover, the Claimants clarify that they "don't deny that in setting tariffs in a feed-in-tariff regime, a regulator has in mind a standard installation and a reasonable return. What [they] do deny is that if the cost of money in the capital markets goes down, you can change the remuneration for the new projects."[363]

343. The Claimants also submit that even if the concept of "reasonable profitability" is incorporated in the 1997 Electricity Law, this is not a concept directed to the investors but to the regulator when setting the specific tariffs. This stems from the preamble of RD 661/2007, which was the legal instrument setting forth the economic framework that guarantees a reasonable return.[364]

344. To the contrary, the Claimants consider "legitimate" and "reasonable" their expectations on the application of the RD 661/2007 economic regime to the entirety of the production and the lifetime of the CSP plants and wind parks, for various reasons, including that: (a) the FIT regime had been offered under a "royal decree"; (b) the RD 661/2007 economic regime was part of a wider international and domestic policy to develop RE power generation infrastructure; (c) the expectations that such regime would apply for the remaining of the lifetime of the investment was further confirmed with Spain's own conduct in 2008, 2009, 2010 (with the July 2010 Agreement and RD 1614/2010) and 2011 (specific oral and written commitments to RREEF); (d) RREEF conducted a thorough due diligence process confirming the applicability of the economic regime under RD 661/2007, for the operational lifetime of the installations.[365]

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[362] CR, para. 516.
[363] Tr. Day 2 (Stoyanov), 150:11-16.
[364] CPHB, paras. 101-102; Tr. Day 1 (Stoyanov), 152:14-22.
[365] CM, para. 456; CPHB, paras. 128-134.

345. The Claimants contend that not only would the Claimants not invest in such circumstances but also that Spain has failed to prove that (a) Spain's "dynamic" reasonable return theory has evidential basis, (b) that RREEFs earnings were unreasonable, thus justifying a change in remuneration, or (c) that the cost of money on capital markets had changed between 2007 and 2013.[366]

346. Fourth, it is also the Claimants' positions that their expectations were frustrated through a process extending over two years and comprising several measures, including:

- Spain's withdrawal of the FIT for electricity production using natural gas under Law 15/2012 frustrate the expectations that the Project Companies would be entitled to payment under the FIT for all the electricity produced.

- The 7% levy measure constitutes a disguised cut to the FIT and is in contradiction with the level of FIT the Project Companies would be entitled to under RD 661/2007.

- The elimination of the Premium under RDL 2/2013 frustrates the Claimants' expectations to have a choice between selling at Fixed Tariff or at the market prices plus Premium.

- The replacement by the CPI-linked updated mechanism for the FIT by a lower index, via RDL 2/2013 frustrates the expectations that the FIT would be updated during the life of the FIT as to reflect variations of the general CPI.[367]

347. As a result, according to the Claimants, the Respondent has eviscerated the key characteristics of RD 661/2007 and the legal framework it had previously guaranteed, entitling Claimants to reparation for breach of its obligation to respect Claimants legitimate expectations and provide FET.[368]

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[366] CPHB, paras. 15, 16.
[367] CM, para. 458.
[368] CM, para. 460.

348. In opposition to the Respondent's submissions, the Claimants further allege that "exhaustive due diligence" is not necessary to make a claim of legitimate expectations and such a standard is not supported by the *Charanne v. Spain* or *Isolux v. Spain* awards. They further consider that, even if a particular standard of due diligence were part of the analysis, RREEF would satisfy a high standard of due diligence, which included face-to-face meetings with high level officials who confirmed that RREEFs due diligence was correct.[369]

ii. The Respondent's Position

349. The Respondent relies on findings by the tribunals in *Plama v. Bulgaria, AES v. Hungary, Electrabel v. Hungary* and *Charanne v. Spain* to assert that "in the absence of a *specific commitment* to stability, an [i]nvestor cannot have an expectation that a regulatory framework such as the one discussed in this arbitration will not be amended."[370]

350. The Respondent, however, agrees with the Claimants that to establish a FET violation, the investors must demonstrate that the expectations allegedly frustrated are legitimate, by showing that they are reasonable and objective as regards the existing regulatory framework.[371] The Parties also agree that such legitimate expectations must be assessed at the time the investment is made, and thus limited to the period of February to August 2011.[372]

351. According to the Respondent, the Arbitral Tribunal needs to analyse whether the foreign investors had knowledge about the general regulatory framework at the time of the investment, *i.e.*, the regulatory framework *per se*, how it is applied and then how it affects its investment. These expectations are to be reasonable, justified and objective following the appropriate due diligence by the investors. In addition, the investors must be aware of

[369] CR, paras. 491-492, CPHB, para. 49.
[370] RCM, para. 771 (emphasis in original)
[371] RPHB, para. 54; RR, para. 883; CR, para. 485.
[372] RR, para. 883; CR, para. 485. In support of its position, the Respondent further relies on Investmart v. Czech Republic, as an authority determine what circumstances must be considered by a tribunal when analysing the Claimants' legitimate expectations. See RR, para. 895, citing Investmart, B.V. v. Czech Republic, UNCITRAL, Award, 26 June 2009, paras. 250-258 (RL-74). See also Tr. Day 2 (Moraleda), 48:6-12.

potential risks with respect to their investments.[373] The Respondent relies on the award of *Charanne v. Spain* to indicate that an investor's legitimate expectations must be assessed via an objective standard or analysis and that "[a] mere subjective belief that the investor could have had at the time of making the investment does not suffice".[374]

352. Hence, for the Respondent, all investors that invest in Spain have an inexcusable obligation to know about the general regulatory framework which governs investments and includes the standards and case-law applicable to their investments.

353. The Respondent considers that the Claimants' expectations, as expressed during the proceedings, consist of (a) the immutability of the economic rights and the remuneration regime established by RD 661/2007 for existing installations and (b) a right to receive future regulated tariffs over the whole useful life of the Plants.[375]

354. With regard to the CSP sector, the Respondent posits that the expectations are based on the Claimants' incorrect and cursory analysis of the Spanish legal framework and the erroneous interpretation of the disputed measures. In support of this position, it relies on several reports issued by legal and financial advisors to the Claimants during the pre-investment phase, including the Pöyry and SJB reports and the Herbert Smith Memorandum.[376]

355. With regard to the Claimants' investment in the wind farm, the Respondent asserts that the Claimants failed to perform the necessary due diligence after significant changes to the regulatory framework took place in 2009 and 2010. The lack of due diligence means that the expectation alleged by the Claimants cannot be deemed real and objective or legitimate.[377]

356. Accordingly, in the Respondent's view, the Claimants' lack of understanding of the legal framework setting forth the remuneration regime and the regulated tariffs, or the absence of

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[373] RCM, paras. 796-797.
[374] RCM, para. 799.
[375] RCM, para. 795.
[376] RCM, paras. 800-812 (See First SJB Report (C-80), Herbert Smith Memorandum (C-86).
[377] RCM, paras. 813-815.

a comprehensive analysis thereof, justify characterizing the Claimants' expectations as "unreasonable" and thus the Claimants' claim must be dismissed. The Respondent further clarifies that investors in a highly-regulated sector, such as the energy one, are expected to perform a "high level" of due diligence, including a diligent analysis of the applicable legal framework.[378]

357. Even if, *arguendo*, the Claimants performed a proper due diligence, the Respondent insists that the disputed measures do not violate the objective legitimate expectations of the Claimants. Relying on prior cases, including *Plama v. Bulgaria* and *Charanne v. Spain*, the Respondent states that to have valid legitimate expectations, it would be necessary for it to have made specific commitments to the investors, guaranteeing an immutable regulation. Only such commitments could give rise to reasonable and justified expectations.[379]

358. The Respondent insists that RD 661/2007 did not contain any promise or specific commitment to the Claimants and their investments, regarding the future immutability of the framework. The Respondent further asserts that neither RD 436/2004, RD Law 6/2009 nor RD 1614/2010 contain any guarantee or promise to "petrify" the remuneration conditions contained in RD 611/2007, or in the aforementioned regulations.[380] According to the Respondent, no diligently informed investor could expect these regimes to be the petrified in their favour only because they fulfilled the regulatory requirements to obtain subsidies.[381] Nor could they expect that these conditions would be maintained indefinitely or improved at any rate.[382]

359. Further developing this statement, the Respondent considers that "it is impossible that any investor could see in article 44.3 of RD 661/2007 or in articles 4 and 5.3 of RD 1614/2010 a

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378 RR, paras. 883, 890, 915.
379 RCM, paras. 816-817; RR, paras. 853-855, 890.
380 RCM, para. 819 citing Charanne (RL-69), para. 511: "Therefore, the Tribunal concludes that the Claimants could not have the reasonable expectation that RD 661/2007 and RD 1578/2008 were not going to be modified during the lifespan of their facilities". See also RR, paras. 900-904, relying on Isolux (RL-95), and Charanne (RL-69).
381 RCM, para. 821.
382 Ibid.

stabilising clause, when all of them were mere copies of article 40.3 of RD 436/2004, derogated years earlier by the same RD 661/2007." The Respondent further provides a chart comparing the provisions to prove its point.[383]

360. In addition, the Respondent argues that in the absence of specific petrification commitments, the Claimants' alleged expectations must be considered unreasonable and unjustified. The Tribunal should further consider the regulatory framework that was actually in place, including the Supreme Court case-law, which further asserts that no investor could have had a legitimate expectation of freezing the regulatory framework.[384] The Respondent also points to myriad statements by the relevant business associations, including APPA and AAE, for CSP and wind, indicating their understanding that the economic regime of the installations operating under the Special Regime, including the premiums, could be modified, and had actually suffered detrimental modifications for existing installations when RD 436/2004 was derogated by RD 661/2007.[385] The Respondent further underlines that during the transitional period offered by RD 661/2007, where they could pick between the 436 and 661 regimes, none of the wind farms switched, demonstrating thereby that the economic regime of RD 436/2004 was more beneficial and profitable.

361. The Respondent then asserts that there are eight essential principles governing the Spanish regulatory framework:[386]

1. The regulatory system is governed by the principle of regulatory hierarchy and this results in specific procedures, legally stipulated, to draft and implement regulations.
2. The regulatory framework is not limited to RD 661/2007 and RD 1614/2010 as claimed by the Claimants. It is configured on the basis of Law 54/1997 and any regulatory standards that have implemented it, including RD 2818/1998, RD 436/2004, RD 1578/2008, RD 1565/2010, RD 1614/2010 as interpreted by Case-law.
3. The fundamental principle that RE subsidies are a cost of the SES, subject to the principle of economic sustainability of the same.

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[383] RR, para. 913.
[384] RCM, para. 828.
[385] Tr. Day 2 (Moraleda), 53:6-60:24.
[386] RCM, para. 829; see also, RR, para. 899.

4. Right to priority of access and dispatch of electricity production.
5. The remuneration of the RE consists of a subsidy which, once added to the market price, provides RE Plants with reasonable rate of return, in the context of its useful life, according to capital markets, which has a dynamic and balanced nature within the SES. This profitability was linked exclusively to the cost made in the construction and operation of the plants.
6. The subsidies were determined according to developments in demand and other basic economic data, expressed in the Renewable Energy Plans (including to investment and operational costs of standard installations), to ensure that these installations are able to reach a reasonable rate of return during their useful lives.
7. The regulatory changes to the remuneration regime of the RE have been motivated since 2004 (i) to correct situations of over-remuneration, or (ii) by the strong variation in the economic data that served as the basis for the estimation of subsidies.
8. Neither RD 661/2007, nor RD 1614/2010, which apparently created the expectations of the Claimants, contain any guarantee or promise to petrify their regime in favour of the Claimants.

362. It is the Respondent's position that the above principles constitute objective legitimate expectations of a diligent investor. On the contrary, expectations that the Respondent would not adopt measures to resolve any deficit or economic imbalance that affected the sustainability of the SES, and rectify a situation of over-remuneration, are unreasonable.[387] In addition, expectations that go against the understanding of renewable energy producers' associations in Spain, [388] or contrary to consolidated interpretations of the law by the Spanish courts, cannot be considered reasonable either.[389]

363. Additionally, the Respondent affirms that the expectations that the Claimants alleged to have had, based on purported statements of the Respondent's authorities are unreasonable. The

[387] RCM, para. 830.
[388] RR, paras. 892-893.
[389] RR, paras. 894, 905.

disputed statements are (i) a presentation created by InvestInspain in November 2008; (ii) the alleged agreement of July 2010 and a related press release; (iii) various verbal and written statement of the Respondent; and (iv) the RAIPRE registrations.[390]

364. First, it is the Respondent's position that the InvestInspain presentation is not relevant since the Claimants did not see it before their investment – as they recognized.[391]

365. Second, the press release is said by the Respondent to merely report the consultation procedure prior to RD 1614/2010 which does not contain petrification commitment of RD 661/2007. It only demonstrated that the situation required changes to the economic regime established by RD 661/2007, that both the Government and system operators were aware of that requirement and that nothing could have prevented the adoption of new adjustment measures in 2013.[392] Moreover, neither the Claimants' advisors, nor the RE sector associations, granted the alleged agreement a binding character.[393]

366. Third, regarding a series of verbal and written statements which supposedly led to legitimate expectations, the Respondent states: (a) as to the emails with several investors summarizing meetings held at the Ministry of Industry, they expressly stated that "nothing is written in marble" in relation to the possibility of making regulatory changes, and constitute accounts of a meeting by a third party and not statements attributable to the Kingdom of Spain[394]; (b) regarding the alleged statements by the National Energy Commission (CNE), these are reflected in a power point presentation which can hardly be attributed to the CNE and cannot be said to have been reviewed by the Claimants;[395] (c) as to the Andasol Plant Assessment Memorandum, it summarizes contacts between the Claimants and officials of the Spanish

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[390] RCM, para. 837; RR, paras. 898, 926.
[391] RCM, paras. 839-841.
[392] RCM, paras. 842-847.
[393] RR, paras. 918-925; Tr. Day 2 (Moraleda), 76:19-24.
[394] RCM, para. 849; RR, paras. 936-942, (referring to Email exchange of 20 May 2011 (C-91)).
[395] RCM, para. 850 (referring to RREEF Pan-European Infrastructure Fund, L.P., Presentation on "Project Guadisol (Greco I & Greco II) – CSP Investment Opportunity", 23 February 2012 ("PEIF Presentation on Project Guadisol") (C-147).

Government, at a time where the investment was already made and thus could hardly constitute the basis of expectations leading to invest, [396] and (d) the March 2011 Resolution 2011, cannot be considered a commitment or even an administrative act, but instead a mere act informing Arenales Solar of the remunerations conditions "currently" in force.[397]

367. In this respect, the Respondent also contends that "neither CNE, nor State lawyers in the Ministry of Industry, nor the IDAE nor InvestSpain have authority to commit the regulatory framework of the Kingdom of Spain. This authority exclusively corresponds to Parliament (that legislates) and to the Spanish Government (that approves regulations)."[398]

368. Thus, the Claimants could not have based their legitimate expectations on the statements from any of the aforementioned authorities, since (a) none of them constituted binding commitments *vis-à-vis* the Claimants, and (b) none of them had the authority to bind the Respondent.[399]

369. Fourth, as it pertains to the RAIPRE registrations, the Respondent denies that this may constitute a commitment guaranteeing the immovability of the RD 661/2007 economic regime.[400] In this sense, the Respondent asserts that the Supreme Court and the CNE, as well as the associations of producers, have maintained that the registration in the RAIPRE is a mere administrative requirement.[401] The Respondent also explains:

> "The registration in a special registry is imposed on all producers of electricity, both renewable and conventional. The RAIPRE is the sub-section of this registry in which the more than 60,000 owners of renewable installations are registered."[402]

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[396] RCM, para. 851 (referring to RREEF Infrastructure (London), "Valuation Memorandum – Q4 2012 Valuation of the 45% Stakes in Andasol 1 and 2" (C-148)).
[397] RCM, para. 852; RR, paras. 932-935 (referring to March 2011 Resolution (C-107)).
[398] RR, para. 866; Tr. Day 2 (Moraleda), 77:3-13.
[399] RR, paras. 865-871.
[400] RR, paras. 926-931, citing Charanne (RL-69), paras. 509-510.
[401] RR, para. 929.
[402] RR, para. 927.

370. The Respondent further explains that:

> "The Claimant has seen how the installations registered in the registry created by RD 2818/1998 were affected by all the reforms of the retribution regime operated since RD 436/2006, without the inclusion in the registry being an obstacle to the application of the successive revisions to the registered installations. Likewise, it has seen how the preregistered photovoltaic installations under coverage of RD 1578/2008 have been affected by RD 1565/2010 and RD-Act 14/2010."[403]

371. Last, the Respondent asserts that even documentation prepared for the Claimants in view of their impending investment, do not support the legitimate expectations presented to the Arbitral Tribunal.[404] These include legal reports prepared by SJB and Herbert Smith or the report of the consultant firm Pöyry.[405]

372. With regard to the latter, the Respondent highlights that the Claimants' consultants even warned them that "future changes might be implemented" and that "in response to certain economic circumstances such as a failure to eliminate the tariff deficit in 2012, the regulator would exercise its discretional power to attempt to rebalance the Spanish electricity system."[406] Similarly, the other reports do not confirm the immutability of the remuneration conditions established in the regulatory framework. The legal reports drafted for the Claimants address that point, and even one of them informed the Claimants that the Government had the possibility of approving a regulation of equal or superior rank in the future to modify RD 1614/2010.[407]

373. The Respondent contends that, before making their investments, the Claimants knew that the Government would continue to adopt measures to guarantee the sustainability of the SEE or to bring an end to any detected situations of over remuneration.[408] The Respondent alleges

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[403] RR, para. 928.
[404] RCM, para. 856.
[405] RCM, paras. 856-861.
[406] RR, paras. 933-937; RPHB, para. 37 (referring to Pöyry Energy Consulting Report 2 (C-87)).
[407] RCM, paras. 857-861.
[408] RCM, para. 862.

that the best evidence of this statement are clauses contained in financing contracts for the plants in which the Claimants invested. Those clauses expressly addressed the potential risk of regulatory change.[409]

374. The Parties are, in particular, in dispute as to the depth of the Claimants' due diligence on the Dédalo Project, and in particular, of SJB's second report mentioned above. The Claimants allege that before making its investment in 2011, RREEF conducted due diligence on the Dédalo Project covering a variety of areas, including technical, financial, tax, insurance and legal.[410] The Respondent alleges that it was a limited "confirmatory due diligence", which only sought to confirm certain information provided to RREEF's Investment Committee already in 2008, when RREEF had first thought of investing in the project. In particular, it alleges that even though it failed to include a thorough study of the changes undergone by the applicable legal framework, it had warned the Claimants that further amendments could be foreseen.[411]

375. The Respondent contends that "Claimant cannot have the legitimate expectation that if the Arenales solar thermal plant has an installed capacity higher than 50 MW, it can receive for forty years the subsidies established by article 36 of RD 661/2007."[412]

376. Furthermore, the Respondent relies on the State Aid Decision[413] according to which "a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission."[414]

377. To conclude, the Respondent states that the legal, regulatory and market frameworks available at the time the Claimants made their investments prove that they could not have legitimate expectations of immutability of the remuneration regime and that, even if they had such expectations, those expectations were unfounded and unreasonable.[415]

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[409] RCM, para. 863; RPHB, para. 38; RR, para. 944(b), 945; Tr. Day 2 (Moraleda), 85:12-91:1.
[410] CM, para. 239.
[411] Second SJB Report (C-81), p. 61.
[412] RR, para. 1074.
[413] Respondent's Observations on Additional Documents, para. 29.
[414] State Aid Decision (RL-115), para. 158.
[415] RCM, paras. 866-867.

b. *The Tribunal's Analysis*

378. The Arbitral Tribunal takes note of the Parties' agreement that it is for the investors to demonstrate that their expectations allegedly frustrated are legitimate, by showing that they are reasonable and objective in the circumstances.

> "Finally, legitimate expectations are more than the investor's subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State."[416]

379. The Tribunal has already ruled that the Claimants had no legitimate expectation that the regime provided for in RD 661/2007 would remain unchanged throughout the term of the investment.[417] The only – but crucial – question is therefore whether the challenged modifications introduced after 2012 constitute "a drastic and radical change" – as the Claimants put it – affecting unexpectedly the conditions of the investments.

380. This Tribunal shares the view expressed in the *Charanne* Award according to which

> "The determination of whether the investor's legitimate expectations have been defeated must be based on an objective standard or analysis. The mere subjective belief that the investor could have had at the time of making the investment does not suffice. Similarly, the application of this principle depends on whether the expectation has been reasonable or not in the specific case. In this regard, the representations that may have been presented by the host State to encourage the investment are relevant."[418]

381. One of the core issues dividing the Parties in respect to the content of the legitimate expectations of the Claimants when they made their investments concerns the question of "reasonable return". The Respondent seems to make this question the exclusive criterion for assessing the respect for the stability and predictability requirements. According to this

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[416] Toto Costruzioni Generali S.p.A. v. Republic of Lebanon (ICSID Case No. ARB/07/12), Award, 7 June 2012, para. 165.
[417] See supra para. 315.
[418] Charanne (RL-69), para. 495. See also Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case No. ARB/08/6), Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, para. 560; cited with approval in Isolux (RL-95), para. 777.

Tribunal, a reasonable return or profitability was, no doubt, part of the guarantees given to the Claimants – and, more generally, to all investors in the Spain's RE.

382. Thus, Article 30(4) of Law 54/1997 provided:

> "4. The remuneration arrangements for electric power generation installations operating under the special regime shall be supplemented by the payment of a premium under statutory terms set out in regulations […]
>
>> 'To work out the premiums, the voltage level on delivery of the power to the network, the effective contribution to environmental improvement, to primary energy saving and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred shall all be taken into account *so as to achieve reasonable profitability rates with reference to the cost of money on capital markets'*." (emphasis added).

383. And the preamble of RD 661/2007 itself guaranteed to "the owners of facilities under the special regime a reasonable return on their investments" while the Renewable Energy Plan 2011-2020, adopted some months before the date when the Claimants made their investments, recalls that "premiums corresponding to special regime installations, provide for electricity generation remuneration levels that afford a reasonable return on investment."[419] More precisely this document indicates:

> "Review of remuneration: […] [The] remuneration amounts […] may be modified on the basis of technological developments within the sectors, market behaviour, [...], while always guaranteeing reasonable rates of return."[420]

384. Thus, the Tribunal concludes that the guarantee of "reasonable return" or "reasonable profitability" was the main specific commitment of Spain *vis-à-vis* the investors in the Special Regime.

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[419] PANER 2011-2020 (R-136), p. 112.
[420] Ibid., p. 115 (emphasis added).

385. It must, however, be noted that, in all the relevant texts, this assurance of a reasonable return or profitability is systematically intertwined with other considerations. Thus RD 661/2007 also enunciates the complementary principle according to which electricity consumers are ensured "an equally fair allocation […] of the costs that can be attributed to the electricity system."[421] For its part, the Renewable Energy Plan 2011-2020 provides that "these reviews take account of cost trends associated with each technology with three objectives in mind: to see that renewable technologies become as competitive as possible with Ordinary Regime generation, to foster a technological development balance and to see that the remunerative scheme moves in the direction of minimising socio-economic and environmental costs".[422] In other words, the reasonable return ensured to the investors – which guarantees them at a minimum against any financial loss – must be assessed keeping in mind the Respondent's concern about the cost of electricity and the competitiveness with other means of production of energy.

386. On the applicable legal standard, the Tribunal concludes that the only legitimate expectation of the Claimants was to receive a reasonable return for its investment.[423] However, this aim was achieved through particular means designed at attracting investments in a sector which was unattractive at market prices; hence the various advantages granted to the producers under the special regime (including the Claimants), notably the FIT that generated important revenue streams and other advantages like the unconditional right of priority of grid access and priority of dispatch.

387. The Claimants cannot prevail themselves of a fixed rate of return for their investment. However, the Arbitral Tribunal is of the view that, whatever the means chosen by the Respondent, the Claimants could legitimately expect a return for their investment at a reasonable rate which implies significantly above a mere absence of financial loss, the precise

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[421] See also RD 436/2004 (C-64) (R-116), Preamble: "the Royal Decree guarantees operators of special regime installations fair remuneration for their investments and an equally fair allocation to electricity consumers of the costs that can be attributed to the electricity system" (emphasis added).
[422] PANER 2011-2020 (R-136), p. 115.
[423] For a similar finding, see Isolux (RL-95), para. 787.

average rate taking into account the actual cost of money on capital markets for such investments as well as other objectives.[424]

388. With regard to the method for assessing the existence and extent of the potential violation of the legitimate expectation of the Claimants, the Arbitral Tribunal agrees with the Claimants' position according to which the analysis of legitimate expectations is a "fact specific enquiry" which requires determining the following questions: first, whether the State's "conduct and representations gave rise to expectations"; second, whether the expectations are legitimate and reasonable; third, the investor must show that it relied on the State's conduct or representations; and, fourth, its "expectations were frustrated by the Disputed Measures".[425] The Tribunal also accepts the compatible and complementary remark by the Respondent according to which these expectations "must be assessed objectively and reasonably"[426].

389. Although these questions are crucial, the Tribunal can deal with them rather briefly since parts of the answers directly or indirectly result from previous rulings already made by the Tribunal in previous paragraphs of this Decision.

390. It can certainly be said in the present case that the State's conduct and representation gave rise to legitimate expectations,[427] regardless of the "umbrella clause" in the last sentence of Article 10(1) ECT,[428] insofar as the Claimants were entitled to expect that the Respondent would not significantly modify the legal framework applicable to the investors as provided for in its domestic law at the time when the investments were made.[429]

391. In this respect, the Tribunal agrees with the *Novenergia* tribunal when it stated that:

> "The legitimate expectations of an investor has generally been considered to be grounded in the legal order of the host State as it stands at the time the

[424] See supra para. 385.
[425] CPHB, para. 44.
[426] RPHB, para. 66.
[427] See e.g. paras. 381-384 supra.
[428] See supra paras. 264-287.
[429] See supra paras. 379-380.

> investor acquires or makes the investment. Arbitral tribunals seized with the task of determining the relevant timing of the legitimate expectations of an investor have stressed that the legal framework of the host State as it existed at the time of making the investment is decisive for any legitimate expectations."[430]

392. The *Novenergia* tribunal made a careful comparison of the *Charanne*, *Isolux* and *Eiser* cases and highlighted the differences between the three cases (all opposing investors in the energy sector to Spain) according to the date on which the investment was made.[431] After distinguishing *Charanne* in which "the arbitral tribunal was only confronted with the legislation enacted by the Kingdom of Spain until 2010 (namely RD 1565/2010 and RDL 14/2010)"[432], that tribunal concluded that it was in order to make a distinction between investments made in 2007 (which was the case in *Eiser* and *Novenergia*) on the one hand and those of 2012 (*Isolux*) on the other hand. In the latter case, the tribunal noted that the investment had been made:

> "at a stage when it must have been clear to the investor that changes were being made to the Special Regime. Even if such changes may not have reached the level of a breach of the FET standard, they certainly must have been an indication to the investor in *Isolux* that significant changes were being made to the Special Regime as set out in RD 661/2007."[433]

This holds true as well in the present case where the Claimants' investments were made between February and August 2011.[434]

393. The Claimants insist on the importance of RD 1614/2010 in their decision to invest in Spain without distinguishing clearly their case from *Isolux* and without explaining which new elements would have changed the legitimate expectations of investors between July 2011 and October 2012.[435]

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[430] Novenergia (CL-243), para. 632.
[431] Ibid., paras. 684-687.
[432] Ibid. para. 685.
[433] Ibid., para. 686.
[434] February 2011: Dédalo Project. July 2011: Arenales Project. August 2011: Andasol Project (See CM, paras. 12-14).
[435] Claimants' Observations on Additional Documents, para. 29.

394. At that time, the Respondent cannot be held as having given an assurance that the Claimants' "[i]nstallations, once qualified in the RAIPRE, would receive the RD661/2007 FIT regime for their operational lifetimes, with future changes to apply only to new installations."[436] Indeed, the Tribunal notes that RD 661/2007 only anticipated changes in the RE with the limitation provided for in Article 44(3) according to which:

> "The revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed."

395. However, as with all other advantages recognized in the Royal Decree, this did not imply an everlasting exemption of any revision of the regulated tariff. Simply (but importantly) the changes to be adopted in the future could not significantly modify the legal framework applicable to investors[437] – including the pledge not to put into question the commitment concerning the reasonable return, a criterion which must be assessed globally, taking into account the object and purpose of RD 661/2007 as expressed in its Preamble.[438] The same reasoning applies with regard to RD 436/2004 (Article 40) and RD 1614/2010 (Articles 4 and 5). Moreover, as recalled above,[439] there is no international obligation on a State to waive or to decline to exercise its regulatory power.

396. Besides the general policy exposed in RD 661/2007 and RD 1614/2010, the Tribunal is not convinced that any other document could have generated stronger or different expectations to the benefit of the Claimants:

- The "international practice for FITs"[440] are merely a contextual element that cannot generate legitimate expectations that the Respondent will not change its regulatory framework;

[436] CPHB, para. 78.
[437] See supra para.315.
[438] See supra paras. 383, 343.
[439] See supra paras. 244-246.
[440] CPHB, para. 79.

- The preparatory documents of RD 661/2007 invoked by the Claimants only confirm the content of RD 661/2007 but do not contain any specific commitment. Furthermore, it is revealing that the Claimants mainly rely on documents issued in 2007, four years before their investment in 2011,[441] when the Spanish economic context was quite different.

- Indeed InvestInSpain, a publicly-owned company, conducted a campaign to support investment in RE in Spain and the documents from this organization praised the stability of the premium system[442] but these were very informal documents which can hardly be considered as commitments of the State, especially *vis-à-vis* the Claimants which appear not to have known them before their investments;

- The Press Release of the Spanish Government issued on 2 July 2010 does no more than reiterating the content of RD 1614/2010;[443]

- The documents concerning the Claimants' meetings with representatives of the Ministry are mainly internal Claimants' documents: the emails exchanged between RREEF, Antin, Lazard and Deutsche Bank Madrid bear upon a meeting with the Ministry of Industry, Tourism and Commerce, established by the Claimants;[444] the PowerPoint presentation on Project Guadisol is made by RREEF itself[445] all these documents have a limited probative value and do not go beyond confirming the general pledge for stability contained in RD 661/2007 (see, *e.g.*, the warning in the email dated 20 May 2011: "this has to be taken with some caution ('nothing is written in marble')";

- The Claimants rely heavily on the Resolution of the Directorate-General for Energy and Mining Policy.[446] The Tribunal agrees with the Respondent that it is merely an informative

[441] See supra para. 392.
**[442]** Manuela García Presentation of November 2008 (C-73), p. 21.
[443] July 2010 Agreement (C-23).
[444] Email exchange of 20 May 2011 (C-91).
[445] PEIF Presentation on Project Guadisol (C-147), p. 25.
[446] March 2011 Resolution (C-107).

document which lists the various texts in force but does not provide that the regime would be maintained.

- The same can be said of the RAIPRE certificates issued for the Claimants' installations[447].

397. As the tribunal in *Electrabel v. Hungary* stated:

> "Fairness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State."[448]

398. In this respect, the Parties have had lengthy discussions on the "due diligence" performed (or not) by the Claimants.[449] In the Tribunal's view, this is not relevant, when characterised as a discussion of diligence. The Claimants' diligence might have been due. However, due or not, the Claimants were made aware that the Respondent's legal regime was subject to possible changes in the future.[450] This is evidence of the fact that any expectation of the Claimants that the applicable legal regime was never subject to any change whatsoever was not legitimate.

399. To summarize: the Claimants had, when they made their investments, a legitimate expectation to get a reasonable return on their investments. Such expectation did not include a guarantee to have the legal regime in place unchanged until the end of the operation of the plants, but it did include to have any modifications reasonable and equitable. Whether such a legitimate expectation was violated can only be assessed by way of a global view of the situation that resulted from the modifications introduced by the Respondent after the date of the investment. It is only in case the answer to this question is in the affirmative that compensation is due to the Claimants under this head of claim.

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[447] See supra para. 340.
[448] Electrabel (CL-24) (RL-10), para. 7.78 – also cited in Isolux (RL-95), para. 778.
[449] See supra paras. 348, 355-357 and 374.
[450] See e.g. Herbert Smith Memorandum (C-86), p. 12; Pöyry Energy Consulting Report 2 (C-87), p. 135.

### ***3. Transparency***

a. *The Parties' Positions*

i. The Claimants' Position

400. Relying on the *Tecmed v. Mexico*, *Electrabel v. Hungary* and *Plama v. Bulgaria* cases, the Claimants allege that the State's conduct toward investors and the legal environment must be free from ambiguity and uncertainty, for it not to be in breach of the FET standard.[451] Moreover, "when changes in policy are being contemplated that may '*significantly affect investments*', a State should be forthcoming with information about those changes to enable an investor to plan."[452] This, however, was not the case here, as RD 661/2007 economic regime was dismantled in a non-transparent manner for the reasons explained below.

401. Concerning the facts of the case, first, according to the Claimants, RDL 9/2013 wiped out the investment regime for the Claimants' investments and was followed by an 11-month Transitory Regime where plants were unable to forecast future cash flows and calculate the precise remunerations that the plant would be entitled to.[453]

402. Second, neither the June 2014 Order nor RD 413/2014 provided the underlying criteria or any transparent analysis explaining the calculations behind the Special Payment and did not offer guidelines on the various aspects of the New Regime set forth 11 months before, when RDL 9/2013 was introduced.[454]

403. Third, the fact that the Special Payment is calculated by reference to a Standard Installation (*i.e.*, not an actual plant but what the Respondent considers to be standard), creates further uncertainties since the Respondent may alter part of the parameters of the Standard

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[451] CM, para. 468-470, referring to Técnicas Medioambientales Tecmed S. A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003 ("Tecmed") (CL-55); Electrabel (CL-24) (RL-10); Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24), Award, 27 August 2008 ("Plama") (CL-44**)** (RL-29).
[452] CPHB, para. 51 (emphasis in original).
[453] CM, para. 471(a).
[454] Ibid., para. 471(b).

Installation every three or six years. And as a result, there is no clear visibility of the regime that will apply later on.[455]

404. Fourth, the lack of visibility and predictability is further aggravated by the fact that under the New Regime, the Respondent retains the right to review the Special Payment in order to make sure that a "reasonable return" continues to apply to the investments. The Claimants affirm that the Respondent has not established a methodology for adjusting the Special Payment over the following Regulatory Periods.[456]

405. Finally, the Respondent's conduct was not transparent because the timeframe during which the remuneration per MW of installed capacity will continue to apply under the Special Payment is unclear (*i.e.*, whether it will continue even if the Respondent considers that the Standard Installation would have already earned a "reasonable return"). In addition, the Respondent has failed to provide a transparent methodology for determining whether a plant has earned reasonable profit.[457]

406. The Claimants also oppose the Respondent's claims that the State Aid Decision would welcome the transparency of the regime:

> "The Decision merely recalls that Spain has agreed to publish '*certain information on a comprehensive State aid website*'.[458] There is no finding with respect to the transparency of the Disputed Measures, let alone with that of the process that led to their adoption."[459]

[455] Ibid., para. 471(c); Regulatory Report, paras. 147-150.
[456] Ibid., para. 471(d).
[457] Ibid., para. 471(e)
[458] Claimants' Response to Spain's Comments on State Aid Decision, para. 35, citing State Aid Decision, paras. 136-137.
[459] Claimants' Response to Spain's Comments on State Aid Decision, para. 35 (emphasis in original).

### ii. The Respondent's Position

407. The Respondent rejects the Claimants' allegation that it failed to encourage and create transparent conditions in violation of Article 10 of the ECT, for the reasons set forth below.[460]

408. The Respondent considers that the Claimants "once again makes the mistake of considering that the ECT guarantees complete *predictability* of the regulatory framework of a State during the time the entire investment remains valid, even if there is no commitment to maintain it"[461]. The Respondent underlines that the Annulment Committee of the *MTD v. Chile* case[462] questioned the interpretation of the foreign investor's expectations by the *Tecmed v. Mexico* tribunal. It further relies on the decision of the *AES Summit* tribunal to conclude that a State doesn't violate transparent conditions if it acts "within the acceptable range of legislative and regulatory conduct."[463]

409. Concerning the facts of the case, the Respondent's arguments are threefold.

410. First, the Respondent followed all procedures established by law, without undue delays and involving the legitimate stakeholders in the process. Statements by actors in the RE sector on the drafts of RD 413/2014 and Ministry Order 1045/2014, contradict the Claimants' statements that investors had been left in the "dark" for 11 months.[464]

411. Second, the Respondent announced the need to introduce reforms since 2009 following the international economic crisis and the necessity to make the system sustainable. According to the Respondent, the need for reform had been alluded to in the Preambles of RDL 6/2009, the Report on RD 1614/2010 and RDL 14/2010, which referred to the decline in electricity demand and the urgent rebalancing required for the SEE.[465] The Respondent further points

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[460] See also RPHB, paras. 124-135.
[461] RCM, para. 901 (emphasis in original).
[462] MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007 (RL-83), paras. 66-67.
[463] RCM, para. 903.
[464] RCM, para. 904(3).
[465] Ibid., para. 904(2).

to a declaration before Congress made by the Minister of Industry in January 2011, before the Claimants' investments, and then to Law 2/2011 of March 2011, as well as statements from the newly elected President in late 2011, all announcing the need to reform the SES.[466]

412. Third, prior to adopting the measures under dispute, in February 2012, and then in 2014, and in accordance with Spanish law procedures, interested parties and stakeholders of the SEE were invited to participate in the process. In particular, they were invited to present observations on the potential modifications through a number of hearing procedures, open consultations processes, as well as invitations to comment on the drafts, which commenced four months after the publication of RDL 9/2013. Neither the Claimants nor the installations in which they invested presented claims. Industry associations such as the APPA and AEE submitted numerous comments and claims on drafts of RD 413/2014 and the June 2014 Order, before it was enacted and comments were addressed and considered by the regulator.[467]

413. The Respondent submits that the aforementioned arguments show that Spain "fulfilled its obligation to warn the foreign investor about the reasons that would justify regulatory changes. It also fulfilled its obligation to announce the limits of these regulatory changes."[468] The Respondent further contends that "[t]he possibility that the Respondent could modify the regulatory framework to adapt it to the changing circumstances in Spain was also known by all the operators in the system."[469] Moreover, the measures were foreseeable by any diligent investor, as recognized by the Spanish Supreme Court.[470]

414. Thus, according to the Respondent, it has adopted a predictable and dynamic regulatory system. In particular, the Respondent explains that Law 24/2013 and RD 413/2014 contain rules that ensure that investors, at all times, receive a reasonable return on their facilities and that the economic equilibrium of the RE projects is respected over time. Contrary to what is

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[466] RR, para. 775; RPHB, paras. 127-132.
[467] RPHB, para. 132; RR, paras. 778-786, 792-795; 969-973.
[468] RPHB, para. 131; Tr. Day 2 (Moraleda), 102:11-103:12.
[469] RPHB, paras. 28-34.
[470] RPHB, para. 72.

stated by the Claimants, the Respondent highlights that the regulatory periods in the New Regime are not discretionary. Instead, they are predictable periods regulated by Law, instead of by decree. Consequently, the establishment of regulatory periods offers security to investors and guarantees that a reasonable return would be maintained along with recovery of the investment value. Thus, this constitutes an added element of security for investors that confirms the Respondent's respect of its obligation to promote transparent conditions.[471] The Respondent also relies on the State Aid Decision which welcomes the transparency of the regime[472].

b. *The Tribunal's Analysis*

415. As explained above, the Arbitral Tribunal does not consider that lack of transparency would constitute an autonomous breach of the FET standard embodied in Article 10(1) ECT.[473] However, even if it were the case, the practical consequence in law would be the same, in that a lack of transparency would constitute a breach of Article 10(1). And, in any case, as the *Novenergia* tribunal, this Tribunal considers that;

> "With respect to the element of transparency, and in line with the tribunal in *Plama*[474], the Tribunal considers this condition to be a significant element for '*the protection of both the legitimate expectations of the Investor and the stability of the legal framework.*'"[475]

416. Having made these points, the Tribunal has not been persuaded by the Claimants' argument that there has been a breach of the principle of transparency: the possibility of an adjustment of the applicable conditions is present in the relevant instruments and the changes have been publicized and explained by the Respondent with sufficient care.

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[471] RCM, paras. 904-905.
[472] Respondent's Comments on the State Aid Decision, para. 31.
[473] See supra para. 260.
[474] Plama (CL-44) (RL-29), para. 178.
[475] Novenergia (CL-243), para. 659 (emphasis in original).

### *4. The Alleged Discriminatory Character of the Disputed Measures*

a. *The Parties' Positions*

i. The Claimants' Position

417. According to the Claimants, Article 10(1) prohibits impairment measures that are either unreasonable or discriminatory and it would suffice to show that Spain's adverse measures are either unreasonable or discriminatory to establish a breach of Article 10(1) of the ECT.[476]

418. Relying on the *Saluka* case, the Claimants further contend that to comply with the standard of reasonableness the Respondent must show that its measures were (1) taken in pursuance of a rational policy goal; and (2) they were carefully tailored to achieve that goal.[477]

419. The Claimants posit that the same reasons that demonstrate the Respondent's violation of the FET standard (see paras. 336-338 above), are sufficient for the Tribunal to conclude that the Respondent violated the Non-Impairment Clause. The Claimants also submit that a breach of the Non-Impairment Clause, results in a simultaneous breach of the FET standard "as no action of the host State can be fair or equitable if it is unreasonable or discriminatory."[478]

420. The Claimants note that by setting up a 7% levy on RE generators but not on installations subject to the Ordinary Regime, the Respondent has applied discriminatory measures and thus breached the Non-Impairment Clause.[479]

421. The Claimants reject the interpretation of the series of tests set out in *EDF v. Romania* case exposed by the Respondent in its submission for the same reasons expressed regarding the reasonableness and proportionality standard, as explained further below.[480]

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[476] CM, para. 488.
[477] CM, paras. 489-491. Saluka Investments B. V. v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006 ("Saluka") (CL-49) (RL-48).
[478] CM, para. 488.
[479] CR, para. 556; CR, para. 351.
[480] CR, para. 556.

### ii. The Respondent's Position

422. The Respondent relies on several arbitral precedents to address both the non-discriminatory and reasonable aspects of the measures as to match the compliance test with the Non-Impairment Clause.[481]

423. Citing three cases, namely *EDF v. Romania*, *AES Summit Test v. Hungary* and *Total v. Argentina*, the Respondent states that it has passed the tests formulated under each case to assess whether the measures adopted by a State are discriminatory and irrational in contradiction to the objectives and purpose of the ECT.[482]

424. In particular, it considers that the macroeconomic control measures were "reasonably related to a rational policy" and thus complied with the standards formulated by the *AES v. Hungary* tribunal and further confirmed by the *Electrabel v. Hungary* tribunal.[483]

425. Furthermore, the Respondent states that the discrimination alleged by the Claimants (between renewable and conventional energy producers) has nothing to do with "the type of discrimination (of the foreign investor compared to the domestic investor) that the ECT tries to avoid."[484]

426. Spain also rejects the Claimants' argument that the TVPEE is discriminatory because the renewable energy producers cannot "pass on" the taxes to the consumers. The Respondent emphasizes that the TVPEE does not discriminate between conventional and RE generators, as Law 15/2012 grants the same treatment to those subject to it, irrespective of whether they are RE or not. The Respondent contends that the economic impact of the TVPEE for these renewable producers is neutralised as a result of the regulated retribution regime applicable to the same.[485]

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[481] RCM, paras. 937-938.
[482] RCM, paras. 936-970; RR, paras. 979-1004.
[483] RR, para. 985.
[484] RR, para. 1008.
[485] RR, paras.1007-1013.

427. For the Respondent, since the disputed measures' aim is to resolve an unsustainable situation of imbalance and avoid that consumers be excessively burdened by over-compensation, they are justified as a rational policy adopted with the aim of addressing an issue of public interest. Moreover, since the challenged reform is of a general scope and is applicable to all the operators and sectors involved in the energy market, it does not discriminate against any particular investor, whether domestic or foreign.[486] Hence, the Respondent concludes that these measures were not discriminatory.[487]

b. *The Tribunal's Analysis*

428. The Tribunal considers that FET encompasses the principle of non-discrimination and it will analyse it as such for purposes of this case. However, had the ECT not contained an express provision on FET or protecting investors against non-discrimination, this principle would still be applicable on the basis of customary international law.

429. Therefore, there is no doubt that, whether as part of the FET or because of the express mention in Article 10(1) ECT,[488] the Claimants are entitled to be immune from discriminatory measures. This principle is clarified in paragraph 3 of Article 10 of the ECT which covers discrimination as against both national investors and those from any other State, whether party to the ECT or not:

> "For the purposes of this Article, 'Treatment' means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable."

430. As noted in *Parkerings v. Lithuania*:

> "Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues

[486] RCM, para. 940.
[487] RCM, paras. 940-941.
[488] This Tribunal considers that it is indeed part of the FET standard as conceived by the ECT (see above para. 260) but this has no concrete consequence in the present case.

> of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context." [489]

431. The principle of non-discrimination requires a State to treat equally what is equal but it does not require a State to treat equally that which is different. "Treating different categories of subjects differently is not unequal treatment. The principle of equality only applies between equal subjects, not between unequal subjects"[490]. This is also the reason why it is legally acceptable to provide for positive discrimination or reverse discrimination, which departs of the principle of formal equality in order to redress the situation of persons or groups when they deserve special protection through a reasonable preferential treatment.

432. The Arbitral Tribunal notes that the Claimants consider that Law 15/2012 is discriminatory in that the 7% levy (TVPEE) is targeted at New Regime generators which, contrary to Ordinary Regime installations, cannot pass the levy to the final consumer.[491] The Respondent replies that "the impact of TVPEE in renewable energy produces […] has been neutralised, since the TVPEE is one of the costs repaid to such producers by the specific remuneration they receive" according to Order IET/1045/2014 "to recover certain costs which, unlike with the conventional technologies, they cannot recover on the market. The TVPEE, precisely, is included in these costs".[492] The Claimants argue, however, that they "have still suffered damages as a result of this measure."[493]

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[489] Parkerings-Compagniet (RL-97), para. 368. See e.g., Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits), European Commission of Human Rights, Judgment, 23 July 1968, Section B, para. 10.
[490] Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (ICSID Case No. ARB/03/5), Award, 6 June 2008, para. 162; see also CMS (CL-16), para. 293; or South West Africa (Ethiopia v. South Africa), Second Phase, I.C.J. Reports 1966, Dissenting Opinion of Judge Tanaka, 18 July 1966, p. 305.
[491] See supra para. 420.
[492] RCM, para. 556; see supra para. 181.
[493] CR, para. 351.

433. In the present case, imposing the same 7% tax to all electrical installations, regardless their ability to pass the levy to consumers entails *prima facie* an unfavourable treatment for RE installations. To avoid that outcome, Law 15/2012 could either have exempted the companies in charge of RE from the 7% tax or have authorized them to transfer the burden of the levy on the consumers. However, Law 15/2012 has not retained any of those options. Instead, the Respondent has decided to include the amount of the levy in the calculation of the remuneration of the RE producers to assure them reasonable profitability. This allows them to recover the amounts paid, as, contrary to the traditional producers, they cannot pass them on consumers. This is a positive discrimination in favour of the RE facilities aimed at reversing the unfavourable treatment that follows from the tax established in Law 15/2012. In other words, the Respondent has adopted specific corrective measures to avoid the discriminatory effect of Law 15/2012 through a legitimate reverse discrimination in favour of the investors adversely affected by that Law. Therefore, the Claimants' complaint on discrimination must be dismissed.

434. Moreover, as established above,[494] the Tribunal has no jurisdiction to decide on the tax. Since, concretely, the discussion between the Parties on the discrimination entirely bears upon the tax, it cannot decide on this aspect of the respective claims of the Parties in this respect.

435. This being said, the Tribunal accepts the Claimants' claim according to which the 7% levy is subsumed within the overall damage caused and would have to be taken into consideration in the assessment of the violation of the FET by the Respondent.

436. In line with this last finding, it is interesting to note that both Parties mix the discussion of the principle of non-discrimination with that of reasonableness, thus confirming that this question also cannot be dealt with in isolation.[495]

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[494] See supra paras. 185-190.
[495] See supra para. 260.

### 5. Proportionality and Reasonableness

#### a. *The Parties' Positions*

##### i. The Claimants' Position

437. In the Claimants' view, the Respondent did not satisfy the proportionality test, consisting in assessing whether a State measure is proportionate by comparing the relationship between the burden imposed on the foreign investor and the aim sought by the State measure, with due consideration of the other alternatives available.[496]

438. Relying on the *Saluka v. Czech Republic* and *Micula v. Romania* cases, the Claimants specify that, to be reasonable, a State's conduct requires demonstration that the conduct "bears a reasonable relationship to some rational policy" and that "it is also necessary that […] the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors." For the Claimants, the Respondent's measures do not satisfy this test.[497]

439. Since the FIT was not the source of the Tariff Deficit and the FIT for wind and CSP only played a limited role in the accumulation of the Tariff Deficit, curtailing the FIT for CSP and wind while gravely affecting foreign investors was not a suitable and proportional measure to achieve the aim sought.[498]

440. The Claimants submits that other less harmful measures could have been adopted, including: (a) raising electricity prices; (b) introducing a fuel tax; (c) adopting a tax on CO2 emissions; (d) profiling of FITs.[499]

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[496] CM, paras. 483-484, CR, para. 526, CPHB, para. 52.
[497] CM, paras. 472-473.
[498] CM, paras. 483-484. The Claimants allege in particular that it was the drop in demand, which was prompted by the financial crisis, that aggravated the tariff deficit in 2010/2011. It was not the premiums to renewable energy. Tr. Day 1 (Stoyanov), 174:10-15.
[499] CPHB, paras. 156-157.

441. The Claimants further contend that "a State measure is not proportionate unless it is necessary to achieve the goals pursued." Since alternative solutions less harmful to investors were available, the Respondent unreasonably decided to enact measures that dramatically altered the investment framework it had promised to CSP investors. The measures cannot therefore be considered as a proportionate answer to the Tariff Deficit.[500]

442. It is also the Claimants' position that, since the Respondent's actions have caused damages to their investments in a substantial amount, this aftermath equals to a violation of its obligations under the ECT to refrain from impairing RREEF's investments through unreasonable measures.[501]

443. According to the Claimants, the Respondent's defences to justify the regime change, namely the overcapacity of RE infrastructure and the Tariff Deficit, are the result of Spain's own regulatory decisions and misjudgement. The Claimants state that it is not foreign investors who should be made responsible for fixing those matters.[502]

444. It is the Claimants' position that the "overcapacity" of the RE sector is due to Spain's failure to locate sole central control over access to the economic benefits of RD 661/2007 in the Ministry. Monitoring of investment and capacity levels could have been carried out more effectively and efficiently. RD 661/2007 permitted to access its economic regime through registration with the RAIPRE and also allowed Autonomous Communities to authorise the construction and registration of installations presented to them in time of economic crisis. According to the Claimants, since the RE projects were sources of revenue and job creation, they were all accepted as long as the applications qualified.[503]

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[500] CM, paras. 484-485.
[501] CM, para. 491.
[502] CM, para. 473.
[503] CM, para. 474.

445. Additionally, the Claimants deny that the measures were a valid excuse to solve the Respondent's Tariff Deficit on three grounds.[504]

446. First, the Claimants assert that tackling the Tariff Deficit, by adopting sudden and drastic changes to the regulatory regime for renewables, cannot be said to be correlated to a rational policy goal.[505] According to the Claimants, the Tariff Deficit existed long before the RE sector developed in Spain and developed due to Respondent's failure to raise regulated tariffs to the level necessary to cover the costs of the Electricity System.[506] However, wind and CSP provide limited contribution to solve the Tariff Deficit, while the regime is causing substantial harm to the Claimants' investments.[507]

447. Second, relying on *BG v. Argentina*, the Claimants state that the Respondent has unreasonably stripped them of key elements of the regulatory regime upon which their investments were made, after creating and fueling legitimate expectations, and such unilateral withdrawal is "by definition unreasonable".[508]

448. Third, the Claimants insist that the Tariff Deficit was not created by the RD 661/2007 economic regime but by the failure of the Respondent to abide by the income-sufficiency principle and comply with its own laws. The Respondent is criticised hence for having failed to set efficient regulated tariffs, *i.e.*, retail tariffs, at levels that are sufficient to cover the costs of all regulated activities, including the costs of the Special Regime. Thus, the removal of RD 661/2007 is an unreasonable answer to address the Tariff Deficit.[509]

449. Finally, the Claimants considers that the State Aid Decision is irrelevant since the decision only verifies that the New Regime does not result in an "overcompensation"[510]:

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[504] CM, para. 476.
[505] This argument is further developed in CPHB, paras. 150-151.
[506] CM, para. 477.
[507] CM, para. 477 (citing Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran et al, 15 Iran-United States Claims Tribunal 189, Award, 14 July 1987 (CL-4), para. 145; CPHB, para. 155.
[508] CM, para. 478.
[509] CM, paras. 479-480; CPHB, para. 155.
[510] State Aid Decision (RL-115), para. 120.

> "Consequently, it is perfectly possible that an incentive scheme found compatible by the Commission undercompensates investors. On any view, there has been no finding that the Claimants were overcompensated under the Original Regime and no evidence has been provided of this."[511]

ii. The Respondent's Position

450. The Respondent addresses together the discriminatory, reasonable and proportionate aspects of the contested measures[512] and considers that the burden of proving the disproportionality falls on the Claimants.[513]

451. The Respondent further rejects the Claimants' allegations that to show the proportionality and reasonableness of the measure, it is the Respondent who must show that the measures were necessary in light of the alternatives available, as being unsupported by international law or prior arbitral decisions.[514] It considers that instead of asking to justify that the adopted measures are the only possible ones, it is for the Claimants to prove the irrationality and disproportionality of the adopted measures.[515]

452. Regarding the affirmation by the Claimants that measures are disproportionate, the Respondent stresses that the Claimants have omitted that the measures were imposed on the entire System, to rebalance the SEE, not only on the Wind Power and CSP Sector.[516] The Respondent underlines that the proportionate nature of the measures has to be appreciated as a whole not just within a specific sector.

453. The Respondent adopted reasonable and proportionate macroeconomic control measures for justified reasons, including (a) "[t]he legal obligation of maintaining the economic system in accordance with the reasonable rate of return principle at all times for the investors, avoiding the over-remuneration that would be contrary to EU law;" (b) "the existence of a public

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[511] Claimants' Response to Spain's Comments on State Aid Decision, para. 28.
[512] RCM, paras. 906- 907.
[513] RR, para. 978.
[514] Ibid.
[515] RR, para. 987.
[516] RCM, paras. 917-918.

interest in the sustainability of the SEE, in a context of serious international crisis and with a severe reduction in energy demand encountered by the RE Sector, which reduced revenues in the SEE and brought economic imbalance to the SEE, together with increased costs in REs"; and (c) "[t]he impossibility of transferring all the burden of the economic imbalance onto consumers."[517]

454. The Respondent contends that, to determine that the measures are not proportional or rational, the Claimants have the burden of proving, based on reliable information, that the Respondent could have adopted other measures compatible with the commitments undertaken with the EU in the MoU of July 2012 in exchange of the financial rescue to rebalance the sustainability of the SES without transferring all the costs to the Spanish consumers. The Claimants have not fulfilled this duty.[518]

455. In particular, the Respondent affirms that it is not for the Respondent to justify that the adopted measures are the only possible ones, and in any case, the Claimants failed to demonstrate the legal, financial and budgetary validity of the "alternative measures" that the Claimants allege could have rebalanced the SEE and guaranteed its sustainability in the future. It points to one of the solutions proposed by the Claimants' quantum expert, which involve, among others, burdening electricity consumers with more than EUR 27 billion in deficit or making up a tax to defray that amount.[519] These are ill-conceived measures, according to the Respondent, since the Claimants "do not explain how, by increasing tariffs, a shrinking number of electricity consumers could have put an end to the SES deficit without hampering the competitiveness of the Spanish economy during an economic recession." On this issue, the Respondent notes that "the tariffs increased by 81% to the consumers between the years 2003 and 2012."[520]

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[517] RR, para. 858.
[518] RPHB, paras. 175-176; see also RR, para. 987.
[519] RCM, para. 920.
[520] RR, para. 987; RPHB, para. 176.

456. The Respondent also considers that some of the Claimants-suggested measures are contrary to EU law[521] and that the subsidies for the production of renewable energies should comply with the limits of the community regulations concerning State Aid.[522] The Respondent points out that the State Aid Decision "ratifies the proportionality and rationality of the disputed measures, since they meet the purpose of the State Aids and are aligned with the regulation of other European Members (Italy, France, Estonia, Latvia and Czech Republic)"[523] and considers that "[t]he Claimant[s] could not legitimately expect that the Kingdom of Spain would not respect the limits provided by EU Law."[524]

457. The Respondent further posits that the measures proposed by the Claimants, reflect an ignorance over Spain's taxation and budget relations, as well as over its obligations under the Memorandum of Understanding signed with the EU.[525] The EU MoU required the Respondent to "address the electricity tariff deficit in a comprehensive way." To do so, apart from the disputed measures, the Respondent also took a series of other measures of taxation or reductions of costs of the SES.[526]

458. Furthermore, the Respondent asserts that the Claimants have omitted two key points: that the supply of electricity in the Respondent is to be carried out at the lowest possible cost for the consumer and that the Respondent is obliged to correct over-remuneration situations pursuant to the Competition Law of the European Union.[527]

459. The Respondent concludes that the disproportionality of the measures has not been demonstrated by the Claimants.[528] The Respondent notes that the Claimants are earning 27% more than what their wind farm costs and "much more than what their Andasol plants cost."

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[521] RPHB, paras. 176-182.
[522] RR, paras. 988-990.
[523] Respondent's Comments on State Aid Decision, para. 27.
[524] Respondent's Observations on Additional Documents, para. 66.
[525] RCM, para. 919.
[526] RPHB, paras. 90-94.
[527] RCM, paras. 921-922.
[528] RCM, para. 923.

The Arenales Solar is not able to recoup its investment costs (and cover the operation costs) due to inefficiencies of the plant and not due to the applicable regulatory regime.[529]

b. *The Tribunal's Analysis*

460. The Arbitral Tribunal considers that the proportionality requirement is fulfilled inasmuch as the modifications are not random, unnecessary or arbitrary, that is, provided that they do not significantly modify the legal framework applicable to the investors.[530]

461. Arbitrary, as established by the ICJ in the *ELSI* case, is "an act which shocks, or at least surprises, a sense of juridical propriety"[531]. Arbitrariness may be assessed *mutatis mutandis* through the criteria set up by the ILC in the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations:

> "consideration should be given to:
>
> (a) Any specific terms of the declaration relating to revocation;
> (b) The extent to which those to whom the obligations are owed have relied on such obligations;
> (c) The extent to which there has been a fundamental change in the circumstances"[532].

462. Once again, the Arbitral Tribunal must recall that the discussion on the burden of proof is somewhat idle: it is for each party which advances a claim to prove its case.[533] This of course holds true concerning the respect – or not – of the reasonableness and proportionality standards.

463. Although intellectually different, both concepts, which both Parties in a large part discuss together, are closely linked, because the breach of one of them normally entails the breach of the other one. It can even be admitted that proportionality is the main test for reasonableness.

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[529] Tr. Day 2 (Moraleda), 40:7-20.
[530] See Charanne (RL-69), para. 517; Eiser (CL-242), para. 370; Novenergia (CL-243), paras. 656-658.
[531] Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), I.C.J. Reports 1989, Judgment, 20 July 1989, para. 128.
[532] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations with commentaries thereto, Guiding Principles No. 10, YBILC, 2006, vol. II, Part two, p. 380.
[533] See supra para. 187.

The concepts of reasonableness and proportionality necessarily include having the minimum negative effect on the States' other international obligations, in the present case, including those resulting from the ECT and customary international law.

464. In the view of the Tribunal, reasonableness in the exercise of regulatory power includes:

- *Legitimacy of purpose*, inasmuch as it represents interests of the society as a whole and does not alter the substance of the rights affected by the regulation.
- *Necessity*, which implies the existence of a pressing social need. The threshold for "necessary" is more demanding than the one for "useful" or "desirable".
- *Suitability*, in that it must make it possible to achieve the legitimate objective pursued.

465. Proportionality for its part is a weighing mechanism that seeks a fair balance between competing interests and/or principles affected by the regulation, taking into account all relevant circumstances. The regulation must be closely adjusted to the attainment of its legitimate objective, interfering as little as possible with the effective exercise of the affected rights.

466. In this respect, the Arbitral Tribunal shares the views expressed by the *Novenergia* tribunal, which cites relevant case law and deserves being cited at some length:

> 657. […A]n assessment of the Respondent's actions under the FET standard allows for a *balancing exercise*. As quoted by the Respondent, the arbitral tribunal in *Electrabel*, set out a basic principle for application of the ECT FET standard in this respect:
>
> > '[T]he Tribunal considers that the application of the ECT's FET standard allows for a balancing exercise by the host State in appropriate circumstances. The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. As was decided by the tribunals in *Saluka v Czech Republic* and *Arif v Moldova*, [a] FET standard may legitimately involve a balancing or weighing exercise by the host State.'
> >
> > 'That requires a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests. Provided that there is an appropriate correlation between the policy sought by the State and the measure,

> the decision by a State may be reasonable under the ECT's FET standard even if others can disagree with that decision. A State can thus be mistaken without being unreasonable.'[534]

> 658. In *Saluka*, the arbitral tribunal also applied the balancing exercise:

> '[T]he scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.
> […]
>
> No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.
> […]
>
> The determination of a breach of [the FET standard] by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.'[535]"[536]

467. In the previous sections of this Decision, the Tribunal has undertaken to study and discuss individually the various arguments put forward by each party. The Tribunal's conclusions on the issue of the proportionality and reasonableness of the challenged measures is the right place to assemble the various aspects of the case since only a global view of the situation permits the respect (or disrespect) by the Respondent of its obligations under the ECT to be assessed.

468. Three preliminary (and complementary) remarks are in order before deciding on the reasonableness and proportionality of the challenged measures:

- First, the Tribunal is of the opinion that the Respondent enjoys a margin of appreciation in conducting its economic policy; therefore, it will not substitute its own views either on the

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[534] Novenergia (CL-243), para. 657, citing Electrabel S.A., Award, 25 November 2015 (RL-68), paras. 165, 180.
[535] Novenergia (CL-243), para. 658, citing Saluka (CL-49) (RL-48), paras. 304-306.
[536] Novenergia (CL-243), paras. 657-658.

appropriateness of the measures at stake or on the characterization of the situation which prompted them; in particular, the Tribunal will abstain to take any position on the issue of the existence of other or more appropriate possible measures to face this situation;

- Second, it is also quite obvious that the Respondent's margin of appreciation cannot be unlimited: otherwise there would be nothing to arbitrate and the Respondent's decisions would be unchallengeable; "discretionary" cannot be equated with "arbitrary"; margin of appreciation is different from unfettered discretion; the FET (and its components), as defined in the previous paragraphs of this Decision, constitute, in the present case the clearest limits of the Respondent's discretion; and

- Third, it cannot be sustained that the measures taken by the Respondent could only result in the maintenance of the initial situation of the investors; to support such an argument would amount to asserting the immutability of the conditions applying to the investors; as the Tribunal has shown earlier, this is not a tenable position.[537]

469. Notwithstanding the first point above, the Tribunal notes that the disputed measures are part of a comprehensive plan aimed at addressing the situation created by a "tariff deficit for a decade, which, over the passage of time, has adopted a structural nature, due to the fact that the actual costs related to regulated activities and the operation of the electricity sector are higher than the collection of the tolls set by the Government, which are paid by consumers."[538]

470. Taking into consideration the Respondent's margin of appreciation, the Tribunal considers that, for appreciating the reasonableness of the disputed measures, it is necessary to start by recalling that the only established legitimate expectation of the Claimants is the guarantee of a reasonable return of their investments. With this in mind, the Tribunal must assess whether such an expectation has been frustrated in violation of the FET standard and its components as detailed in Article 10(1) ECT.

[537] See supra para. 315.
[538] RDL 9/2013 (R-37) (See also C-31), Preamble.

471. The very expression *legitimate* expectation of a *reasonable* return of investments can leave no doubt as to the unavoidable part of subjectivity in such an assessment. Neither the word 'legitimacy' nor the word 'reasonable' lend themselves to a purely objective assessment. In the view of this Tribunal, the best way to limit as far as possible the interpreter's share of subjectivity – in this case that of the arbitrators - is to cross a series of varied indicia. In this regard, the following elements in particular seem to the Tribunal to need to be taken into consideration, and, first of all, of course, the various calculations, based on different methods, made by the experts selected by the Parties, notably their findings concerning:

- the valuation date taken into account in order to determine the fair market value and,
- to that same purpose, the risk of unsustainability;
- the rentability of the investment, conducted both *in abstracto* and *in concreto*, taking into consideration the particular operating costs of each installation and the price paid for their acquisition;
- the predictable lifetime of the plants; and
- the cost of money on the capital market.

472. Such an empirical assessment cannot be made in the abstract. In other words, the Tribunal will be in the position to determine whether the measures taken by the Respondent have adversely affected the Claimants' legitimate expectation for a reasonable return only when it has evaluated the loss sustained by them, taking into account all the relevant elements. In other words, the determination of a violation of the principles of proportionality and reasonableness is inseparable from an assessment of the damages – if any – endured by the Claimants as a consequence of the measures taken by the Respondent.

## VII. THE PRINCIPLE OF DAMAGES

473. The Claimants assert to be entitled to full reparation in accordance with principles of customary international law, as codified in the ILC Articles.[539] With basis on ILC Articles 1, 28, 34-36,[540] the Claimants contend that the Respondent is under the obligation to make restitution or, alternatively, compensate the Claimants, putting them, as far as possible, in the position that they would have been in but for the Respondent's wrongdoing.[541] The Tribunal agrees with these assumptions although it has some doubts that, in a case like this, implying repealing laws and regulations as requested by the Claimants,[542] *restitutio in integrum* would be an appropriate remedy. In this respect, the Tribunal is of the same mind as the ICSID tribunal in *LG&E v. Argentina*:

> "The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty. Consequently, the Tribunal arrives at the same conclusion: the need to order and quantify compensation."[543]

474. However, compensation is due if, but only if, an injury has been caused by an internationally wrongful act.[544] In the previous sections of this Decision, the Tribunal has concluded that the Respondent was not in breach of its obligations concerning the transparency[545] and the non-discriminatory[546] nature of the challenged measures. It has also found that the principle of

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[539] CM, para. 511; CR, para. 576 (referring to International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I) Corr. 4 (2002), 28 January 2002 (CL-86).
[540] CM, para. 513.
[541] CM, paras. 514-515; CR, para. 576.
[542] CM, para. 515.
[543] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Award, 25 July 2007 ("LG&E Award") (CL-34) (RL-34), para. 87; see also e.g., CMS (CL-16), para. 406.
[544] See International Law Commission, Draft Articles on Responsibility of State for Internationally Wrongful Acts, YBILC 2001, vol. II, Part Two; annexed to the AGNU Resolution 56/83 (RL-93), Art. 31(1).
[545] See supra para. 416.
[546] See supra para. 431.

stability and predictability had been complied with by the Respondent, except to the extent that the challenged measures have been applied retroactively:[547] this being contrary to both the FET standard embodied in Article 10(1) ECT and a well-established general principle of law,[548] the Respondent must compensate the Claimants for the ensuing losses it incurred as a consequence of this breach (A).

475. Besides the findings summarized in the above paragraph, the Arbitral Tribunal has also considered that the Claimants could not legitimately expect that the rules applicable to their investments would remain unchanged for the entire duration but that they had a legitimate expectation to get a reasonable return on their investments.[549] Such expectation implies that the modifications brought to the previous regime would be made in conformity with the principles of reasonableness and proportionality, failing which the losses incurred by the Claimants must be compensated. However, the Tribunal has left open the question of the infringement of the legitimate expectations of the Claimants, since it considers that the reasonableness and proportionality of the measures adopted by the Respondent can only be assessed in view of the extent of the losses suffered by the Claimants.

476. It therefore falls to the Tribunal to assess the loss of profits suffered by the Claimants as a consequence of the new regime, on the basis of the positions of the Parties and, in particular, the expert opinions they have commissioned, as well as their answers to the questions put by the Tribunal in its Request for Additional Information dated 16 January 2018, confirmed by its letters of 12 and 28 February 2018 (B).

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[547] See supra para. 330.
[548] See supra para. 326.
[549] See supra para. 399.

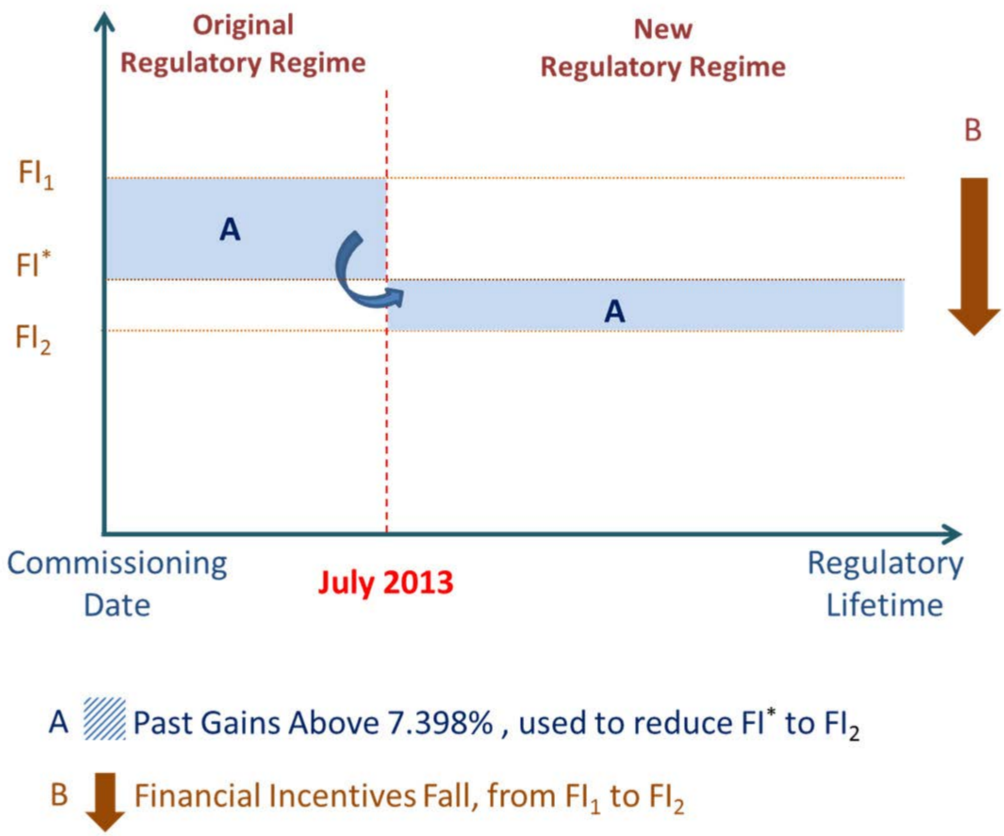
## A. THE LOSSES CAUSED BY THE RETROACTIVE APPLICATION OF THE CHALLENGED MEASURES

a. *The Parties' Positions*

i. The Claimants' Position

477. In their Rebuttal Regulatory Report, the Claimants' experts explain that the New Regime's retroactivity has the effect of clawing-back previous remuneration which is higher than 7.398% – this percentage representing the "reasonable return" under the New Regime. According to the Claimants, the damage they have suffered corresponds to the difference between the remuneration received before 14 July 2013 and the new financial incentives introduced by the Respondent at this date.

478. Brattle illustrates this damage with the following Figure, in which the blue shaded area "A" indicates the alleged "windfall profits":



479. Following the Tribunal's invitation to provide a breakdown of the valuation including the alleged retroactivity of the new regime,[550] the Claimants further stated that:

> "It would be possible to update the Alternative Claim to separately identify the impact of each element of retroactivity in the methodology of the New Regulatory Regime. However, as Brattle explains 'it would require the Tribunal to direct the parties to prepare a new (and extensive) analysis'."[551]

ii. The Respondent's Position

480. The Respondent disagrees that the new regime applies retroactively and gives no information concerning the valuation of the damages caused by its alleged retroactivity.

b. *The Tribunal's Analysis*

481. As recalled above,[552] the Respondent has decided, in its own words, to take into account "the remuneration already received from the beginning of the operation of the facility, for the purpose of calculating the future subsidies to receive […]."[553] The Tribunal has already concluded that such a means of calculation was in contradiction with the principle of non-retroactivity[554] and entailed a right to compensation for the Claimants.[555]

482. This being said, four further remarks are in order:

- first, the compensation due in this regard has a distinct character from the one which could be due for the global compensable losses possibly sustained by the Claimants as the result of the challenged measures;
- second, as apparent from Brattle's figure reproduced in para. 478 above, the damage must be calculated in view of the lifetime of the investment that the Tribunal considers to be 25 years;[556]

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[550] Tribunal's Request for Additional Information, 16 January 2018.
[551] CS, para. 40, citing Brattle Memorandum, para. 50.
[552] See supra para. 300.
[553] RR, para. 966; see also RR, paras. 432-441.
[554] See supra paras. 325-329.
[555] See supra para. 330.
[556] See infra para. 549.

- third, calculation of the damage suffered as a consequence of the retroactive application of the new regime must bear upon the erroneous taking into account of the past gains of the Claimants above the target return of 7.398% from the time of the investment until July 2013; and

- fourth, the Arbitral Tribunal observes that the Claimants note that Brattle, their own valuation experts, consider that it would be complicated, but not impossible, to determine the impact of the unlawful retroactive application of the new regime in isolation but that this would imply new expert investigations, while the Respondent has failed to answer the Tribunal's question in this respect.

483. The Claimants are entitled to compensation as a consequence of the Respondent's breach of the principle of non-retroactivity, whatever the conclusion of the Tribunal would be concerning the alleged breach of the Claimants' legitimate expectations concerning a reasonable return. The resulting harm endured by the Claimants must, therefore, be evaluated autonomously. However – but this is a different issue – the assessment of the actual return must be done taking into consideration the retroactive application of the new regime. If not, compensation would be granted twice for one same wrongful act.[557]

## B. THE LOSSES SUFFERED BY THE CLAIMANTS AS A RESULT OF THE DECREASE OF THEIR RETURN ON INVESTMENT

### (a) Standard of damages and method of valuation

a. *The Parties' Positions*

i. The Claimants' Position

484. The ECT is silent on the standard of compensation of damages for a breach of the obligations under its Article 10. The Claimants assert that the standard of compensation for a breach of Article 10 of the ECT should be the difference in the fair market value of the investments with and without the disputed measures.[558]

[557] See infra paras. 567-587.
[558] CM, para. 518.

485. The Claimants refer to the standard of compensation due for lawful expropriation under Article 13 of the ECT, which is the fair market value of the investment immediately prior to the taking.[559] Relying on the awards in *CMS v. Argentina*, *Enron v. Argentina*, *Sempra v. Argentina*, and *Azurix v. Argentina*, the Claimants state that in the absence of an express requirement, the standard of the fair market value of the investment also applies to breaches other than expropriation, such as breach of FET.[560] The Claimants also rely on the award in *Anatolie Statie v. The Republic of Kazakhstan*, where the tribunal held that the standard of compensation for a breach of Article 10(1) of the ECT, should not be lower than the fair market value standard prescribed under Article 13 of the ECT.

486. The Claimants assert that a discounted cash flow ("DCF") analysis is the appropriate method for measuring the fair market value of the investments. Brattle, Claimants' valuation experts, explain that a DCF method is appropriate because CSP and wind plants have a relatively simple business model, whose demand of electricity and long run value can be analysed and modelled in detail based on available data; it is a method that dominates the valuations of power stations, used by lenders providing project finance and even by the Respondent; and can be used to explore the impact of different scenarios on the Claimants' cash flows, enabling a proper accounting to be taken of regulatory risk by modifying the revenues that the Claimants will earn under the disputed measures.[561]

487. Further, the Claimants argue that contrary to the Respondent's assertion, the DCF method is not speculative. Investment treaty arbitration jurisprudence generally favours a DCF approach, recognizing its main advantage of establishing a fair market value in a conceptually correct manner as the present worth of future benefits.[562]

488. The Claimants argue that *Khan Resources B.V. v. Mongolia* illustrates when the DCF is not appropriate, such as when there are additional uncertainties like how a project would be

[559] CM, para. 517; CR, para. 576.
[560] CM, para. 519; CR, para. 576.
[561] CM, paras. 526-532; CR, paras. 577, 610.
[562] CR, para. 602

financed, whether the claimant can bring the project into production by itself or if it needs a strategic partner, etc.[563] But here, the Andasol Plants and the Wind parks have sufficient operational history. They were established and operative producing energy since 2008 (but for Arenales, due to a turbine failure). Besides, the Claimants reference a number of decisions in which tribunals have used the DCF method despite little or no operational history.[564] Also, the Claimants argue that the installations were fully financed at the date of assessing damages and without the disputed measures the plants would not have had difficulties servicing their loans.[565] In any case, few tribunals have considered the financial state of a claimant as being relevant to assessing the future prospect of the investment.[566]

489. Also, the Claimants reject the Respondent's argument that the volatility of pool prices makes the DCF method uncertain. Brattle explains that the volatility of pool prices is a reason to implement a FIT regime. Under a regime with fixed tariffs as under RD 661/2007, cash flows are independent from the pool price, so electricity prices play a limited, if any, role in the remuneration obtained under such regimes.[567]

490. The Claimants also address the Respondent's criticism that the DCF is inappropriate due to the disproportion between the investment and the amount claimed. The Claimants distinguish this case from those of *Wena Hotels v. Egypt* and *Tecmed v. Mexico*, where the disproportion was determined by the tribunals to be a relevant factor to reject DCF. In those cases, the amounts claimed were more than seven times the amount invested, while here it is 1.53 times.[568] Brattle also explains that, given the time elapsed between the investment and the valuation date, damages would naturally be higher than the amounts invested by the Claimants, so as to earn a reasonable return.[569]

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[563] CR, paras. 606, 607.
[564] CR, paras. 629-637.
[565] CR, paras. 638-646.
[566] CR, paras. 641.
[567] CR, paras. 647-649.
[568] CR, paras. 654-661.
[569] CR, para. 662.

491. The Claimants argue that the valuation date to determine the fair market value should be 20 June 2014. Relying on *International Technical Products Corporation v. Iran*, *Azurix v. Argentina* and *Enron v. Argentina*, the Claimants assert that, in cases of indirect expropriation resulting from a series of measures, tribunals have found that the appropriate date for determining liability and valuing damages should be the culmination of all events, when the deprivation was irreparable or when the most serious damage arose in connection with a certain measure. Further, the Claimants argue that tribunals have adopted those tests for breaches other than expropriation.[570] Similarly here, the Claimants maintain that the valuation date to determine the fair market value of their assets should be 20 June 2014, which is the date of publication of the Ministerial Order IET/1045/2014, marking the final act of Respondent's measures that, according to the Claimants, caused irreversible deprivation and most serious damage to their investments.[571]

492. The Claimants assert that the Respondent must compensate them for the lost fair market value of their investments, comprised of historical losses and losses relating to future cash flows.[572] The DCF analysis compares a "But for" scenario, which assumes that the disputed measures were never implemented, to an "Actual" scenario, which considers the full effect of the disputed measures on the investments. According to Brattle's valuation, the damages due is the difference in the net present value between the Claimants' cash flows with and without the disputed measures.[573]

493. For lost historic cash flows, Brattle compared the cash flows between the period of 27 December 2012 (Law 15/2012) and 20 June 2014 (Order IET/1045/2014). Over that period, Brattle compared the cash flows that the Claimants would have accrued but-for the disputed measures to the Claimants' actual accrued cash flows, resulting from the disputed measures.[574] The Claimants summarize the steps taken by Brattle to measure the lost historic

[570] CM, paras. 534-542.
[571] CM, paras. 543-547.
[572] CM, para. 521.
[573] CM, para. 522.
[574] CM, paras. 524(a), 548.

cash flows. The Claimants explain that Brattle adopted seven assumptions to define the but-for scenario for the period of December 2012 and June 2014.[575] In addition, Brattle considered that due to the disputed measures, Arenales Solar and Dédalo needed equity injections that would not have been required in the but-for scenario.[576] Finally, Brattle considered that for Arenales there is a performance guarantee payment, which in the but-for scenario would have reflected a payment subject to the Special Regime and that now reflects payments based on the New Regime.[577] Applying all those assumptions, Brattle quantified the Claimants' lost historical cash flows at EUR 45 million, later updated in Brattle's Rebuttal Report to EUR 48.3 million.[578]

494. For lost future cash flows, Brattle compared the net present value as at 20 June 2014 of what Claimants' cash flows would have been but for the disputed measures to what those cash flows are projected to be resulting from the disputed measures.[579] The Claimants summarize the four steps taken by Brattle to quantify the lost future cash flows.

495. First, Brattle calculated the base net present value of the reasonably expected cash flows of the Claimants' CSP plants and wind farms, in both the but-for and the actual scenarios. Brattle quantified lost net present value of Claimants' equity in the CSP plants and wind farms at EUR 810 million.[580] Second, Brattle calculated the adjusted net present value, by accounting the positive side effects of holding debts and having tax benefits in both, the but-for and the actual scenarios. According to Brattle, the financing side effects increase the impact of the disputed measures from EUR 10 million, to EUR 820 million.[581] Third, Brattle subtracted from the adjusted net present value of the but-for and of the actual scenarios, the net present value of the debt, swap obligations and impact of any debt restructuring of the Project Companies. Brattle quantified that the Disputed Measures reduced the final equity

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[575] CM, para. 550.
[576] CM, para. 551.
[577] CM, para. 552.
[578] CM, para. 553; CR, para. 590.
[579] CM, para. 524(b).
[580] CM, paras. 554(a), 557-564.
[581] CM, paras. 554(b), 565-567.

value to EUR 735 million.[582] Fourth, Brattle attributed to the Claimants a percentage of the final equity value that is in proportion to the Claimants' individual shareholding in the Project Companies; accounted for RREEF's preferential share in Arenales Solar; and applied an illiquidity discount of 18% since the Claimants' CSP plants and wind farms are difficult to trade.[583]

496. In total, Brattle quantified the lost future cash flows at 20 June 2014 at EUR 252 million, which together with lost historical cash flows amounts to damages of EUR 297 million, excluding interest and tax gross-up.[584] In their Reply, the Claimants adjusted that amount to EUR 265 million, excluding interest and tax gross-up.[585]

497. The Claimants argue that they have met the standard of proof used to establish the certainty of future cash flows and that Respondent's claim that Brattle's calculations are speculative is baseless. The Claimants note a distinction between the standard of proof for quantification of loss and for existence of loss. Relying on *Lemire v. Ukraine*, the Claimants argue that a more relaxed test applies to calculation of damages, once the existence of the damages is attributed to the conduct of the State.[586] The Claimants maintain that the future cash flows in the but-for and in the actual scenarios can be reliably be estimated to a high degree of certainty, since Brattle's calculation is mostly based on objective data. For example, Brattle calculated the base net present value relying on the Claimants' production forecasts in the normal course of business, adjusted that value accounting for financing side-effects based on objective and actual data, calculated the final equity value by looking at the market value of the debt, which is calculated on objective third-party data.[587]

498. Further, the Claimants argue that an asset-based method, such as the one suggested by the Respondent, is inappropriate. According to Brattle, the method proposed by the Respondent

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582 CM, paras. 554(c), 568-570.
583 CM, paras. 554(d), 571-574; CR, para. 591.
584 CM, para. 574.
585 CR, paras. 577, 593.
586 CR, para. 614.
587 CR, paras. 619-628.

is not a recognized valuation method for renewable energy generation assets. Instead, it is used in the context of transmission and distribution monopolies.[588] The Claimants point out that BDO, Respondent's valuation experts, compared the enterprise value of an investment to that investment's regulatory asset base, without accounting for the switch in regime, as the method assumes that a different regime was in place when the Claimants invested.[589] The Claimants maintain that such method is a way for Respondent to deny liability and to assert that no damage was suffered, because the method assumes that both the original and the new regime offered a reasonable return on efficient investment.[590]

499. Subsidiarily, the Respondents also presented an alternative valuation based on the DCF method. In their Rebuttal Report, Brattle offered an alternative valuation for CSP plants and wind farms said to address Respondent's alternative valuation based on a reasonable return allegedly implicit in the FIT originally offered before the New Regime. The Claimants explain that such methodology still leads to substantial damages.[591]

500. In short, Brattle offered an alternative valuation that removed all retroactive effects of the New Regime and assumed that a 9.5% after-tax return was reasonable for CSP plants and wind farms and also levelized the cost targets for each CSP plant and wind farm at a "marginal plant level", which is understood as the most expensive plant on the system that is nevertheless efficient.[592] Also, Brattle's alternative valuation involved some adjustments, including, among others, that the Respondent should have calculated levelized costs assuming an average useful life of 40 years for CSP plants and 25 years for wind farms.[593]

501. Brattle applied the above assumptions to alternative scenarios, each with different cost targets, but with the same 9.5% after-tax return. Brattle calculated the Claimants' damages in three alternative scenarios for CSP plants and in two alternative scenarios for the wind

[588] CR, para. 679.
[589] CR, para. 681.
[590] CR, para. 680.
[591] CR, para. 759; Brattle Rebuttal Regulatory Report, paras. 259- 275.
[592] CR, para. 754; Brattle Rebuttal Regulatory Report, para. 155.
[593] CR, para. 751; Brattle Rebuttal Regulatory Report, para. 265.

farms.[594] In CSP scenario 1, the "marginal plant" is the most expensive type of efficient CSP plant on the system, that is, according to Brattle, the tower system. With this methodology, Brattle calculated that damages amount to EUR 254 million. In CSP scenario 2, Brattle abandoned the single cost target associated to a "marginal plant" and assumed that the Respondent was allowed to change the FITs under RD 661/2007 and discriminate between CSP technologies once construction costs were understood and the date that operations were approved. Brattle calculated damages at about EUR 115 million. Under CSP scenario 3, Brattle computed damages on the basis of the actual costs of the construction of CSP plants and also assumed that the Respondent was allowed to discriminate between CSP plants. Brattle calculated damages in CSP scenario 3 at about EUR 141 million.[595]

502. For the wind farms, Brattle calculated the Claimants' damages under two scenarios. Under Wind scenario 1, Brattle assumed that the "marginal plant" is the most expensive type of wind plant entering the system after the issuance of RD 661/2007, and calculated damages at EUR 26 million. For Wind scenario 2, Brattle computed the FIT with reference to the actual costs of construction of Claimants' own wind farms and assumed that the Respondent was allowed to set different FITs for each wind farm, but should not have changed the target rate of return. Brattle calculated damages at EUR 10 million. This, according to Brattle, reflects that the Claimants' wind farms are among the most efficient installations in the Spanish wind sector, their construction costs are low, so an alternative valuation on those costs results in positive damages.[596]

### ii. The Respondent's Position

503. The Respondent argues that the legal and regulatory regime from 1997 to present day has always granted the same reasonable profitability. Therefore, the Claimants have not been deprived of anything nor have they endured any prejudice.[597] Also, the Respondent has not

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594 CR, paras. 756-759.
595 CR, para. 756; Brattle Rebuttal Regulatory Report, para. 270.
596 CR, para. 758; Brattle Rebuttal Regulatory Report, paras. 271-274.
597 RCM, para. 1011.

breached the ECT and it is under no obligation to indemnify the Claimants.[598] But, even if the Tribunal were to find that the Respondent is liable for breaching the ECT, the alleged damages are not entitled to compensation.[599]

504. In relation to the compensation standard, the Respondent considers that the "Tribunal just cannot apply standards or criteria thought for cases of expropriation or cases when the property has been taken, or cases where the investor has not been able to sell the investment."[600]

505. The Respondent considers 20 June 2014 as an irrelevant and arbitrary date to evaluate Claimants' investment and maintains that the sale of the plants is a relevant event for valuation purposes.[601]

506. The Respondent asserts that the alleged damages are speculative and therefore not compensable and that the DCF method is not appropriate in these circumstances. The Respondent maintains that the Claimants' distinction between lost historic and lost future cash flows fails to consider the concept of regulatory useful life and omits the overall consideration of cash flows, past and future, to guarantee a reasonable return on the investments made.[602]

507. The Respondent asserts that by law wind farms and solar power plants are guaranteed a reasonable return, protected from market uncertainness and fluctuations.[603] The Respondent contends that the Claimants' projection is illusory since the claims assume that the "actual" scenario will be maintained over the coming decades, ignoring that the guarantee of reasonable return is the guiding principle of the system.[604] Relying on a judgment by the

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[598] RCM, para. 1012.
[599] RCM, paras. 1013, 1075(c).
[600] RRS, para. 30.
[601] RRS, para. 20.
[602] RCM, para. 1019.
[603] RCM, para. 1020.
[604] RCM, para. 1021; RR, paras. 1083-1085.

Supreme Court of the Kingdom of Spain, the Respondent argues that the damages have not been substantiated, since their calculation is based on a long-time horizon and nothing guarantees that the remuneration shall remain unchanged in the current form.[605] Further, the Respondent maintains that the Claimants have not met their burden of proof to establish the loss of value of their plants.[606]

508. The Respondent maintains that, in the circumstances of this case, the DCF method is not appropriate because it is an excessively speculative method that may lead to overvaluation.[607] The circumstances to which the Respondent refers are: the lack of sufficient financial history to maintain a solid future cash flow projection; the significant tangible asset base, without relevant intangible assets to analyse; the cash flows' high dependency on external, volatile and unpredictable elements; the financial weakness of the project finance structure; the long-term forecasts; the contradiction between the long-time horizon and the plants' declared useful life; and the disproportion between the alleged investment and the amount claimed.[608] The Respondent refers to the tribunal's findings in *Tenaris v. Venezuela*, to support its argument that a DCF method is inappropriate when a company has a limited operation history and when a country's general economic conditions make it unlikely that a company's cash flows be projected with reasonable certainty.[609]

509. Relying on *Rusoro v. Venezuela*, the Respondent argues that small adjustments in the estimates can lead to significant divergences and that the Claimants' sanity check of their DCF valuation is fictitious.[610] The Respondents maintains that BDO, its valuation expert, offered instead a more credible reality check, looking at public information provided by two yieldcos stating that, following the disputed measures, renewable energy plants in the Respondent which provide a reasonable rate of returns are active, not deteriorated.[611]

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[605] RCM, para. 1022.
[606] RR, paras. 1085-1087.
[607] RCM, paras. 1027, 1030.
[608] RCM, para. 1031.
[609] RR, para. 1094.
[610] RR, paras. 1089-1093.
[611] RR, para. 1092.

510. Relying on doctrine, the Respondent asserts that the Tribunal should instead evaluate the existence of damages using a method that is easier, less speculative and that looks to the past, based on the cost of assets, examining whether the costs are recovered and if there is reasonable return on the costs. Such method considers normal rates of return, since extraordinarily high or low rates are rare, and is appropriate when the investment is recent and lacks a history of profitability.[612]

511. Relying on the report of BDO, the Respondent argues that the DCF method provides abnormal results and that Claimants' valuation of their investment in the "but-for" scenario (EUR 363 million for CSP plants and EUR 85 million for wind farms) implies that, if the Claimants obtained the requested compensation, a disproportionate internal rate of return ("IRR") of 30% and 39% for the CSP plants and wind farms, respectively.[613] Instead, BDO calculated the IRR before taxes for the CSP plants at 7.2% and for the wind farms at 13.0%.[614]

512. The Respondent offered an alternative valuation based on Brattle's outline to highlight the volatility of the DCF method. In its first report, BDO presented two alternative scenarios. In a first alternative, the actual scenario is compared with the but-for scenario, which was created based on the tariff calculated under RD 436/2004 for Andasol 1 and Andasol 2 and under RD 661/2007 for the other plants. A second alternative, involved a rate for the but-for scenario under RD 661/2007 for all plants. In its second report, BDO updated those two alternatives with new information obtained from the Claimants, namely, that the Arenales plant is over-powered with a capacity higher than 50 MW. Thereby, in a "but for" scenario, the subsidy in Article 36 of RD 661/2007 would not be applicable, instead the subsidy of Article 45 of RD 661/2007 would apply, which is a lower subsidy.[615]

513. Under the first alternative and considering the over-powering of Arenales plants, the Respondent maintains that Claimants' investment increased in value by EUR 32 million

[612] RCM, paras. 1033-1038; RR, paras. 1096-1099.
[613] RCM, paras. 1039-1042; RR, para. 1101.
[614] RR, paras. 1105, 1106.
[615] BDO Report duplicating Brattle's Rebuttal Report, paras. 286-298.

under the new measures instead of suffering damages.[616] Under the second alternative and considering the over-powering, the Respondent argues that even if the rate for but-for scenario under RD 661/2007 was erroneously applied to all plants, Brattle calculated a negative financial impact of EUR 297 million, while BDO calculated a negative impact 90% lower, of EUR 31 million.[617] The Respondent explains that the discrepancies between Brattle's and BDO's DCFs derive from the different parameters used. Further, the Respondent argues that the alternative valuation offered by Brattle in its Rebuttal Report lacks any economic basis and makes a misguided interpretation of reasonable rate of return.[618]

b. *The Tribunal's Analysis*

514. The Tribunal faces very lengthy and fundamentally irreconcilable expert assessments of the damages (or absence of damages) incurred by the Claimants as a consequence of the challenged measures. Exactly as the ICJ in the *Pulp Mills* case, this Tribunal:

> "does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the [Tribunal], after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, [… the Tribunal] will make its own determination of the facts, on the basis of the evidence presented to it […]."[619]

515. The Tribunal notes that all the other tribunals which have, up to now, made a decision on similar cases in already published (and produced by the Parties) awards have adopted an "either/or" posture when deciding on the damages. Either they have found that the Respondent was not in breach of its obligations under the ECT and they have, logically,

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[616] RCM, paras. 1043-1050; RR, paras.1124-1129.
[617] RCM, para. 1052; RR, para. 1130.
[618] RR, para. 1078.
[619] Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports 2010, Judgment, 20 April 2010, para. 168.

decided that it had no obligation to compensate any losses suffered by the Claimant; this has been the position taken in the *Charanne*, *Isolux* and *Blusun* cases. Or the tribunals have considered that, since the Respondent had been found in breach of Article 10 of the ECT, it was obliged to make full reparation for the losses suffered; this has been the position taken by the *Eiser* and *Novenergia*[620] tribunals. This last position would be illogical in the present case since the Tribunal accepted that the Claimants were not immune from reasonable changes in the regime applicable to its investment; therefore, it is only to the extent that the modifications would have exceeded the limits of what is reasonable that compensation would be due and should be calculated.

516. In effect, as noted by the *Blusun* tribunal (in a different but similar Italian context):

> "In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime. These considerations apply even more strongly when the context is subsidies or the payment of special benefits for particular economic sectors."[621]

517. In deciding whether the Claimants has obtained a reasonable return for their investments, account must be taken of the finding of the Tribunal that the Claimants can avail themselves of no commitment given by the Respondent as for the immutability of the applicable regime.[622] Since this Tribunal does not consider that Spain had an obligation to maintain the initial regime integrally, the modification of such regime does not entail *per se* a breach of the ECT, even if it entails a lesser return for the Claimants, unless the new regime deprives the Claimants of a reasonable return according to the cost of money in the capital market which is the only established legitimate expectation of the Claimants, as the Tribunal has

[620] In Novenergia, the tribunal deducted the damages caused by the 7% levy, considering that it had no jurisdiction on that tax and the measures taken by the respondent before 2013, considering they did not violate the FET.
[621] Blusun (RL-117), para. 372.
[622] See e.g., para. 399 supra.

already ruled. In this respect, the Tribunal cannot concur with the *Eiser* tribunal which, while admitting that the "Claimants could not reasonably expect that there would be no change whatsoever in the RD 661/2007 regime over three or four decades",[623] nevertheless decided that the Respondent ought to be integrally compensated for the losses caused by the new regime. And, with all due respect, as will be shown more precisely below,[624] it seems very exaggerated to contend that "[t]he new system put into effect in 2014 by Ministerial Order IET/1045/2014 deprived Claimants of substantially the total value of their investment."[625] The Claimants in the present case, while asking for the integral compensation of their alleged losses, do not go that far. In fact, they were able to sell their shares in the Andasol plants for EUR 77.7 million.[626]

518. In reality, the situation in the present case is much more similar to the situation in the *LG&E v. Argentina* or *Lemire v. Ukraine* cases in which the tribunals decided that:

> "[t]he BIT establishes the rule that compensation for expropriation is to be based on 'fair market value' of the investment; this principle, however, is of little use in the present arbitration, because the breach does not amount to the total loss or deprivation of an asset. Gala Radio still exists and Claimant still owns it: compensation thus cannot be based on fair market value of assets expropriated."[627]

519. The Tribunal further remarks that both Parties' experts have used several methods of calculation and achieve fundamentally different results regardless of the chosen method. The reason is that their calculations are based on fundamentally different assumptions or criteria. Without taking any position on the relevance of the DCF method to compare the assets value in the two scenarios, which has been used by various tribunals[628] and which has also been

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[623] Eiser (CL-242), para. 387. (See also para. 398: "Once set, neither the regulatory life nor the prescribed 'initial value of the investment' can be changed.")
[624] See infra paras. 567-587.
[625] Eiser (CL-242), para. 413.
[626] See supra para. 177.
[627] ICSID, Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18), Award, 28 March 2011 (CL-32), para. 148; see also LG&E Award (CL-34) (RL-34), paras. 36-39.
[628] Eiser (CL-242), paras. 462-465; Novenergia (CL-243), para. 818.

criticized by others,[629] this Tribunal does not find it useful to assess the reasonableness of the Claimants' return under both regimes. Comparing the income or asset valuation in the two scenarios makes it possible to calculate a difference but gives no indication as to whether the two remunerations are reasonable or not.

520. Conversely, the internal rate of return is an indicator of a project's profitability. As explained by BDO:

> "the reasonable return provided by the Spanish State corresponds to what is economically known as the Internal Rate of Return (IRR) of a project. The internal rate of return (IRR) of a project measures the average annual returns of said project, based on the updated cash flows generated by the project over its entire lifespan."[630]

521. Since the Tribunal has determined that the only legitimate expectation of which the Claimants could prevail themselves was that of a "reasonable return", it is appropriate to compare both regimes depending on the IRR that the Claimants can get under each of them. As the *Novenergia* Tribunal put it, "the internal rates of return is a relevant measurement for what the Claimant was expecting to get from its investment in the Kingdom of Spain at the time of making the investment."[631]

**(b) Does the new regime provide for a reasonable return?**

522. With regard to the other possible head of damage suffered by the Claimants – the alleged absence of a reasonable return, the Tribunal has already amply shown that:

- the Claimants could not legitimately expect that their return under the previous regime would remain unchanged for the entire duration of their investment;

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[629] Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/26), Award, 29 January 2016 (RL-103), paras. 525-527; Rusoro Mining Limited v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016 (RL-102), para. 760.
[630] BDO First Report, para. 35.
[631] Novenergia (CL-243), para. 826.

- besides the unlawful partial retroactive application of the new regime, the only breach by the Respondent of its obligations to the Claimants resulted from the absence of a differential between the return on investment and the cost of money in the capital market; and
- for the rest, the contested measures did not infringe the rights of the Claimants under the ECT, while
- the new regime, although indeed less advantageous for the Claimants than the previous one, offers them other elements guaranteeing the stability in the return on their investment; and,
- concerning more specifically Arenales, the question debated between the Parties as to its installed capacity[632] has no consequence in the Tribunal's reasoning since the compensation awarded to the Claimants is based on an assessment of the reasonableness of the actual return, not on that resulting from the special regime under RD 661/2007 which was limited to plants of an installed capacity of 50 MW and below.

523. As a result, the Tribunal considers that, while entitled to compensation for unreasonable return on their investments – if established -, the Claimants cannot claim full compensation for the total decrease in their profits as a result of the adoption of the new regime by the Respondent; they can only get compensation to the extent that such decrease is below the threshold of a reasonable return.

524. The Claimants rightly note that Article 30(4) "[does] not define [a] reasonable return"[633]. The "reasonable return" has sometimes been described as a general principle according to which "investors should be entitled to make a reasonable return on and of their investment"[634]. The Arbitral Tribunal does not take any position as to the existence of such general principle; it simply notes that, in the present case, this rule must be applied since it is consecrated in the relevant applicable texts. Moreover, the Tribunal agrees with *Charanne*[635]

[632] See supra paras. 493-495, 512-513.
[633] CR, para. 225.
[634] AES Corporation and Tau Power B.V. v. Republic of Kazakhstan (ICSID Case No. ARB/10/16), Award, 1 November 2013, paras. 398-400.
[635] Charanne (RL-69), para. 518.

and *Isolux*[636] tribunals that this principle should be defined according to Spanish law and mainly to Law 54/1997. Therefore, the Tribunal shares the Respondent's view that:

> "the concept of '*reasonable return*' has its own meaning: (i) it means, first, that producers in the special regime are entitled to a '*return*'. That is, the remuneration they receive allows them to recover both the amounts invested (CAPEX) and the operating costs of these assets (OPEX) and, in addition, obtain an industrial benefit. (ii) It means, secondly, that the industrial benefit guaranteed to producers must be '*reasonable*'[637]. Therefore, that benefit cannot be disproportionate or '*irrational*'. (iii) Third, the judgment of reasonableness must be made on the basis of an element that is objective and variable: '*with reference to the cost of money in the capital market*'."[638]

525. Before evaluating whether the IRR is reasonable, according to the cost of money on the capital markets at the relevant date, the Tribunal has to decide on how the IRR should be calculated.

### ***1. How should the reasonable return be calculated?***

a. *The Parties' Positions*

i. The Claimants' Position

526. The Claimants contend that the ECT protects their equity interests and that the IRRs associated with those investments are shareholders IRRs which are calculated by taking into consideration "the price paid for the shares as the initial investments and the actual and projected cashflows to the Claimants, over the lifetime of the assets."[639]

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[636] Isolux (RL-95), para. 807.
[637] RR, para. 182, n. 96: “"Reasonable" according to the Dictionary of the Royal Academy of the Spanish Language means: "adequate, according to reason, proportionate, not exaggerated" Dictionary of the Spanish Language, electronic version (Twenty-third edition October 2014) “razonable”. Royal Spanish Academy. http://dle.rae.es/?w=razonable#.VlSem4LfJQY.email. (R-288)”.
[638] RR, para. 182 (emphasis in original).
[639] CS, para. 7.

527. The Claimants also recognize that while shareholders IRRs can be a source of information and an important contextual element, they

> "cannot, however, serve as a benchmark against the level of return that the regulator considered reasonable when establishing the RD 661/2007 regime (or the New Regime). The reason for this is that RD 661/2007 offered a FIT to the installation,[640] regardless of who the ultimate owner of the installation may have been or what they paid for their equity interest. The New Regime takes the same approach. As Brattle explains, the '*regulatory focus on project IRRs was logical in part to avoid the need to anticipate and choose among the many and varied financing structures adopted by individual renewable investors*'.[641] The regulator never considered what shareholder returns the regulations were seeking to provide but instead assessed the target returns at asset level.[642]"[643]

528. The Claimants consider that the shareholders' IRRs calculated by the Respondent for Andasol are irrelevant since they do not take into account the premium paid by the Claimants to acquire their investment.[644] In reality, their actual equity IRR is much lower than what the Respondent argues. The Claimants position is that they paid this expensive price because, under the previous regime, the project IRR was much higher.

529. The Claimants agree[645] with the Respondent's expert Carlos Montoya that:

> "30. The decision to obtain a loan or credit to undertake the investment is a financial decision based merely on the interests of the promoter. The credit

[640] Ibid., para. 11, n. 7: "As the Tribunal will recall, that return was not communicated to investors at the time but was set out in the Ministry's internal report on RD 661/2007 (Exhibit C-0225). The investors were provided with (and promised) a remuneration in €c/kWh for every kWh of electricity produced (see Exhibit C-0024, RD 661/2007, Article 36). They were also told that this remuneration would yield a reasonable return (Exhibit C-0024, RD 661/2007, Preamble: "*The economic framework established in the present Royal Decree develops the principles provided in Law 54/1997, of 27 November, on the Electricity Sector, guaranteeing the owners of facilities under the special regime a reasonable return on their investments*")." (emphasis in original)
[641] CS, para. 11, citing Brattle Memorandum, para. 12.
[642] Ibid., n. 9: "Exhibit C-0225, Ministry of Industry Tourism and Commerce Report on draft RD 661/2007, 21 March 2007, p. 16, s. 3.2.2, which refers to a "project IRR". This is consistent with the PER 2005-2010, which refers to "*project … profitability*" (Exhibit C-0043, PER 2005-2010, August 2005, p. 274)." (emphasis in original)
[643] CS, para. 11 (emphasis in original).
[644] BDO Response to Tribunal Requests, para. 18.
[645] CS, para. 21.

> conditions depend therefore on both the decisions taken by the promoter regarding his own funds and of the agreements reached with other partners or with banking entities.
> 31. These aspects are unrelated to regulation in renewable energies and it is not possible to incorporate them into the parameters of remuneration, since there are infinite possibilities in the financing of plants that could not be reflected in the parameters of remuneration: the percentages of financed capital are different in each plant, since each partner may have different financing conditions, and such conditions may vary over time or may be altered by a change in the distribution of partners in a particular plant or sale, etc."[646]

530. The Claimants calculate all IRRs on a pre-tax basis in order to make them comparable with the 7.398% pre-tax target used by the regulator in the new regime.[647]

531. The Claimants make a distinction between holding and exit IRRs. They consider the former more reliable since it is less affected by macroeconomic effects and find it consistent with both regulator's approach and Tribunal's request for additional information.[648]

532. The Claimants' experts assert that the useful life of the plants is 25 years for the Wind Parks and 40 years for the CSP Plants (except for the storage components).[649] The Claimants particularly rely on RD 661/2007 that provides a tariff rate for 25 years which implies that Respondent considered itself that the useful life was at least 25 years.[650] The Claimants also contend the Respondent's assertion that the shorter useful lives (20 to 25 years) set out in accounts of the Project Companies should be used, since those correspond to accounting standards used for depreciation purposes which should not determine whether they are reasonable assumptions for calculating the fair market value of the Claimants' investments under the ECT.[651]

533. Concerning the recent disposal of Andasol for EUR 173 million (with EUR 77.7 million for the Claimants which owned 45% of the shares), the Claimants consider that this amount is

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[646] Second Witness Statement of Mr Carlos Montoya, 3 February 2017, paras. 30-31.
[647] CS, paras. 19-20.
[648] CS, paras. 16-18.
[649] Expert Report of Dr Mancini Report, 16 December 2016.
[650] RR, paras. 728-730.
[651] CR, paras. 650-653.

consistent with their valuation made in 2014: 67 million. Brattle explains the 10 million differences by:

> "(i) the passage of time, (ii) the repayment of debt, (iii) a reduction in the Spanish corporate tax rate and (iv) changes in macroeconomic variables, including a drop in interest rates between June 2014 and July 2017, which prompts a reduction in the relevant discount rate. These changes have the net effect of increasing the value of future cash flows and the equity value of the Andasol Plants in July 2017."[652]

534. The Claimants' experts also point out the difference between the original regime that allows investors to earn more than the reasonable return if they operate efficiently and the new regime which:

> "has adopted new, stricter cost targets that consider reductions in costs that investors achieved only after the establishment of the Original Regulatory Regime and before the introduction of the New Regulatory Regime. In effect, the New Regulatory Regime has used hindsight to shift the target. The result is to appropriate the benefits that existing investors previously earned by beating the initial target of the Original Regulatory Regime."[653]

535. The Claimants state that they invested a large amount of money in order to have efficient plants since the previous regime allocated a remuneration which was function on the reality of the production. They claim that given these important investments the new remuneration scheme deprives them from receiving a reasonable return since it is not based on the reality and the efficiency of the production and therefore does not promote anymore the efficient installations.[654]

536. The Claimants further assert that the Respondent's target rates of return are set by reference to "standard facilities", with defined costs and production parameters. The differences

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[652] CS, para. 33.
[653] Brattle Rebuttal Regulatory Report, para. 18.
[654] CPHB, para. 143.

between these targets and the IRR in reality "result from the differences in costs and production between the Claimants' plants and the relevant standard installation."[655]

ii. The Respondent's Position

537. The Respondent considers that the rate of return has always been per project.[656] It asserts that the regulatory framework ensures a reasonable project IRR since its very purpose is to make renewables projects competitive compared to conventional producers.[657] The Respondent denies the relevance of shareholders IRRs but considers that they are, in this case, higher than project IRRs.[658]

538. Considering the sale of Andasol, the Respondent asserts that, if the previous investors had kept the project, their shareholders' IRR would have been 10% post-tax.[659] The Respondent recognizes that the Claimants' return has been much lower because they paid an important premium when they acquired Andasol. The Respondent's position is that the weight of this decision must be borne only by Claimants and cannot in any way be attributed to the Respondent.[660]

539. The Respondent considers that the distinction between holding and exit IRRs is not relevant for the resolution of the dispute and does not strip out macroeconomic effects as the Claimants assert. Furthermore, according to the Respondent, both calculations lead to the same result.[661]

540. The Respondent argues that Claimants' valuation is erroneous because it artificially extends the hypothetical financial impact of the measures. In its calculations, Brattle assumed a useful life of 40 years for solar thermal plants and 25 years for wind farms, in circumstances that

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[655] CS, para. 26.
[656] RPHB, para. 171.
[657] RRS, para. 6.
[658] RRR, para. 6. See infra para. 560.
[659] RRR, paras. 11-12.
[660] RRS, paras. 11-12
[661] RRS, para. 14.

their useful life is at most 25 and 20 years, respectively. The Respondent notes that such shorter useful life was declared in the companies' official accounting, was envisioned in the banking files for financing the projects of the solar thermal plants, was estimated in the operation and maintenance contracts for the installations of the wind farms, and in the project report on RD 661/2007 and PER 2005-2010. In the view of the Respondent taking into account a useful life comprised between 20 and 25 years is further supported by reports by engineering experts on solar thermal plants.[662]

541. The Respondent also contends that Brattle's calculations failed to consider the costs of necessary renovations for the solar thermal plants; that their storage system will probably become inoperative in 25 years, reducing the number of hours of operation; and that a substantial change in the components of the plant would cause under RD 661/2007 a "new date of entry into service" making inapplicable the subsidy of RD 661/2007.[663] The Respondent clarifies that for the purposes of simplifying comparisons with Brattle's DCF calculation, BDO's alternative valuation did not consider any of these factors related to the useful life of the technical components of solar thermal plants, but still led to a positive financial impact. Had they been considered; the positive impact would be even greater.[664]

542. The Respondent denies that the profitability under the previous regime was calculated taking into account the particular costs of each investor:

> "The premiums established in RD 661/2007 were set with the objective of providing a typical facility with a return of approximately 7%, in accordance with the standards set in PER 2005-2010: the CAPEX of a typical facility, the OPEX of a typical facility, equivalent operating hours, unit costs, execution periods, useful life and sales prices of the final energy unit.
> […]

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[662] RR, paras. 1108-1116.
[663] RR, paras. 1117-1120.
[664] RR, paras. 1126, 1127, 1131.

> This methodology was not a novelty introduced in PER 2005-2010. In December 1999, PFER 2000-2010[665] was approved in execution of LSE 54/1997. PFER 2000-2010 set the implementation objectives for renewable energies to a yearly upwards trend of electrical demand equal to 2%[666]. Like its successor (PER 2005-2010), the PFER 2000-2010 followed a methodology consisting in defining, within the scope of each technology and according to the state of the art at the time, different *typical facilities*. Once said typical facilities have been determined, different *standards* shall be established for each one (investment costs, operating costs, useful life of the plant, primed production hours, market price) which would allow said plant to reach, within a certain amount of time (useful life) a *reasonable return* according to the cost of money in the capital market[667]. The profitability of *typical projects* was estimated at '*7 % with company resources, before financing and after taxes*'[668].”[669].

543. The Respondent denies that the new regime would discriminate against efficient and expensive installations like the Claimants' ones since the Claimants can still reduce their operation costs in order to be more efficient and obtain a higher remuneration.[670]

b. *The Tribunal's Analysis*

544. First of all, the Tribunal has to decide if the reasonable return protected by the Tribunal is the project IRR or the Shareholders IRR.

545. There can be no doubt that the ECT protects shareholder interests. As such, it ensures to them the right to a fair and equitable treatment, including the respect of their legitimate expectations. As the Tribunal already explained, the only legitimate expectations the Claimants had in this case was to obtain the reasonable return that the Respondent was committed to. It is therefore necessary to look precisely at the Respondent's commitment. Both the Claimants and the Respondent agree that the reasonable return targeted by the Spanish law is a project IRR. The Tribunal see no reason to decide otherwise.

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[665] RR, para. 239, referring to PFER 2000-2010 (R-134).
[666] RR, n. 145: “Ibid, page 31”.
[667] RR, n. 146: “Ibid, pages 200-218”.
[668] RR, n. 147: “Ibid, page 182”.
[669] RR, paras. 236-239 (emphasis in original).
[670] RPHB, paras. 184-192.

546. Consequently, the premium paid by the Claimants to acquire Andasol has no impact on the calculation of the reasonable return provided by the Respondent to Andasol as a project. The Spanish energy regulatory framework has been conceived in order to have a general scope and to apply to projects of all kinds. It was not the objective of the regulator to take into account the particularities of each installation and of the various modes of financing. The Tribunal considers that there is no objection in principle to this approach whether it concerns the definition of standard financing costs or operating costs.

547. However, the Tribunal agrees with the *Blusun* tribunal that regulatory evolutions can be modified by the regulator on the condition that it is done:

> "in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime."[671]

In assessing the reasonableness of the return earned by the Claimants, the Tribunal will therefore take into consideration the actual IRR that their projects have received and not only the target fixed by the Respondent.

548. The Tribunal agrees with the Respondent that the distinction made between the exit IRR and the holding IRR does not have a major impact on the calculation. As the IRR determined to be applicable in this case by the Tribunal is the project IRR,[672] it is assumed that the profitability will be calculated during the whole life of the investment, that is the lifetime of the plant.

549. Consequently, the lifetime of the plants has a major impact on these calculations. Future cash flows are not infinite and are limited in time by this lifetime. The Tribunal has paid due attention to counsel's presentations and experts' reports and to the decisions of other tribunals in similar cases. The tribunal in the *Charanne* case considered that the lifetime of the plants

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[671] Blusun (RL-117), para. 372.
[672] See supra para. 545.

would be in average, 27.5 years. [673] The *Eiser* tribunal, before which the same experts intervened, found Dr Servert's evidences much more reliable than Dr Mancini's opinion and retained a service life of 25 years.[674] The Tribunal agrees that the useful lifetime of CSP Plants should be considered to be 25 years, which corresponds to the Claimants' assessment in several occasions prior to the referral of the case to the Tribunal.[675]

550. Concerning the disposal of Andasol by the Claimants, the Tribunal considers it as a factual element which can be useful to assess the market value of the investment and the reasonableness of the return.[676] Nevertheless, this event does not have a direct impact on the calculation of the IRR since it is a project IRR calculated for the whole life of the plants; in such a case, the sale of the investment is irrelevant.

### ***2. Is the Claimants' return under the new regime reasonable with reference to the cost of money on the capital market?***

#### a. *The Parties' Positions*

##### i. The Claimants' Position

551. The Claimants consider that the reasonable return is a target used by Spain to set the FIT.[677] Responding to the Tribunal's request for additional information, the Claimants explain that regulator's target dropped from a pre-tax 12.2% (Andasol), 11.6% (Arenales), 8% (Wind), to 7.398% for all.[678] To calculate these targets on the previous regime, the Claimants rely on the internal report of the Ministry of Industry Tourism and Commerce on RD 661/2007 which envisaged a reasonable return post-tax around 9.5% for CSP and 7% for wind farms.[679]

[673] Charanne (RL-69), para. 527.
[674] Eiser (CL-242), paras. 451-452.
[675] See supra para. 540.
[676] See infra para. 573.
[677] CR, para. 228.
[678] CS, paras. 23-24.
[679] CS, para. 19.

552. According to Brattle, the pre-tax IRRs of the projects under the new regime are respectively: 7.4% (Andasol 1), 6.9% (Andasol 2), 6.7% (Arenales), 13.6% (San Lorenzo C), 13.2% (San Lorenzo D), 13% (Esquilvent).[680]

553. Contrary to RD 661/2007, the new regime fixes the reasonable return *in abstracto*, without taking into consideration the specific investment and operating costs. It has the effect of reducing the reasonable return from 9.5% on average after-tax for CSP and 7% for wind to 5.8% and 6.5% after-tax respectively.[681]

554. The Claimants reject the Respondent's calculation which claims that they made a 10% equity IRR after the sale of Andasol. Their own calculation – taking into consideration their paid premium – leads to a 2.7% equity IRR.[682]

555. The Claimants assert that the Respondent's justification that it had to amend the scheme to keep the return reasonable considering the cost of money on capital market is not credible. They argue that (1) the reasonable return is not a dynamic concept; (2) the return under the previous regime was not considered as unreasonable by the Respondent in 2007; and (3) the cost of money on capital market has not changed between 2007 and 2013.[683]

556. Brattle challenges BDO's calculation of the "cost of money". Their own calculation of the weighted average cost of capital (WACC) is 8.148% post-tax.[684] To calculate this cost, they based themselves on a risk-free rate of 4.398% which corresponds to the average yield on ten-year Spanish government bonds.[685] They add a market risk premium of 5.5%, an unleveraged beta of 0.5 and a 1% premium that represents what the Respondent used to attract foreign investors. According to them, the WACC post-tax would be 8.148% and the pre-tax 11.640%, considering a 30% corporate tax rate.

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680 Brattle Memorandum, Table 3.
681 CPHB, para. 143.
682 BDO Response to Tribunal Requests, Table 4; CRR, paras. 23-24.
683 CPHB, para. 16.
684 Brattle Rebuttal Regulatory Report, para. 218.
685 Ibid, para. 213.

557. The Claimants' experts challenge the Respondent's claim that there was a higher regulatory risk under the previous regime since they consider that the continuous changes in the regime have increased the risk.[686]

558. The Claimants rely on their experts who explain that considering that Arenales production is higher than the Andasol Plants, the shift from a production-based FIT (EUR per MWh) to a capacity-based incentive payment (EUR per MW) had an additional adverse impact on this plant.[687] The Claimants disagree with the Respondent's experts that claim that Arenales has an installed capacity of more than 50MW.[688]

559. The Claimants' experts have performed the disaggregation of their valuation, with five heads of claim corresponding to the five disputed measures: (a) the 7% Levy; (b) removal of the Pool + Premium Option; (c) change of inflation indexation; (d) removal of premiums for production with natural gas; and (e) ultimate switch to the New Regulatory Regime. Considering that all these measures are interlinked, they calculated various scenarios represented in the following table:[689]

[686] Brattle Rebuttal Regulatory Report, paras. 165-171.
[687] CRR, para. 1(b); see also Brattle Memorandum, para. 25.
[688] CR, paras. 795-796.
[689] CS, paras. 34-36.

Table 4: Liability Permutations – CSP (40 year lifetime)

| Liability Combination | 7% Levy | Removal of Premium FIT | Inflation Index Change | Removal of Production with Gas | Switch to New Regulatory Regime | Damages at June 2014 € mln | Value Reduction borne by RREEF € mln |
|---|---|---|---|---|---|---|---|
| #1 | Breach | Breach | Breach | Breach | Breach | -238 | 0 |
| #2 | Breach | Breach | Breach | No until repeal | Breach | -236 | -3 |
| #3 | Breach | Breach | Breach | No breach | Breach | -176 | -62 |
| #4 | Breach | Breach | No breach | Breach | Breach | -217 | -21 |
| #5 | Breach | Breach | No breach | No until repeal | Breach | -215 | -23 |
| #6 | Breach | Breach | No breach | No breach | Breach | -161 | -78 |
| #7 | Breach | No until repeal | Breach | Breach | Breach | -237 | -1 |
| #8 | Breach | No until repeal | Breach | No until repeal | Breach | -235 | -3 |
| #9 | Breach | No until repeal | Breach | No breach | Breach | -175 | -63 |
| #10 | Breach | No until repeal | No breach | Breach | Breach | -216 | -22 |
| #11 | Breach | No until repeal | No breach | No until repeal | Breach | -214 | -24 |
| #12 | Breach | No until repeal | No breach | No breach | Breach | -160 | -78 |
| #13 | Breach | No breach | Breach | Breach | Breach | -158 | -80 |
| #14 | Breach | No breach | Breach | No until repeal | Breach | -156 | -82 |
| #15 | Breach | No breach | Breach | No breach | Breach | -116 | -122 |
| #16 | Breach | No breach | No breach | Breach | Breach | -140 | -98 |
| #17 | Breach | No breach | No breach | No until repeal | Breach | -138 | -101 |
| #18 | Breach | No breach | No breach | No breach | Breach | -102 | -137 |
| #19 | No breach | Breach | Breach | Breach | Breach | -186 | -52 |
| #20 | No breach | Breach | Breach | No until repeal | Breach | -184 | -55 |
| #21 | No breach | Breach | Breach | No breach | Breach | -136 | -102 |
| #22 | No breach | Breach | No breach | Breach | Breach | -169 | -70 |
| #23 | No breach | Breach | No breach | No until repeal | Breach | -166 | -72 |
| #24 | No breach | Breach | No breach | No breach | Breach | -123 | -115 |
| #25 | No breach | No until repeal | Breach | Breach | Breach | -185 | -53 |
| #26 | No breach | No until repeal | Breach | No until repeal | Breach | -183 | -56 |
| #27 | No breach | No until repeal | Breach | No breach | Breach | -136 | -103 |
| #28 | No breach | No until repeal | No breach | Breach | Breach | -168 | -71 |
| #29 | No breach | No until repeal | No breach | No until repeal | Breach | -166 | -73 |
| #30 | No breach | No until repeal | No breach | No breach | Breach | -123 | -116 |
| #31 | No breach | No breach | Breach | Breach | Breach | -114 | -124 |
| #32 | No breach | No breach | Breach | No until repeal | Breach | -112 | -126 |
| #33 | No breach | No breach | Breach | No breach | Breach | -82 | -156 |
| #34 | No breach | No breach | No breach | Breach | Breach | -99 | -140 |
| #35 | No breach | No breach | No breach | No until repeal | Breach | -97 | -142 |
| #36 | No breach | No breach | No breach | No breach | Breach | -68 | -170 |

Notes and sources:
Tables M - Rebuttal Financial Model CSP_Damages Breakout.
"Breach" Indicates that the Disputed Measure **is a breach.**
"No Breach" Indicates that the permanent implementation of the Disputed Measure **is not a breach.**
"No until repeal" Indicates that the implementation of the Disputed Measure before its repeal in June 2013 **is not a breach,** but a permanent implementation **is a breach**.
The value reduction borne by RREEF is calculated as the difference between the damages calculated in the scenario, and damages under Liability Combination #1.

### ii. The Respondent's Position

560. Answering the Tribunal's request for additional information, the Respondent states that the actual pre-tax project IRRs are 8.2% (Andasol 1), 7.5% (Andasol 2), 5.7% (Arenales), 13.1% (San Lorenzo C), 12.6% (San Lorenzo D), 12.9% (Esquilvent).[690] It considers that these returns are consistent with the target 7.398% and that therefore the Claimants have suffered

[690] BDO Response to Tribunal Requests, Table 1.

no damage.[691] Furthermore, the Respondent claims that the actual equity IRRs that the investors are obtaining are even higher, between 7.4% and 51.8%[692].

561. The Respondent disagrees with the Claimants' appreciation of the targets under the previous regime. According to the Respondent, which relies on the REPs,[693] the regulator targets were a 7% post-tax and not a 9.5% post-tax for the CSP plants.[694] The Respondent questions as well the rates used by the Claimants to convert the IRRs from post-tax to pre-tax, considering that they imagine taxes that are never paid by plants thanks to a large number of tax deductions.[695]

562. The Respondent considers that the reasonable return is dynamic: "the cost of money on the capital market is not simply a 'programme criterion'. Far from it, it is a comparison criterion imposed by law that allows the regulator to determine whether profitability at a given time is reasonable or not."[696]

563. The Respondent considers that the projected IRR under the new regime is reasonable, since it covers standard investment and operation costs and allows a return higher than the cost of money.[697] The Respondent's experts calculated this cost of money by reference to the WACC for the renewable sector in Spain as of June 2014.[698] To calculate the WACC, BDO uses the average return of Germany's ten-year bonds of the month of June 2014 as a risk-free rate, then adds a country risk premium of 1.41%, a market risk premium of 5.5% and a levered beta of 0.84 (calculated on the basis of an unleveraged beta of 0.41[699]). The result is a 7.43% post-tax shareholders' cost. Considering that the cost of the debt is 3.21% (calculated with

[691] RRR, para. 5.
[692] Ibid., para. 6.
[693] PFER 2000-2010 (R-134), p. 274; PER 2005-2010 (R-135), pp. 272-273.
[694] RRS, para. 16(a).
[695] Ibid., para. 16(b).
[696] RCM, para. 168.
[697] RPHB, para. 81.
[698] BDO First Report, paras. 197-199.
[699] In its First Report, BDO refers to an unleveraged beta of 0.4 while in its Working Papers, Table G, it uses an unleveraged beta of 0.41. The Tribunal considers the data in the Working Papers as more accurate and retains this one.

the average return of the 10-year Euribor swap plus a debt spread of 3.01% and a tax rates of 30%) and that the financial structure of the plants is 60% equity / 40% debt, BDO concludes that the WACC post-tax was 4.90% in June 2014.[700] The Respondent's experts did the same calculations for each year from 1998 to 2038.[701]

564. The Respondent's experts explain that the "reasonable return is closely linked to the risk of an investment."[702] BDO considers that under the but-for scenario, the revenue would be subject to greater risk and greater uncertainty than in the current scenario, where, the Respondent argues, there is a stable, more predictable framework with less risk.[703] The Respondent considers that, in view of the important deficit of the previous regime, there was a risk of collapse which has to be taken into consideration in the assessment of the reasonableness of the Claimants' return.

565. The Respondent has made the breakdown of damages requested by the Tribunal and draws the following conclusions from those new calculations:

> "i. Law 15/2012 (gas+tax) amounts for more than half the damages calculated by Brattle.
>
> ii. RDL 9/2013 and subsequent disputed measures amount to no damage whatsoever (it improves the cash-flows and the value of the investment).
>
> iii. Particularly, if Tribunal finds that its jurisdiction does not cover the 7% tax, damages must be reduced between € 53M and € 67M, depending on the assumption on useful life."[704]

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[700] Ibid., paras. 199-202.
[701] BDO Working Papers, Table G.
[702] BDO First Report, para. 195.
[703] RCM, paras. 1051-1055; RR, para. 60.
[704] RRR, para. 21.

566. These calculations are represented in the following table:

Table 8: Individual and aggregate impacts of each of the Disputed Measures and final damages considering lawful different measures (€M)

| Law/RDL/RD (A) | Specific Measure (B) | Separate Damage (C) | Resulting Damage (D) |
|---|---|---|---|
| **Base Case** | | | **(31)** |
| Law 15/2012 | Tax on Production | (29) | (2) |
| | Elimination of Natural Gas Production | (28) | (3) |
| | **Aggregate** | **(54)** | **--** |
| RDL 2/2013 | Elimination of pool option | (47) | -- |
| | Change in CPI index | (21) | (10) |
| | **Aggregate** | **(72)** | -- |
| Law 15/2012 and RDL 2/2013 | **Aggregate** | **(116)** | **--** |
| RDL 9/2013; Law 24/2013; RD 413/2013 and OM 1045/2014 | Specific Remuneration: pool+subsidy (Rinv+Ro) | 85[18] | -- |
| All Disputed Measures | **Aggregate** | **(31)** | **--** |

Source: Updated BDO financial models

b. *The Tribunal's Analysis*

567. It is an undisputed fact between the Parties that the actual return targeted by the new regime is a 7.398% pre-tax project IRR. However, they do not agree on the targeted return under the previous regime. The Claimants consider that the pre-tax project IRR under the previous regime was between 12% and 8% and the Respondent recognizes at least a 7% post-tax IRR. The Tribunal does not find it necessary to determine the precise IRR under the previous regime. It must only be noted that, indisputably, the IRR under the new regime is lower than

under the previous one. This does not give any indication on the reasonableness of the return under the new regime. As the Tribunal already stressed, the Respondent has the possibility to modify this return as long as it remains reasonable. The Tribunal then considers that this return is not fixed and may evolve, depending on the cost of money in the capital market. In other words: (1) what could have been considered as reasonable in 2007 might not be reasonable anymore in 2012 or 2014; and (2) “reasonable” is not an absolute notion and a reasonable return does not correspond, even at a given date to a fix number, but rather to a range of possible numbers.

568. As the Tribunal considers that the reality of the actual IRR must be assessed, it is in order to look at the numbers put forward by both Parties. The following table represents their calculation of the actual IRR under the new regime:

| | **Claimants** | **Respondent** |
|---|---|---|
| *Andasol I* | 7.4% | 8.2% |
| *Andasol II* | 6.9% | 7.5% |
| *Arenales Solar* | 6.7% | 5.7% |
| ***CSP Assets*** | **7.0**% | **7.2**% |
| *San Lorenzo C* | 13.6% | 13.1% |
| *San Lorenzo D* | 13.2% | 12.6% |
| *Esquilvent* | 13.0% | 12.9% |
| ***Wind Assets*** | **13.1%** | **13.0%** |

569. As shown in this table, the Parties agree on the order of magnitude of the pre-tax IRR under the new regime. For the wind assets, the return is around 13%, well above the 7.398% target provided by the regulator as well as well above the cost of money in the capital market[705]. The Tribunal is conscious that these figures are pre-tax figures; however, whatever the impact of the taxes on the returns on the Claimants’ investment, these returns are obviously reasonable when referenced to the cost of money in the capital market. Therefore, concerning

[705] For the calculation of said cost (5.86%), see infra, para. 586.

the Wind Assets, the Respondent has not breached its obligation to insure a reasonable return to the Claimants.

570. The Tribunal will focus now its analysis on CSP assets for which calculations of both Parties are also similar. According to Brattle, the difference between the respective experts of the Parties concerning Andasol and Arenales is explained by the use of higher capital costs and production levels.[706]

571. To assess the reasonability of these returns, the Tribunal has to calculate post-tax figures. The Tribunal considers that taxes are costs impacting the return of the Claimants' investments. Therefore, taxes must be taken into consideration for the global assessment of the reasonable return to which the Claimants are entitled and the IRR should be evaluated post-tax. This applies in particular to the 7% levy. The Tribunal recognizes that Article 21(1) of the ECT is a carve-out from the Tribunal's jurisdiction and, therefore, it does not take a decision over the legality of the levy. But this does not change the fact that the levy has an impact on the return. In this respect, the Tribunal recalls that it has decided that the 7% levy has to be taken into account in this calculation.[707]

572. The Parties disagree on the targeted post-tax project under the new regime. The Claimants consider that 7.398% IRR pre-tax is equivalent to an average 5.8% IRR post-tax for CSP plants; for its part, the Respondent denies these rates but without giving its own numbers. More precisely and still according to Claimants, the tax rates are 18.3% for Arenales and 21.8% for Andasol I and II, depending on the particular profile of depreciation of each asset. Absent any indication by any of the Parties concerning the origin and nature of the applicable taxes, the Tribunal will take for granted that these rates are accurate and include the 7% levy. The table below reflects the post-tax IRRs based on the figures given by the Parties.

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[706] Brattle Response to BDO, para. 8.
[707] See supra para. 191.

| | **Claimants** | | **Respondent** | |
|---|---|---|---|---|
| | Pre-tax | Post-tax | Pre-tax | Post-tax |
| *Andasol I* | 7.4% | 5.79% | 8.2% | 6.41% |
| *Andasol II* | 6.9% | 5.40% | 7.5% | 5.87% |
| *Arenales Solar* | 6.7% | 5.47% | 5.7% | 4.66% |
| ***CSP Assets*** | **7.0**% | 5.55% | **7.2**% | 5.65% |

573. Concerning the shareholders' IRRs after the disposal of Andasol, the Tribunal notes that the numbers are not disputed by the Parties. They seem to agree that the greenfield investors made a 10% IRR and that the Claimants' made a return much lower considering the premium they paid to acquire Andasol. The Claimants evaluate this IRR at 2.7%. These data can inform the Tribunal on the reality of the return for Claimants but do not have a direct impact on the assessment of the reasonableness of the return provided by the Respondent to the plants. Indeed, as the Tribunal has already explained,[708] the Respondent's legal framework guarantees a project reasonable return and not a shareholders' reasonable return.

574. According to Act 54/1997, the reasonable return should be assessed "with reference to the cost of money in the capital market". The Tribunal understands this reference to the cost of money in the capital market as a guideline to assess the reasonableness of the return generated by the plants. Under this cost of money, a project is likely to be seen as being not profitable, and no investor would likely invest in it. A reasonable return has therefore to be superior to this cost of money. To calculate this cost of money, both Parties calculated the WACC, which "reflects the cost of raising funds from shareholders and lenders for a typical company operating in a given industry."[709]

575. The cost of money should be calculated at a particular date, taking into consideration the economic factors at this date. Considering that this Tribunal calculates a WACC for the sole

[708] See supra para. 545.
[709] Total S.A. v. Argentine Republic (ICSID Case No. ARB/04/1), Award, 27 November 2013, para. 75.

purpose of comparing it to the remuneration defined in RDL 9/2013, the date should be the same that the one retained in the law: June 2013.

576. Both Parties have calculated a post-tax WACC for renewable energy companies. They differ significantly in their results. The Respondent calculates a WACC of 4.9% while the Claimants' calculation comes to about 8.148%. This difference lies mainly in the fact that the Claimants have only calculated a cost of equity, using Capital Asset Pricing Model (CAPM), while the Respondent calculated both a cost of equity and a cost of debts, taking into consideration the common financial structure of the projects.

577. The Tribunal agrees with the Respondent approach. Considering that the reasonable return provided by the Respondent is allocated to the project, it seems logical to take into consideration the financial structure of the whole project. The return obtained by the projects will be used to remunerate both equity and debt. The Tribunal follows the Respondent calculation on this point and accepts the following financial structure: debt 60% / equity 40%. Consequently, it will be necessary to leverage the beta, that is the "company's systematic risk",[710] in the calculation of the cost of equity, as does the Respondent.

578. The remaining difference comes from the fact that the Claimants use the average yield on ten-year Spanish government bonds as the risk-free rate (4.98%) while the Respondent uses the ten-year German government bonds (1.38%) as a risk-free rate to which it adds a "country risk premium" of 1.41%. Furthermore, the Claimants add a 1% premium since it represents what the Government agreed to add in 2007 in order to attract more investments.

579. The Tribunal recalls that it is common to use a country risk premium to calculate the CAPM. As the tribunal in the *Tidewater v. Venezuela* case put it:

> "Rather the country risk premium quantifies the general risks, including political risks, of doing business in the particular country, as they applied on that date and as they might then reasonably have been expected to affect

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[710] EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic (ICSID Case No. ARB/03/23), Award, 11 June 2012 (CL-220), para. 613.

> the prospects, and thus the value to be ascribed to the likely cash flow of the business going forward.
>
> 187. The inclusion of a country risk premium is a very common feature of tribunals' calculations of compensation, since, as one tribunal observed 'the fundamental issue of country risk [is] obvious to the least sophisticated businessman.'"[711]

580. Concerning an investment in Spain, the Tribunal is more convinced by the Claimants approach to use the average yield on ten-year Spanish government bonds as the relevant free-risk rate. All the more so that RDL 9/2013 itself provides that "[s]uch reasonable return will be based on, before taxes, the average returns in the secondary market of the State's ten-year bonds plus the adequate differential."[712]

581. The difference between the cost of money and the reasonable return has to be evaluated according to the risk for the investor. The higher the risk, the higher the return should be to be considered "reasonable".

582. There is a risk that the regulatory framework may change and this is part of the risk that the investors should assume. In this respect, the Tribunal cannot concur with the analysis made by the *Novenergia* tribunal, which considered that:

> "it cannot be correct to assume a higher risk in a scenario where the regulatory framework of the RE sector would have remained stable and RD 661/2007 would have continued to remain in force as originally implemented. The facts of the case show that under the Special Regime, the Respondent managed to attract numerous investors to the tune of billions of euros, indicating that the risk was considered low. Conversely, under the Specific Regime, it is not reasonable to conclude that the risk is lower, especially considering that the current remuneration system is subject to periodic reviews and the turmoil that they have caused."[713]

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[711] Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5), Award, 13 March 2015 (CL-232), para. 186-187, citing Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara, UNCITRAL, Award, 4 May 1999.
[712] RDL 9/2013 (C-31), p. 26. See also RDL 9/2013 (R-37), p. 14.
[713] Novenergia (CL-243), para. 832.

583. First of all, a low risk itself has never attracted any investor. The risk has a meaning only regarding the potential remuneration. If the investors were attracted by the Respondent previous regime, it is because they have considered the remuneration attractive enough, considering the risk. Furthermore, the *Novenergia* Tribunal seems to confuse the risk which is a potential fact and the realisation of this risk itself. If the previous regime would have remained stable, the risk would not be realised, but it does not make it higher or lower. The fact is that the risk happened, the regime changed.

584. In certain respects, the risk is lower under the new regime considering that the Respondent ensured a better sustainability of the whole system. It is only by considering that the Respondent could not lawfully modify the previous regime that the risk under the previous regime could be considered lower than under the new regime, but the Tribunal already explained this assumption is wrong.[714] Moreover, a return of 7.398 % pre-tax is guaranteed under the new regime which provides for strict time limits for its revision,[715] while the previous regime gave no guarantee of fixed return on investment.

585. Considering the calculation of the market and systemic risks, both Parties agree that the market risk premium is 5.5%[716] but differ on the beta to apply. Claimants retains a 0.5% beta while Respondent chose a 0.41% beta. This difference results from the Parties' divergence in risk assessment under the new regime. The Tribunal considers that both demonstrations are equally sustainable and therefore retains a 0.455% beta.

586. In summary, the WACC should be calculated in June 2013, taking into consideration the Spanish 10 years bond as the risk-free rate that is 4.398%, a market risk premium of 5.5%, a beta of 0.455%, a ratio debt/equity of 60/40 and a cost of debt of 3.43% in 2013 (as calculated by the Respondent and taking into consideration that both Parties use the 30% corporate tax rates[717]). The WACC calculated by the Tribunal on this basis is 5.86%.

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[714] See supra para. 398.
[715] RDL 9/2013 (C-31), p. 26: "The parameters of the remuneration regime can be revised every six years".
[716] See supra paras. 556, 563 (referring to Dimson, Elroy and Marsh, Paul and Staunton, Mike, "Equity Premia Around the World", 7 October 2011 (BQR-7)).
[717] See supra paras. 556, 563.

587. The Tribunal considers that a return would not be reasonable if the project IRR is lower than the WACC thus calculated. Moreover, the Tribunal also considers that, in the particular circumstances of the case, the Claimants had legitimate expectations that the return on their investment would be above the mere level of the WACC since the Respondent attracted investments in the renewable energy sector by raising hope of above-average profits.

588. According to Brattle, the Respondent's regulator seems to have retained a 1% supplementary "premium to induce additional investment"[718]. This figure has not been challenged by the Respondent, which considers that nothing should be added, and represents, in the view of the Tribunal, a fair addition to the WACC calculated as indicated above in order to assess whether the actual return obtained by the Claimants is reasonable.

589. Consequently, the Tribunal considers that the reasonable return must not be below 6.86% post-tax. In this respect, the Tribunal notes that according to the calculations of both Parties,[719] the IRR of each CSP plant is lower than 6.86%. The actual return earned by Claimants for their CSP plants thus does not fulfil the legitimate expectation of the Claimants in the special circumstances of the case. Consequently, the Respondent must be held responsible for a breach of its obligation to insure a reasonable return to the Claimants investment and it must pay to them a compensation amounting to the difference between their actual return and the reasonable return as calculated above by the Tribunal: 6.86%.

590. As explained above,[720] since the retroactive application of the new regime is duly taken into account for assessing the reasonableness of the return, there is no reason to compensate specifically for the retroactivity imposed by the Respondent since it is found in breach of its obligation to insure a reasonable return of the Claimants. Otherwise: this would result in compensating twice for the same damage.

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[718] See Brattle Rebuttal Regulatory Report, Table 3.
[719] Summarized in the table supra para. 572.
[720] See supra para. 483.

591. However, a separate compensation for the breach of the non-retroactivity principle is due with respect to the wind plants for which the Tribunal has already accepted that the new regime ensures a reasonable return of the Claimants' investment.[721]

## VIII. THE TRIBUNAL'S DECISION

592. The Tribunal is unable to make the calculations necessary to determine both the actual IRR per project and the partially retroactive application of the Respondent's measures on the basis of the data provided by the Parties. The Respondent stands by its position that it has fully complied with its obligations and cannot be held responsible for any breach and, therefore, that no compensation is due. For their part, the Claimants have offered rather detailed indication on the calculation of the compensation allegedly due to them as a consequence of the Respondent's responsibility, but they base themselves on premises partly different from those adopted by the Tribunal.

593. In such conditions, to use the pictorial words reported in a previous ICSID tribunal interim decision, given the present state of the evidence the Tribunal should not "take as its task picking and choosing between the experts on each issue one by one, cafeteria-style" and, exactly like that tribunal, the present Tribunal considers that it "does not possess the requisite technical expertise to decide between experts' disagreements over highly technical issues – it is equally uncomfortable with simply picking one set of experts' conclusions over the other."[722]

594. In the opinion of this Tribunal, the similarities with the case of *Perenco Ecuador* go further. Like the tribunal in that case, this Tribunal:

> "well understands that the onus of proof is on a party who makes an allegation and it could be said that because of the doubt in which the Tribunal finds itself Ecuador [in the present case Spain] could be said to have failed in tipping the burden in its favour. However, as the Tribunal is satisfied that there has been some damage for which it seems likely that

[721] See supra para. 569.
[722] Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case No. ARB/08/6), Interim Decision on the Environmental Counterclaim, 11 August 2015, para. 585.

> Perenco [the Respondent in the present case] is liable, the Tribunal is not disposed to dismiss the counterclaim [the claim concerning the reasonable return] *in limine.* […]
>
> 586. Accordingly, the Tribunal has concluded that it must require an additional phase of factfinding in order to arrive at a proper and just conclusion. It is not content to issue a final determination on the extent of Perenco's [Spain's in the present case] liability on the basis of the current expert reports.
>
> 587. As already intimated, the Tribunal intends to appoint its own independent environmental expert who will be instructed to apply the Tribunal's findings set out above and work with the Tribunal and the Parties to enable the Tribunal to determine the extent of contamination in the Blocks for which compensation is owed."[723]

595. In such circumstances, a choice is open to the Tribunal: either it could appoint its own expert to enable it to determine the actual return on their investments received by the Claimants and the losses they have suffered as a result of the breach of the principle of non-retroactivity by the Respondent; or it could ask the Parties to settle their differences in these respects in view of the precise Tribunal's findings exposed above.

596. The Tribunal is satisfied that the Parties' experts are highly qualified and have a thorough knowledge of the case and that the different results obtained by them are the consequences of the different premises on which their calculations (when effected) are made. In these circumstances, the Tribunal is persuaded that, with the assistance of their respective experts, the Parties could reach an agreement on the impact of the wrongful retroactive application of the new regime concerning the wind plants belonging to the Claimants, as well as the actual return on the Claimants' investments evaluated according with the indication given above.

597. Therefore the Tribunal considers it appropriate and more economical to invite the Parties to attempt to seek agreement on the two points mentioned above – based on the findings contained in the present decision.[724] Failing agreement reached between the Parties within a period on which they are invited to agree within ten days from the notification of this

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[723] Ibid., paras. 585-587.
[724] For a comparable decision, see Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, (ICSID Case No. ARB/12/13), Decision on Liability and the Principles of Quantum, 30 December 2016, para. 907.

decision, the Tribunal will, following consultation with the Parties, fix a calendar for submissions of the Parties on the remaining data to be decided. In case at the end of the specified period – or if the Parties inform the Tribunal that they are unable to reach an agreement on these two issues any time before the expiry of this period – the Tribunal will appoint its own expert to that end.

598. On the basis of the agreement of the Parties or assisted by its own expert, the Tribunal will decide on the amount of the compensation due to the Claimants.

599. The Tribunal also reserves its decision concerning interest and tax on the one hand and the costs on the other hand.

600. For the reasons set forth above, the Tribunal decides as follows:

(1) Unanimously: The Tribunal does not have jurisdiction to decide on the 7% levy;

(2) Unanimously: The Respondent is in breach of its obligations under the ECT for the retroactive application of the new regime; this breach concerns both the Wind plants and the CSP plants belonging to the Claimants;

(3) By majority: With respect to each of the CSP Plants, the Respondent is in breach of its obligation to insure a reasonable return to the Claimants' investment insofar as this return per plant is lower than the WACC + 1% as defined by the Tribunal;

(4) By majority: All other claims and requests of the Parties are dismissed;

(5) By majority: The Parties are directed to attempt to reach an agreement on the amount of compensation to be paid by the Respondent to the Claimants in respect of its breaches of its obligations as defined in paragraphs (3) an (4) above, in accordance with the Tribunal's findings;

(6) By majority: Absent an agreement within the period specified in conformity with paragraph (7) below, the Tribunal will proceed to the nomination of an independent expert to assist it in the calculation of the final amount of damages;

(7) By majority: The Parties are directed to find an agreement within ten days following the notification of the present decision on a reasonable schedule for the

implementation of paragraph (5) above; failing an agreement on this point, the Tribunal will fix a schedule to this end;

(8) By majority: The decisions on interest, tax and costs are reserved and will be fixed in the final Award.

Professor Robert Volterra appends his partial dissenting opinion to the Decision.

[ *Signed* ]
Robert Volterra
Arbitrator

[ *Signed* ]
Pedro Nikken
Arbitrator

[ *Signed* ]
Alain Pellet
President of the Tribunal