INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

JGC HOLDINGS CORPORATION
(FORMERLY JGC CORPORATION)
Claimant

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/15/27

DECISION ON JURISDICTION, LIABILITY, AND CERTAIN ISSUES OF QUANTUM

Members of the Tribunal
Professor Hi-Taek Shin, President
Professor Dr. August Reinisch
Professor Mónica Pinto

Secretary of the Tribunal
Ms. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: May 21, 2021

Representation of the Parties

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TABLE OF CONTENTS

I. Introduction and Parties **1**

II. Procedural History **1**

III. Factual Background **21**

A. Overview 21

B. The Energy Charter Treaty 21

C. The Spanish Regulatory Framework 22

D. The Claimant's Investments 67

IV. The Parties' Relief Sought **95**

A. The Claimant's Request for Relief 95

B. The Respondent's Request for Relief 98

V. Jurisdiction **100**

A. Overview 100

B. Whether the TVPEE is a tax measure of the Respondent for the purpose of the tax carve-out pursuant to Article 21(1) of the ECT 102

(1) The Respondent's Position 102

(2) The Claimant's Position 107

(3) The Tribunal's Analysis 110

C. Wether the TVPEE is a taxation measure other than that on income or on capital which is subject to the claw-back provision of Article 21(3) of the ECT for the purpose of the MFN treatment obligation 113

(1) The Claimant's Position 113

(2) The Respondent's Position 119

(3) The Tribunal's Analysis 120

D. Conclusion on Jurisdiction 123

VI. LIABILITY **123**

A. Overview of the Disputes 123

B. Applicable Law: The ECT and the Relevance of Spanish Domestic Law and EU Law 125

C. Parties' Positions 128

(1) The Claimant's position 128

(a) Date of investment 128

(b) Essential characteristics of the Spanish regulatory framework at the time of the Claimant's investment 130

(c) Timely registration of the Solacor Plants in RAIPRE 147

(d) The Claimant's legitimate expectations 148

(e) Disputed Measures: 154

(i) Law 15/2012 and RD-L 2/2013 (RF#2) 154

(ii) RD-L 9/2013, Law 24/2013, RD 413/2014 and implementing Ministerial Orders including MO IET/1045/2014 (RF#3) 156

(f) The Claimant's rebuttal to the Respondent's tariff deficit and reasonable rate of return arguments 161

(g) The Claimant's position on the standard of protection and the Respondent's breaches of obligations under the ECT 169

(i) Stability obligation in Article 10(1) of the ECT 169

(ii) The FET standard in Article 10(1) of the ECT 170

(iii) Legitimate expectations 173

(iv) Application of the stability obligations and the FET in Article 10(1) of the ECT 178

(v) Transparency 181

(vi) Most Constant Protection and Security (MCPS) and MFN treatment 181

(vii) Non-Impairment 182

(viii) Umbrella clause 183

(ix) Alternative claim under the "Reasonable Rate of Return" theory 183

(2) The Respondent's position 184

(a) Principles and objectives of the Spanish electricity system and the hierarchy of rules 185

(b) EU Legal Order and State Aid 189

(c) The Respondent's position on specific factual issues 190

(i) Date of investment 190

(ii) Regulatory framework at the time of the Claimant's investment 191

(iii) Nature of RAIPRE 198

(iv) Alleged July 2, 2010 Agreement and RD 1614/2010 198

(v) In response to the Claimant's argument on "declaratory contract" 201

(vi) In response to the Claimant's arguments on legitimate expectations 201

(d) Disputed Measures 208

(i) The Legitimacy of the Disputed Measures 208

(ii) Measures under Law 15/2012 and RD-L 2/2013 210

(iii) Measures under RD-L 9/2013, Law 24/2013, RD 413/2014 and implementing Ministerial Orders 212

(e) The Respondent's position on its obligations under the ECT 217

(i) Object and purpose of the ECT 218

(ii) Stability obligation under the ECT 220

(iii) The FET standard under the ECT 221

(iv) Transparency 228

(v) Most Constant Protection and Security (MCPS) standard 228

(vi) Obligation not to impair the Claimant's investment by unreasonable or discriminatory measures (Non-Impairment) 228

(vii) Umbrella clause 229

(viii) In response to the Claimant's alternative claim 229

D. Tribunal's Analysis 229

(1) Standard of protection under the ECT 230

(a) Introduction 230

(b) Overview of the first two sentences of Article 10(1) of the ECT 233

(c) The duty to create stable conditions 234

(d) The duty to accord FET 237

(i) FET and legitimate expectations 237

(ii) Legitimate expectations and the State's right to regulate 242

(iii) Balancing exercise 244

(iv) Legitimate expectation and the Claimant's knowledge 246

(2) Application of the law to facts 248

(a) Date of investment 248

(b) Regulatory framework at the time of the Claimant's investment and the Claimant's legitimate expectations 250

(i) Historical evolution of the remuneration regime for CSP plants in Spain 250

(ii) The remuneration regime for CSP plants at the time of the Claimant's investment 258

(iii) Offering and Acceptance Letters 273

(iv) Registration on RAIPRE 275

(v) Arbitral Jurisprudence 276

(vi) Due diligence 284

(c) Disputed Measures 295

(i) Law 15/2012 and RD-L 2/2013 297

(ii) RD-L 9/2013, EPA 2013, RD 413/2014, MO IET/1045/2014 and subsequent measures 300

(3) Judicial Economy 314

(4) Decision on the Claimant's application for negative inference 314

(5) Decision on the Respondent's application for negative inference 315

VII. Damages 316

A. Applicable law 316

B. The Parties' positions on the framework of damage claims 318

(1) The Claimant's position 318

(2) The Respondent's position 324

(3) The Tribunal's analysis 329

C. Date of valuation 331

(1) The Claimant's position 331

(2) The Respondent's position 333

(3) The Tribunal analysis 334

D. Valuation method 336

(1) The Claimant's position 336

(2) The Respondent's position 340

(3) The Tribunal's analysis 343

E. Impact of TVPEE in damage estimation 344

(1) The Claimant's position 344

(2) The Respondent's position 346

(3) The Tribunal's analysis 347

F. Corrections to Compass Lexecon's DCF method 347

(1) Relevance of the Transaction Value 348

(2) Revenue options: FiP with 15% gas generation or FiT with 12% gas generation 353

(3) Production projections 357

(4) Lifetime (Useful life) of the Solacor Plants 359

(5) Regulatory risk adjustment 365

(6) Discount for illiquidity 368

(7) Discount for lack of control (Minority discount) 373

(8) O&M cost 378

(9) Inflation forecast 380

(10) Weighted Average Cost of Capital (WACC) v. Adjusted Present Value (APV) Approach. 382

G. Tax gross-up 383

H. Pre-award and post-award interest 385

VIII. Decisions of the Tribunal and directions to the Parties 389

TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
CER-CL1 or Compass Lexecon's First Report	Claimant's Expert Report by Compass Lexecon, dated June 29, 2016
CER-CL2 or Compass Lexecon's 2nd Report	Claimant's Second Expert Report by Compass Lexecon, dated January 31, 2018
CER-F or Fichtner's Report	Claimant's Expert Report by Fichtner GmbH & Co. KG, dated January 30, 2018
C-#	Claimant's Exhibits
Cl. Applic.	Claimant's Application for a Confidentiality Order, dated December 19, 2017
Cl. Closing	Claimant's PowerPoint presentation used in support of its Closing Statement, dated September 22, 2018
Cl. Cost – Jan. 31, 2019	Claimant's Submission on Costs, dated January 31, 2019
Cl. Cost – Feb. 22, 2019	Claimant's Comments on Respondent's Submission on Costs, dated February 22, 2019.
Cl. Cost – Mar. 1, 2019	Claimant's Reply to Respondent's Comments on Costs, dated March 1, 2019
Cl. Mem.	Claimant's Memorial on the Merits dated June 30, 2016
Cl. New Cases	Claimant's Comments to New Awards and Decisions rendered or made publicly available in Spanish ECT cases until October 10, 2019, dated October 25, 2019.
Cl. Opening	Claimant's PowerPoint presentation used in support of its Opening Statement, dated September 17, 2018
Cl. PHB	Claimant's Post-Hearing Brief, dated December 21, 2018

Cl. Rej.	Claimant's Rejoinder on Jurisdiction dated May 28, 2018
Cl. Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, dated January 31, 2018
Cl. Skeleton	Claimant's Skeleton submission dated September 11, 2018
CL-#	Claimant's Legal Authority
CLEX-#	Exhibits to Compass Lexecon's Reports
CNE	Spanish acronym for the (now defunct) National Commission for Energy (*Comisión Nacional de la Energía*)
CNMC	Spanish acronym for the National Commission on Markets and Competition (*Comisión Nacional de los Mercados y de la Competencia*)
CWS-AZZ or Zuluaga's First WS	Claimant's Witness Statement of Mr. Armando Zuluaga Zilbermann, dated January 29, 2018
CWS-ES or Soler's WS	Claimant's Witness Statement of Mr. Eduard Soler Babot, dated June 23, 2016
CWS-LCR1 or Crespo's First WS	Claimant's First Witness Statement of Dr. Luis Crespo Rodríguez, dated June 20, 2016
CWS-LCR2 or Crespo's 2nd WS	Claimant's Second Witness Statement of Dr. Luis Crespo Rodríguez, dated January 18, 2018
CWS-ME1 or Endo's First WS	Claimant's First Witness Statement of Mr. Masayasu Endo, dated June 30, 2016
CWS-ME2 or Endo's 2nd WS	Claimant's Second Witness Statement of Mr. Masayasu Endo, dated January 18, 2018
CWS-TM1 or Miyamoto's First WS	Claimant's First Witness Statement of Mr. Tetsushi Miyamoto, dated June 30, 2016
CWS-TM2 or Miyamoto's 2nd WS	Claimant's Second Witness Statement of Mr. Tetsushi Miyamoto, dated January 26, 2018

CWS-VFQ or Fernández-Quero's WS	Claimant's Witness Statement of Mr. Valerio Fernández-Quero, dated June 22, 2016
ECT	Energy Charter Treaty
EO1-# and EO2-#	Exhibits to Econ One's First and 2nd Reports
EPC	English acronym for engineering, procurement and construction activities
EU	European Union
FET	Fair and equitable treatment
FI-#	Exhibits to Fichtner's Report
Hearing	Hearing on Jurisdiction and the Merits, held September 17, 2018, to September 22, 2018, at the World Bank Paris Conference Center
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
MCPS	Most constant protection and security
MFN	Most-favored-nation
O&M	English acronym for operation and management activities
PO1	Procedural Order No. 1, dated February 25, 2016, concerning procedural matters
PO2	Procedural Order No. 2, dated June 21, 2017, concerning production of documents
PO3	Procedural Order No. 3, dated February 6, 2018, concerning confidentiality of documents
PO4	Procedural Order No. 4, dated April 23, 2018, concerning Respondent's site visit request of March 8, 2018

PO5	Procedural Order No. 5, dated July 25, 2018, concerning the organization of the Hearing
PO6	Procedural Order No. 6, dated August 14, 2018, concerning the Respondent's request for reconsideration of August 7, 2018
PO7	Procedural Order No. 7, dated August 27, 2018, concerning the Parties' requests for the Tribunal to decide on the admissibility of new documents
PO8	Procedural Order No. 8, dated December 4, 2019, concerning Respondent's withdrawal of the objection to the jurisdiction of the Tribunal based on the reasoning in *Achmea*.
PO9	Procedural Order No. 9, dated December 11, 2019, concerning Respondent's request for the exclusion of evidence.
Procedural Calendar	Procedural Calendar attached to the PO1, as revised
RfA	Request for Arbitration from the Claimant against the Respondent, dated June 8, 2015
RER-EO1 or Econ One's First Report	First Econ One Research Inc. Expert Report, dated December 2, 2016
RER-EO2 or Econ One's 2nd Report	Second Econ One Report, dated April 20, 2018
RER-JS or Servert Report	Dr. Servert Lifetime analysis Report, dated April 1, 2018
RER-MVC/MJSM or Vaquer and Santos Legal Expert Report	Dr. Marcos Vaquer Caballería and Dr. María José Santos Morón Thermosolar Report
R-#	Respondent's Exhibits
Resp. Closing	Respondent's PowerPoint presentation used in support of its Closing Statement, updated September 24, 2018
Resp. C-Mem.	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, dated December 2, 2016

Resp. Cost – Jan. 31, 2019	Respondent's Submission on Costs, dated January 31, 2019
Resp. Cost – Feb. 22, 2019	Respondent's Comments on Claimant's Submission on Costs, dated February 22, 2019.
Resp. Cost – Mar. 1, 2019	Respondent's Reply to Claimant's Comments on Costs, dated March 1, 2019
Resp. New Cases	Respondent's Comments on ECT Precedents, dated October 25, 2019
Resp. Opening	Respondent's PowerPoint presentation used in support of its Opening Statement, dated September 17, 2018
Resp. PHB	Respondent's Post-Hearing Brief, dated December 21, 2018
Resp. Rej.	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated April 20, 2018
Resp. Skeleton	Respondent's Skeleton submission dated September 11, 2018
RWS-CM1 or Montoya's First WS	Respondent's First Witness Statement of Mr. Carlos Montoya, dated November 30, 2016
RWS-CM2 or Montoya's 2nd WS	Respondent's Second Witness Statement of Mr. Carlos Montoya dated April 20, 2017
RL-#	Respondent's Legal Authority
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on January 4, 2016 in ICSID Case No. ARB/15/27, comprising Prof. Hi-Taek Shin (Korean), President, appointed by the Secretary-General; Prof. Rudolf Dolzer (German), appointed by the Claimant; and Prof. Mónica Pinto (Argentine), appointed by the Respondent. The Arbitral Tribunal was reconstituted on April 23, 2020, comprising Prof. Hi-Taek Shin (Korean), President, Prof. Dr. August Reinisch (Austrian), appointed by the Claimant

	following the passing away of Prof. Rudolf Dolzer; and Prof. Mónica Pinto (Argentine).

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 for Japan on October 21, 2002, and for the Kingdom of Spain on April 16, 1998 (the "**ECT**" or "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**"), specifically for Japan on September 16, 1967, and for the Kingdom of Spain on September 17, 1994 .

2. The Claimant is JGC Holdings Corporation (formerly JGC Corporation) ("**JGC**" or the "**Claimant**"), a corporation incorporated under the laws of Japan.

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

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

5. This dispute relates to a series of measures implemented by the government of Spain modifying the regulatory and economic regime of renewable energy projects in 2012 through 2014 after the Claimant made an investment in renewable energy projects in Spain in 2010.

II. PROCEDURAL HISTORY

6. On June 8, 2015, ICSID received a request for arbitration, from JGC Corporation against the Kingdom of Spain (the **"Request for Arbitration"**), together with Exhibits C-01 to C-15.

7. On June 22, 2015, the Secretary-General of ICSID registered the Request in accordance with Article 36 of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of

Procedure for the Institution of Conciliation and Arbitration Proceedings (the **"Arbitration Rules"**) and Articles 37 to 40 of the ICSID Convention.

8. On September 29, 2015, the Claimant informed the Centre that the Parties had reached an agreement on the method for the constitution of the Arbitral Tribunal. In accordance with this agreement, the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, the presiding arbitrator, to be appointed by agreement of the Parties. If an agreement was not reached, either Party could request the Secretary-General to appoint, under a ballot procedure, the arbitrator(s) not yet appointed, expressly excluding Article 38 of the ICSID Convention. On this same date, the Respondent confirmed this agreement.

9. On October 1, 2015, following appointment by the Claimant, Professor Rudolf Dolzer, a national of Germany, accepted his appointment as arbitrator.

10. On October 23, 2015, the Claimant informed the Secretary-General that the Respondent had not appointed its party-appointed arbitrator by the agreed deadline of October 20, 2015 and requested the Secretary-General to take the necessary steps towards the corresponding appointment to have the Tribunal constituted as soon as possible.

11. On October 26, 2015, the Tribunal acknowledged receipt of the Claimant's letter of October 23, 2015, noting that in accordance with the Parties' agreed method for the constitution of the Tribunal, the Centre stood ready to make any missing appointments, upon either party's request, from November 10, 2015, as agreed upon by the Parties.

12. On November 3, 2015, the Respondent appointed Professor Mónica Pinto, a national of the Argentine Republic, as arbitrator. On November 11, 2015, Prof. Pinto accepted her appointment as arbitrator.

13. On November 26, 2015, the Claimant informed the Centre that the Parties had not reached an agreement on the appointment of the President of the Tribunal and requested the Secretary-General to proceed with this appointment pursuant to the Parties' agreement of September 29, 2015.

14. On December 4, 2015, the Centre submitted a ballot of five (5) candidates for the Parties to consider and to complete by December 15, 2015.

15. On December 15, 2015, the Centre informed the Parties that the ballot did not result in the selection of a mutually agreeable candidate, and that in accordance with the Parties' agreement of September 29, 2015, the Secretary-General would proceed with the appointment of the presiding arbitrator.

16. On December 21, 2015, the Centre informed the Parties the intention of the Secretary-General to appoint Professor Hi-Taek Shin, a national of the Republic of Korea, as the President of the Tribunal, and invited the Parties to submit their observations on this proposal by December 30, 2015.

17. On December 31, 2015, the Secretary-General informed the Parties that since they had not submitted observations, she would proceed with the appointment of Professor Shin as the presiding arbitrator.

18. On January 4, 2016, the Secretary-General, in accordance with Rule 6(1) of the ICSID Arbitration Rules, 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. Ms. Mercedes Cordido-F de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

19. The Tribunal, constituted in accordance with Article 37(2)(a) of the ICSID Convention, is composed by Professor Hi-Taek Shin, a national of the Republic of Korea, President, appointed by the Secretary-General; Professor Rudolf Dolzer, a national of Germany, appointed by the Claimant; and Professor Mónica Pinto, a national of the Argentine Republic, appointed by the Respondent.

20. On February 22, 2016, the Tribunal held a First Session with the Parties, by teleconference in accordance with ICSID Arbitration Rule 13(1).

21. On February 25, 2016, the Tribunal issued Procedural Order No. 1 (**"PO1"**) recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed

issues. PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, D.C., United States of America. PO1 also sets out a schedule for the jurisdictional/merits phase of the proceedings (the **"Procedural Calendar"**).

22. On June 30, 2016, the Claimant filed its Memorial on the Merits (**"Claimant's Memorial"**), accompanied by the witness statements of Mr. Eduard Soler Babot (**"CWS-ES"** or "**Soler's WS**") with supporting documents to CWS-ES 1-86; Dr. Luis Crespo Rodríguez (**"CWS-LCR1"** or "**Crespo's First WS**") with supporting documents to CWS-LCR1 1-93, Mr. Masayasu Endo (**"CWS-ME1"** or "**Endo's First WS**") with supporting documents to CWS-ME1 1-48; Mr. Tetsushi Miyamoto ("**CWS-TM1**" or "**Miyamoto's First WS**") with supporting documents to CWS-TM1 1-23; and Mr. Valerio Fernández-Quero ("**CWS-VFQ**" or "**Fernández-Quero's WS**"); Compass Lexecon's Expert Report ("**CER-CL1**" or "**Compass Lexecon's First Report**"); Exhibits to Compass Lexecon's Expert Report CLEX-1 to CLEX-113; Exhibits C-016 to C-562; and Legal Authorities CL-001 to CL-148.

23. On December 2, 2016, the Respondent filed a Counter-Memorial on the Merits and a Memorial on Jurisdiction (**"Respondent's Counter-Memorial"**), accompanied by the witness statement of Mr. Carlos Montoya (**"RWS-CM"** or "**Montoya's First WS**"), exhibits to Mr. Montoya's witness statement W-0005 to W-0444, the expert report of Econ One Research (**"RER-EO1"** or "**Econ One's First Report**"); exhibits to Econ One's First Report EO-1 to EO-121; Exhibits R-1 to R-246; and Legal Authorities RL-1 to RL-82.

24. On December 23, 2016, the Parties informed the Tribunal of their agreement to amend the procedural calendar, and the Tribunal confirmed the amended procedural calendar, as agreed by the Parties.

25. On May 8, 2017, the Parties informed the Tribunal of their agreement to further amend the procedural calendar to extend the deadline for the Parties to submit the Redfern Schedules supporting their respective requests for Production of Documents. On the same date, the

Tribunal authorized a further amendment to the procedural schedule, as agreed by the Parties.

26. Accordingly, on May 22, 2017, each Party filed a Request for Production of Documents. Respondent's Request was accompanied by Exhibit R-247, and Claimant's Request by Exhibits C-563 and C-564.

27. On June 21, 2017, the Tribunal issued Procedural Order No. 2 ("**PO2**") concerning Production of Documents.

28. On July 24, 2017, the Claimant informed the Tribunal that the Parties had agreed to further amend the procedural calendar. The Respondent confirmed the agreement by subsequent communication.

29. On July 26, 2017, the Tribunal approved the amended procedural calendar, as agreed by the Parties.

30. On December 19, 2017, the Claimant filed an Application for a Confidentiality Order (the "**Claimant's Confidentiality Application**"). On this same date, at the Respondent's request, the Tribunal granted the Respondent leave to comment on the Claimant's Confidentiality Application by December 29, 2017.

31. On December 29, 2017, the Respondent filed its observations on the Claimant's Confidentiality Application, together with an Index of Factual Exhibits and Exhibits R-247 to R-249.

32. On January 2, 2018, the Tribunal invited the Claimant to submit its comments on the Respondent's observations of December 29, 2017, by January 5, 2018. On January 3, 2018, the Claimant requested an extension of this deadline until January 10, 2018.

33. On January 3, 2018, the Tribunal invited the Parties to agree on the deadlines for their respective submissions and to inform the Tribunal accordingly. On this same date, the Respondent proposed that each Party have six (6) business days to submit its comments on each other submissions.

34. On January 8, 2018, the Claimant agreed to the Respondent's proposal of January 3, 2018. By communication of the same date, the Tribunal authorized the deadline for the Parties' submission, as agreed by the Parties.

35. On January 10, 2018, the Claimant filed its Reply to the Respondent's observations of December 29, 2017, on the Claimant's Confidentiality Application.

36. On January 18, 2018, the Respondent filed its Rebuttal on the Claimant's Confidentiality Application.

37. On January 31, 2018, the Claimant filed its Reply Memorial on the Merits and Counter-Memorial on Jurisdiction (**"Claimant's Reply"**) accompanied by the second witness statement of Dr. Luis Crespo Rodríguez (**"CWS-LCR2"** or "**Crespo's 2nd WS**") with supporting documents to CWS-LCR2 1-61; Mr. Masayasu Endo (**"CWS-ME2"** or "**Endo's 2nd WS**") with supporting documents to CWS-ME2 1-15; Mr. Tetsushi Miyamoto ("**CWS-TM2**" or "**Miyamoto's 2nd WS**") with supporting documents to CWS-TM2 1-12; and the first witness statement of Mr. Armando Zuluaga Zilbermann ("**CWS-AZZ**" or "**Zuluaga's First WS**") with supporting documents to CWS-AZZ 1-5; Compass Lexecon's Second Expert Report (**"CER-CL2"** or "**Compass Lexecon's 2nd Report**"); Exhibits to CER-CL2: CLEX-114 to CLEX-294, Fichtner's Expert Report ("**CER-F**" or "**Fichtner's Report**"); Exhibits to CER-F: FI-1 to FI-28; Exhibits C-565 to C-703; and Legal Authorities CL-149 to CL-172.

38. On February 1, 2018, the Respondent filed a renewed request for Production of Documents dated January 31, 2018 (the "**Respondent's Renewed POD Request**"), arguing non-compliance by the Claimant with PO2 on Production of Documents. On that same date, the Tribunal invited comments from the Claimant by February 8, 2018.

39. On February 6, 2018, the Tribunal issued Procedural Order No. 3 concerning Confidentiality of Documents ("**PO3**").

40. On February 8, 2018, the Claimant filed observations on the Respondent's Renewed POD Request. On February 9, 2018, the Tribunal invited the Respondent to comment within three working days, noting that the Claimant would have the opportunity to make

comments thereon in three working days. On February 13, 2018, the Respondent filed its response on this matter together with Exhibits R-251 and R-252 and an updated list of the Respondent's factual exhibits. On February 16, 2018, the Claimant filed further observations in rejoinder.

41. On February 28, 2018, the Tribunal provided directions to the Parties on the Respondent's Renewed POD Request.

42. On March 2, 2018, each Party filed its response to the questions posed by the Tribunal in its letter of February 28, 2018 regarding the Respondent's Renewed POD Request. On the same date, the Respondent informed the Tribunal of its receipt of certain files from the Claimant regarding Production of Documents.

43. On March 6, 2018, the Claimant filed a request for leave from the Tribunal to file into the record the Final Arbitral Award rendered in the SCC Arbitration (V2015/063) *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, dated February 15, 2018 ("***Novenergía* award**"). On the same date, the Tribunal invited the Respondent to comment on the Claimant's request by March 12, 2018.

44. On March 8, 2018, the Respondent filed a request dated March 7, 2018, for the Tribunal to allow the inspection of the Solacor 1 and Solacor 2 CSP Plants by the Respondent's Expert on Useful Life, Prof. Jorge Servert (the "**Respondent's Site Visit Request**"). On the same date, the Tribunal invited the Claimant to comment on the Respondent's Site Visit Request by March 15, 2018.

45. On March 12, 2018, the Respondent filed its comments on the Claimant's request of March 6, 2018 regarding the *Novenergía* award.

46. On March 12, 2018, the Parties informed the Tribunal of their agreement to request the Tribunal to extend until March 14, 2018, the March 12, 2018 deadline to submit, as required by the Tribunal in its directions of February 28, 2018, an updated full report on the compliance with PO2. On the same date, the Tribunal confirmed the extension of the deadline, as agreed by the Parties. Accordingly, on March 14, 2018, each Party filed a communication regarding its compliance with PO2 regarding Production of Documents.

47. Also, on March 14, 2018, the Claimant filed a letter with a Redfern Schedule regarding the alleged non-compliance by the Respondent with PO2, requesting the Tribunal to draw adverse inferences from the Respondent's conduct.

48. On March 15, 2018, the Tribunal invited further comments from the Parties on the outstanding issues regarding Production of Documents. The Tribunal also referred to the Claimant's request of March 6, 2018 regarding the *Novenergía* award, noting that although it was already in the public domain, the Tribunal allowed the Claimant to introduce the *Novenergía* award, and the Parties to make consecutive comments as to its relevance by certain deadlines, which were later extended at the Claimant's request, with the Respondent's agreement.

49. On March 15, 2018, the Claimant filed its comments on the Respondent's Site Visit Request. On March 19, 2018, the Tribunal invited the Respondent to comment on this issue, if it so wished, by March 22, 2018.

50. On March 19, 2018, each Party filed further comments on their respective communications of March 14, 2018 regarding Production of Documents. The Respondent attached to its comments RL 0091EN (*Decision of the European Commission, rendered on 11 November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste* (State Aid S.A. 40348 (2015/NN), and an updated list of legal authorities.

51. By letter of March 22, 2018, the Tribunal referred to the Parties' recent correspondence concerning the alleged non-compliance with the Tribunal's PO2 regarding production of documents, noting that the Tribunal deemed that it was premature to make any decision on drawing adverse inferences, reserving its decision until later.

52. On March 22, 2018, the Respondent filed comments on the Claimant's opposition of March 15, 2018 to the Respondent's Site Visit Request. On March 23, 2018, the Tribunal posed questions to the Respondent on the Inspection of the Solacor 1 and Solacor 2 CSP Plants by the Respondent's Expert on Useful Life, and invited the Claimant to comment, if it so

wished, thereafter. The Respondent filed its response to the Tribunal's question on March 27, 2018.

53. On April 5, 2018, the Claimant introduced the *Novenergía* award into the record, as authority CL-0173, together with a brief comment on its relevance and importance to the present case, and an updated list of legal authorities.

54. On April 6, 2018, the Tribunal informed the Parties of its decision to not accept the Respondent's Site Visit Request dated March 7, 2018, noting that the reasons for its decision would follow later.

55. On April 20, 2018, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction ("**Respondent's Rejoinder**"), accompanied by the second witness statement of Mr. Carlos Montoya (**"RWS-CM2"** or "**Montoya's 2nd WS**"), exhibits to Mr. Montoya's 2nd WS W-0005 to W-0693, the Legal Report of Prof. Marcos Vaquer Caballería and María José Santos Morón ("**Vaquer and Santos Legal Expert Report**"), authorities to the Vaquer and Santos Legal Expert Report RD-001 to RD-0079, the Technical Report of Dr. Jorge Servert ("**JSR**" or "**Servert Report**"), exhibits to the Servert Report JSR-01 to JSR-20 and JSRC-01 to JSRC-23, the Second Expert Report of Econ One Research (**"RER-EO2"** or "**Econ One's 2nd Report**"); exhibits to Econ One's First Report EO-122 to EO-195; Exhibits R-0247 to R-0383; and Legal Authorities RL-0092 to RL-0128, an Updated List of Exhibits, and an Updated List of Legal Authorities.

56. On April 23, 2018, the Tribunal issued Procedural Order No. 4 concerning the Respondent's Site Visit Request ("**PO4**").

57. At the Parties' request, on May 18, 2018, the Tribunal confirmed the revised procedural schedule, as agreed by the Parties.

58. On May 28, 2018, the Claimant filed its Rejoinder on Jurisdiction ("**Claimant's Rejoinder on Jurisdiction**" or "**Cl. Rej**."), accompanied by Exhibits C-0704 to C-0713, Legal Authorities CL-0174 to CL-0181, and Updated Lists of Exhibits, and Legal Authorities.

59. On June 1, 2018, each of the Parties filed its respective notification of witnesses and experts called for cross-examination during the Hearing.

60. Also, on June 1, 2018, the Claimant filed a request for the Tribunal to order the testimony of Mr. Santiago Caravantes Moreno ("**Caravantes**") at the Hearing. At the Tribunal's invitation, on June 8, 2018, the Respondent submitted its observations on the Claimant's request of June 1, 2018.

61. On June 9, 2018, the Tribunal invited the Claimant to comment on paragraph 8 of the Respondent's observations of June 8, 2018, within three working days, noting that the Respondent would then have the opportunity to comment, if it so wished, also within three working days. The Claimant submitted its comments in reply on June 13, 2018.

62. On June 20, 2018, the Tribunal noting that both Parties agreed, in principle, to Mr. Caravantes' testimony during the Hearing, invited the Parties to agree on the details of such testimony, and to inform and/or seek directions from the Tribunal. On the same date, the Parties informed the Tribunal of their agreement to deal with the details of the examination of Mr. Caravantes together with those of the rest of the witnesses and experts that would appear during the Hearing. On June 21, 2018, the Tribunal took note of the Parties' agreement in this regard.

63. On June 25, 2018, the Respondent filed a request for the Tribunal to lift the confidentiality restrictions under PO3 to enable the Respondent to disclose an exhibit from this case in another case. At the invitation of the Tribunal, the Claimant filed its observations on June 29, 2018. Subsequently, on July 6, 2018, the Tribunal denied the Respondent's request of June 25, 2018 for the reasons indicated therein.

64. Following exchanges between the Tribunal and the Parties, and after giving ample opportunity to both Parties to state their positions, on June 29, 2018, the Tribunal decided on the issue regarding the interpretation services to and from Japanese to be provided for the examination of two of the Claimant's fact witnesses, Mr. Masayasu Endo and Mr. Tetsushi Miyamoto, during the Hearing.

65. Following exchanges between the Tribunal and the Parties, on July 13, 2018, the Tribunal held a Pre-Hearing Organizational Meeting with the Parties by telephone conference. Subsequently, and after consulting with the Parties, the Tribunal issued Procedural Order No. 5 dated July 25, 2018 concerning the Organization of the Hearing ("**PO5**").

66. On August 7, 2018, the Respondent filed a request for reconsideration of the Tribunal's PO5 of July 25, 2018. On August 9, 2018, the Claimant filed observations on the Respondent's request of August 7, 2018. On August 10, 2018, the Respondent filed a response to the Claimant's observations of August 9, 2018. On August 14, 2018, the Tribunal issued Procedural Order No. 6 concerning the Respondent's request for reconsideration of August 7, 2018 ("**PO6**").

67. Following exchanges between the Tribunal and the Parties, on August 17, 2018, the Parties submitted to the Tribunal an agreed Agenda for the Hearing.

68. Also, on August 17, 2018, each Party filed a request for leave from the Tribunal to introduce new documents to the record for their use during the Hearing pursuant para. 19 of PO5 and para. 16.3 of PO1. At the Tribunal's invitation, each Party submitted observations on the other Party's request, and on August 27, 2018, the Tribunal issued Procedural Order No. 7 ("**PO7**") with its decision on the Parties' requests for the submissions of new documents.

69. On August 28, 2018, the Claimant filed Legal Authority CL-182 and Exhibits C-094 (resubmitted), and C-714 to C-725, together with an updated list of exhibits and legal authorities.

70. Following exchanges between the Tribunal and the Parties, on August 30, 2018, the Tribunal provided directions to the Parties for the filing of responsive documents ("**Responsive Documents**") to counter those new documents admitted by the Tribunal under PO7.

71. On August 31, 2018, pursuant to the Tribunal's directions under PO7, the Respondent filed Exhibits R-384 to R-394, Legal Authority RL-129 and an updated list of exhibits and legal authorities.

72. On September 3, 2018, the Parties submitted their respective lists of Responsive Documents, and on September 4, 2018, each Party commented on the other Party's list using a "Redfern schedule format".

73. On September 5, 2018, the Tribunal issued its decision on the Parties' requests for the submission of Responsive Documents.

74. On September 6, 2018, pursuant to the Tribunal's decision of September 5, 2018, the Claimant filed an updated list of exhibits and legal authorities and introduced CL-183 into the record.

75. Also pursuant to the Tribunal's decision of September 5, 2018, on September 7, 2018, the Respondent filed an updated list of exhibits and introduced Exhibits C-395 and C-396 into the record.

76. On September 11, 2018, each Party filed a Skeleton Brief.

77. On September 12, 2018, each Party filed lists of chronological issues and of questions that required the Tribunal's determination.

78. A hearing on the merits and jurisdiction was held at the World Bank Conference Centre in Paris, France from September 17 to September 22, 2018 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Professor Hi-Taek Shin	President
Professor Rudolf Dolzer	Arbitrator
Professor Mónica Pinto	Arbitrator

ICSID Secretariat:

Ms. Mercedes Cordido-Freytes de Kurowski	Secretary of the Tribunal

For the Claimant:

Counsel:

Mr. José Alberto Fortún Costea	Cuatrecasas Gonçalves Pereira, S.L.P.
Mr. Luis Pérez de Ayala Becerril	Cuatrecasas Gonçalves Pereira, S.L.P.
Ms. María Isabel Rodríguez Vargas	Cuatrecasas Gonçalves Pereira, S.L.P.
Mr. Antonio Delgado Camprubí	Cuatrecasas Gonçalves Pereira, S.L.P.
Mr. José Ángel Rueda García	Cuatrecasas Gonçalves Pereira, S.L.P.
Mr. Borja Álvarez Sanz	Cuatrecasas Gonçalves Pereira, S.L.P.
Mr. José Ángel Sánchez Villega	Cuatrecasas Gonçalves Pereira, S.L.P.
Mr. Ignacio Frutos Blanco	Cuatrecasas Gonçalves Pereira, S.L.P.
Ms. Yoshimi Ohara	Nagashima Ohno & Tsunematsu

Parties:

Mr. Nobukazu Ishii	JGC Corporation
Mr. Akifumi Takita	JGC Corporation

For the Respondent:

Counsel:

Ms. Amaia Rivas Kortazar	Abogacía General del Estado
Mr. Antolín Fernández Antuña	Abogacía General del Estado
Ms. María José Ruiz Sánchez	Abogacía General del Estado
Mr. Roberto Fernández Castilla	Abogacía General del Estado

Parties:

Ms. Raquel Vázquez	IDAE

Court Reporters:

Mr. Trevor McGowan	English-Language Court Reporter (The Court Reporter Ltd)
Mr. Leandro Iezzi	Spanish -Language Court Reporter (DR-Esteno)
Mr. Dionisio Rinaldi	Spanish -Language Court Reporter (DR-Esteno)

Interpreters:

Mr. Jesús Getan Bornn	English-Spanish Interpreter
Ms. Amalia Thaler de Klemm	English-Spanish Interpreter

Mr. Marc Viscovi	English-Spanish Interpreter
Ms. Ryoko Okamoto	English-Japanese Interpreter
Ms. Mariko Higuchi	English-Japanese Interpreter

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

On behalf of the Claimant:

Witnesses:

Mr. Masayasu Endo	JGC Corporation
Mr. Tetsushi Miyamoto	JGC Corporation
Dr. Luis Crespo Rodríguez	Protermosolar
Mr. Armando Zuluaga Zilbermann	Abengoa Solar, S.A
Mr. Eduardo Soler Babot	

Experts:

Mr. Johannes Daniel Kretschmann	Fichtner GmbH & Co. KG
Dr. Jorge Padilla	Compass Lexecon
Mr Antón García	Compass Lexecon
Mr Rui Pratinha (*)	Compass Lexecon
Ms. Ria Abichandani (*)	Compass Lexecon
Mr. Juan María Castillo	OCA Global (formerly at Diseprosa)
Mr. Alberto Saavedra (*)	OCA Global (formerly at Diseprosa)

On behalf of the Respondent:

Witness:

Mr. Carlos Montoya	IDAE
Mr. Santiago Caravantes	Ministerio para la Transición Ecológica

Experts:

Dr. Daniel Flores	Econ One Research
Mr. Juan Riveros (*)	Econ One Research
Mr. José Díaz (*)	Econ One Research
Dr. Jorge Servert	STA
Dr. Marcos Vaquer	Universidad Carlos III de Madrid
Dra. María José Santos	Universidad Carlos III de Madrid

(*) Present at the Hearing but not examined.

80. Between October 31, 2018 and January 17, 2019, the Parties filed their agreed corrections to the hearing transcripts.

81. On December 21, 2018, the Parties filed simultaneous Post-Hearing Briefs.

82. On December 28, 2018, the Respondent filed a request for exclusion of evidence concerning the Claimant's Post-Hearing Brief. This was followed by the Claimant's comments on January 11, 2019.

83. On January 20, 2019, the Tribunal acknowledged receipt of the Respondent's request of December 28, 2018, and the Claimant's comments of January 11, 2019, noting that the Tribunal would review this matter and inform them of its decision in due course.

84. On January 31, 2019, the Parties filed simultaneous Submissions on Costs. The Claimant's Submission was accompanied by an updated list of legal authorities and Legal Authorities CL-183 to CL-200.

85. On February 15, 2019, the Tribunal approved two rounds of simultaneous submissions on each other's Submissions on Costs, as agreed by the Parties.

86. On February 22, 2019, each Party filed observations on the other Party's Submission on Costs, and subsequently, on March 1, 2019, each Party filed a brief reply to the other Party's observations. The Claimant's reply was submitted together with an updated list of legal authorities and Legal Authorities CL-201 and CL-202.

87. On May 15, 2019, the European Commission filed an Application for Leave to Intervene as Non-Disputing Party pursuant to Rule 37(2) of the ICSID Arbitration Rules (the "**EC's Application**"). On the same date, the Parties were invited to submit their comments on the EC's Application by May 27, 2019.

88. The Claimant filed its observations on the EC's Application on May 24, 2019, and the Respondent did so on May 27, 2019. The Respondent's submission was filed together with an updated List of legal authorities and Legal Authority RL-130.

89. On June 4, 2019, the Tribunal issued its decision not to accede to the EC's Application, after considering, *inter alia*, the advance stage reached by the proceedings, and that the Parties had already filed their Post-Hearing Briefs and Submissions on Costs.

90. On September 17, 2019, the Centre informed the Parties that the Tribunal expected to issue its award by March 2020, and that further updates on its status would be provided to the Parties as soon as possible.

91. On October 10, 2019, the Tribunal invited the Parties, if they so wished, to introduce into the record any publicly available award or decision rendered or fallen into the public domain after the Hearing and until the date of that invitation (i.e., October 10, 2019), concerning the renewable energy sector in which Spain acted as a party that was not yet in the record at the time (the "**ECT Decisions**"). Each Party would also have the opportunity to file brief comments of such decisions.

92. On October 18, 2019, the Claimant informed the Tribunal and the ICSID Secretariat that it had changed its corporate name from "JGC Corporation" to "JGC Holdings Corporation" and requested leave from the Tribunal to submit its updated corporate registration. On October 19, 2019, the Tribunal granted the Claimant's request and invited the Respondent to submit its comments on this issue, if it so wished.

93. On October 21, 2019, the Claimant submitted its updated corporate registration.

94. Also on October 21, 2019, the Claimant with reference to the Tribunal's invitation of October 10, 2019, proposed providing one single document (instead of summaries of each award or decision) covering (i) a number of factual and legal issues identified in the awards and decisions that are at stake in this arbitration and (ii) the treatment given to them by the tribunals by comparison with the Parties' positions in this arbitration. This proposal was admitted by the Tribunal by email of the same date, noting that Respondent could proceed that way too, if it so wished.

95. On October 25, 2019, each Party filed (i) its comments to new awards and decisions rendered or made publicly available in Spanish ECT cases until October 10, 2019; (ii) a list of its new legal authorities as of October 25, 2019; together with (iii) copies of the new

authorities (Claimant's Legal Authorities CL-201 to CL-211, and Respondent's Legal Authorities RL-131 to RL-140).

96. On October 28, 2019, the Claimant replaced its submission of October 25, 2019, including its list of legal authorities, deleting Legal Authority CL-210, which was the award rendered on August 2, 2019, in the case *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 ("***InfraRed* award**"). On this same date, the Tribunal invited the Respondent to confirm whether it agreed with this action.

97. On October 30, 2019, the Respondent informed the Tribunal that it did not oppose the replacement of the previous submission as long as no reference was made in the record to it, given that the Claimant made comments on a precedent that Spain did not have the opportunity to comment upon. The Respondent also reiterated its request of December 28, 2018, concerning Claimant's Post-Hearing Brief, and requested the Tribunal to extend its Decision to references made in the Claimant's comments to new awards and decisions in Spanish ECT cases, which should be stricken out of the record.

98. Following an invitation from the Tribunal, on November 6, 2019, the Claimant agreed with the Respondent's approach that "no reference" should be made to the *InfraRed* award, and requested the Tribunal to uphold its replaced submission of October 28, 2019.

99. On November 8, 2019, the Respondent informed the Tribunal that in light of the reasoning of the Court of Justice of the European Union in its Opinion 1/2017[1], the Respondent thereby withdrew its objection to jurisdiction based on EU law, i.e., the *Achmea* objection. Following the Tribunal's invitation, on November 15, 2019, the Claimant submitted its comments on the Respondent's withdrawal of the *Achmea* objection.

[1] Opinion 1/17 of the Plenary Session of the Court of Justice CJEU, CETA, April 30, 2019, publicly available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir= &occ=first&part=1&cid=9435105

100. On December 4, 2019, the Tribunal issued Procedural Order No. 8 on Respondent's Withdrawal of the Objection to the Jurisdiction of the Tribunal Based on the Reasoning in *Achmea* ("**PO8**").

101. Also, on December 4, 2019, the Respondent requested leave from the Tribunal to introduce additional documents into the record. On December 9, 2019, the Claimant submitted its comments on this request, noting that the Claimant did not oppose the introduction of the new documents requested by Spain if the Tribunal allowed the Claimant to re-introduce the *InfraRed* award, as well as its comments thereon, into the record.

102. On December 11, 2019, the Tribunal issued Procedural Order No. 9 ("**PO9**"), denying, for the reasons indicated therein, Respondent's request of December 28, 2018 for the exclusion of evidence from the record concerning the Claimant's Post-Hearing Brief.

103. On December 23, 2019, the Tribunal granted the Parties' requests of December 4 and December 9, 2019, to introduce additional documents into the record (the *Stadtwerke* award, the *BayWa* decision, and the *InfraRed* award) provided that they were not subject to any confidentiality obligation.

104. On December 26, 2019, each Party submitted into the record the additional awards/decision approved by the Tribunal on December 23, 2019. The Claimant's submission was accompanied by an updated List of legal authorities and Legal Authority CL-210[2], and the Respondent's submission was filed together with an updated List of legal authorities and Legal Authorities RL-141[3], RL-142[4], RL-143[5] and RL-144[6].

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[2] *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain,* ICSID Case No. ARB/14/12, Award, August 2, 2019 ("***InfraRed* Award**") (**CL-210**).

[3] *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding Gmbh v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, December 2, 2019 ("***BayWa* Decision**") (**RL-141**).

[4] Dissenting Opinion of Mr. Horacio Grigera Naón attached to the *BayWa* decision (**RL-142**).

[5] *Stadtwerke München GMBH, RWE Innogy GmbH, and others v Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, December 2, 2019 ("***Stadtwerke* Award**") (**RL-143**).

[6] Dissenting Opinion of Mr Kaj Hobér attached to the *Stadtwerke* award (**RL-144**).

105. On March 10, 2020, the Respondent requested leave from the Tribunal for (i) the Respondent to submit three new legal authorities (*PV Investors*[7], *Hydro Energy*[8] and *RWE*[9]), and (ii) the Parties to provide simultaneous written commentaries, if the Tribunal so wished.

106. On March 13, 2020, the Claimant objected to the Respondent's request of March 10, 2020, and requested the Tribunal an update on the status of its Award in the present case.

107. On March 21, 2020, given the advanced status of the proceedings and of the Tribunal's work, the Tribunal denied the Respondent's request of March 10, 2020 for leave to introduce three new legal authorities into the record, and informed the Parties on the status of the Tribunal's work in the present case.

108. On April 8, 2020, the Parties were notified that Prof. Rudolf Dolzer had passed away, and that in accordance with ICSID Arbitration Rule 10(2), the proceeding was suspended until the vacancy resulting from Prof. Dolzer's passing had been filled. In accordance with ICSID Arbitration Rule 11(1), the Claimant was to appoint a new arbitrator following the same method by which Prof. Dolzer had been appointed.

109. By letter of April 22, 2020, the Claimant informed the Secretariat of the appointment of Prof. Dr. August Reinisch, a national of Austria, as arbitrator pursuant to ICSID Arbitration Rule 11(1). Prof. Dr. Reinisch subsequently accepted his appointment.

110. On April 23, 2020, the Centre informed the Parties that the Tribunal was reconstituted and that in accordance with ICSID Arbitration Rule 12, the proceeding was resumed on that day.

111. On May 11, 2020, the Respondent proposed the disqualification of Prof. Dr. August Reinisch pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID

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[7] *PV Investors v. the Kingdom of Spain*, PCA Case No. 2012-14, Award, February 28, 2020 ("***PV Investors award***"), including the Concurring and Dissenting Opinion of Charles N. Brower issued in that case.

[8] *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain,* ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, March 9, 2020 ("***Hydro Energy* Decision**").

[9] *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain,* ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, December 30, 2019 ("***RWE* Decision**").

Arbitration Rules. In accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended on that same date until a decision was taken by the two unchallenged Members of the Tribunal, Prof. Hi-Taek Shin and Prof. Mónica Pinto (the "**Unchallenged Arbitrators**"), as provided for in Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

112. On the same date, May 11, 2020, the two Unchallenged Arbitrators set a timetable for the Parties' submissions and Prof. Dr. Reinisch's explanations.

113. As scheduled, the Claimant filed comments on the Disqualification Proposal on May 19, 2020, and Prof. Dr. Reinisch furnished explanations on May 23, 2020. On May 30, 2020, the Respondent submitted additional observations on the Proposal. No further observations were received from the Claimant.

114. On July 14, 2020, the proposal for disqualification of arbitrator August Reinisch was declined by the Unchallenged Arbitrators, and the proceeding was resumed pursuant to ICSID Arbitration Rule 9(6).

115. On October 10, 2020, the Respondent requested leave from the Tribunal to submit into the record the Decision on Jurisdiction, Liability and Directions on Quantum issued on August 31, 2020 in *Cavalum SGPS, S.A. v. the Kingdom of Spain* (ICSID Case No. ARB/15/34) (the "***Cavalum decision***"), together with the Dissenting Opinion of Mr. David R. Haigh Q.C.. The Respondent also noted, that unless the Tribunal preferred otherwise, given the advanced stage of the proceeding, it was not necessary for the Parties to make written observations on this new legal authority.

116. On October 14, 2020, following an invitation of the Tribunal, the Claimant opposed to the Respondent's request of October 10, 2020 for the reasons indicated therein, and requested the Tribunal to inform the Parties on "the stage of the deliberations of the case and the potential date of issuance of the Award".

117. On October 20, 2020, the Tribunal informed the Parties that (i) given the advanced status of the proceedings and the Tribunal's work, the Tribunal denied the Respondent's request of October 10, 2020; and (ii) as for the status of the Tribunal's work, there had been some

obstacles for the fluency of the Tribunal Members' work. There were health concerns, followed by the current pandemic worldwide situation, the unfortunate passing of Professor Dolzer, the reconstitution of the Tribunal and the disqualification proposal. The Tribunal also noted that since then its Members had exchanged draft sections and thorough notes expressing their particular views on several issues. As a result, the Tribunal anticipated that it should have its work ready by mid-February 2021, thanking the Parties for their understanding.

III. FACTUAL BACKGROUND

118. The Tribunal provides below a summary of the factual background to the dispute. It is not meant to be exhaustive, and the Tribunal might address additional facts in the Tribunal's analysis, to the extent that they are relevant and useful. The Tribunal has nonetheless considered all the evidence produced in this case. The Tribunal will follow a chronological order, whenever it is possible, and will describe the Parties' positions regarding the underlying facts that are disputed by the Parties.

A. OVERVIEW

119. In order to promote the use of power generation from renewable energies, including concentrated solar thermal power ("**CSP**"), during the 1990s the Respondent decided to put in place a specific regulatory framework, that is described below, which provided certain incentives to attract investors to engage in energy projects in Spain.

120. The Claimant invested in two 50-MW CSP plants, Solacor 1 and Solacor 2, located in El Carpio, near Córdoba, in Andalusia (Southern Spain) (Solacor 1 and Solacor 2 plants are collectively referred to as the "**Solacor Plants**").

B. THE ENERGY CHARTER TREATY

121. As indicated before, this case concerns a dispute submitted to ICSID on the basis of the ECT and the ICSID Convention. The Claimant argues that the Respondent has breached its obligations under the ECT and international law.

122. The ECT is a multilateral treaty. It provides a multilateral framework for energy cooperation that is unique under international law. The ECT was adopted in 1994, and entered into force for Japan on October 21, 2002, and for the Kingdom of Spain on April 16, 1998.

C. THE SPANISH REGULATORY FRAMEWORK

123. In this section, the Tribunal will review the Spanish regulatory framework governing the production of electricity utilizing CSP technology and the remuneration regime therefor in reliance on which the Claimant made an investment in the Solacor Plants in 2010 and the subsequent changes made thereto in 2012 through 2014 which have impacted the Claimant's investment. While this section is based upon the Parties' respective chronology and the evidence on the record of the proceedings, it does not purport to be exhaustive of all aspects of the regulatory framework during the covered period nor to include only legislation applicable to the Claimant's investment in the Solacor Plants. Rather it focuses on the salient aspects of the Spanish regulatory framework upon which the Parties have placed reliance in advancing their respective positions in the course of these proceedings and which the Tribunal finds useful in analysing the merits of the Claimant's claim.

Law 54/1997 (EPA 1997)

124. The backbone of the Spanish regulatory framework applicable to renewable energy production, in particular CSP plants in which the Claimant invested in 2010, was the Electric Power Act 1997, enacted on November 27, 1997 ("**Law 54/1997"** or **"EPA 1997"),**[10] and successive royal decrees promulgated thereunder.

125. Law 54/1997 organized power production activities in two separate regimes: Ordinary Regime ("**Ordinary Regime**") and Special Regime ("**Special Regime**"). The Ordinary Regime was applicable to conventional production facilities using non-renewable energy sources, while the Special Regime was applicable to qualifying electricity producers using

[10] Electric Power Act, Act 54/1997, of November 27, on the Electric Power Sector (Published in the Official State Journal, BOE, on November 28, 1997) (**C-0036**) (**R-0003**). (**C-0036tt**) and (**R-0003EN**) refer to "Spanish Electric Power Act (Unofficial English Translation)", 4th Edition, 2008, National Energy Regulatory Commission (Spain) ; (**C-0036t**) is a partial English translation of EPA 1997. In this Decision, the Tribunal, in principle, relies on (**C-0036tt**) (**R-0003EN**) when the Parties' respective translation differs.

non-consumable renewable source of energies, such as CSP, and with an installed capacity not exceeding 50 MW. This dual system was established due to the need to promote production through renewable energy sources, since the price that could be obtained in the competitive market by renewable energy producers was insufficient to cover construction and operation costs with reasonable return on investment and to achieve this, subsidies were necessary to be profitable.[11]

126. Law 54/1997 set forth Spain's policy objective to have the contribution of renewable sources of energy reach 12% of the Spanish gross energy consumption by the year 2010 ("**12% Objective**") and mandated the Government to draw a plan to "*promote renewable energies and whose objectives shall be taken into account in the setting of premiums*".[12] The mandate of Law 54/1997 has been implemented by successive Renewable Energy Plans.[13] Law 54/1997 also laid down a legal framework governing the rights and obligations of electricity generators under the Special Regime.

127. Under Law 54/1997, remuneration of electricity producers under the Special Regime is composed of two components: the market price for the sale of electricity and a premium that complements the market prices to guarantee the economic viability of that activity. Specifically, Article 30(4) of Law 54/1997 provides that:

> *"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 and in the following cases"*[14]

128. The same article mandates the Government to consider the following in setting the premium:

> *"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*

[11] Resp. C-Mem., para. 266.
[12] Sixteenth Transitory Provision of Law 54/1997 amended this provision and moved it to Twenty-fifth Additional Provision, which reads that: "*The Government shall modify the Plan for the Promotion of Renewable Energies in order to adapt it to the objectives established by the European Union of 20% by 2020 and shall maintain the Plan's commitment to 12% by 2010. These objectives shall be taken into consideration when setting the premiums for these type of installations*". (**C-0036tt**) (**R-0003EN**).
[13] Resp. C-Mem., para. 274.
[14] (**C-0036tt**)(**R-0003EN**)

to achieve reasonable profitability rates with reference to the cost of money on capital markets."[15]

129. Thus, the Spanish Government was authorized to set the premiums to promote renewable energies taking into consideration the objective set by the EPA at 12% by 2010 and 20% by 2020.

130. EPA 1997 established a system of registration for the facilities under the Special Regime to benefit from the rights thereunder in the Register of Production Installations under the Special Regime ("**RAIPRE**")[16], managed by the Ministry of Energy (and coordinated with the regional registers managed by each Autonomous Community in Spain).[17] Article 31 of EPA 1997 requires that in each case, "*the entry shall specify the remunerative arrangements that apply."*[18]

131. The Spanish Government has carried out its mandate given by the EPA 1997 through successive royal decrees such as RD 2828/1998, RD 841/2001, RD 436/2004, RD 661/2007 and RD 1614/2010 based upon principles set forth therein.

Royal Decree 2818/1998

132. On December 23, 1998, Royal Decree 2818/1998, on the production of electric energy by facilities supplied through sources or resources of renewable energy, waste or cogeneration ("**RD 2818/1998**") was approved.[19] It was the first regulatory development implementing Law 54/1997.[20] RD 2818/1998, in its preamble, provided that it aimed to promote Special Regime installations, with incentives with "*no time limit*".[21]

133. RD 2828/1998 adopted a remuneration framework which was composed of the market price and premium as an additional payment to encourage the development of Special

[15] *Id.*
[16] In Spanish, *Registro administrativo de instalaciones de producción en régimen especial.*
[17] Cl. Mem., 137.
[18] **(C-0036tt)(R-0003EN)**
[19] Royal Decree 2818/1998 of December 23, 1998 on the production of electrical energy by facilities using resources or sources of renewable, waste-based, or cogeneration energies. **(C-0050t)** **(R-0080EN)**
[20] Resp. C-Mem., para 336.
[21] **(C-0050t)**

Regime facilities.[22] Solar and solar thermal, wind and hydraulic technology producers under Special Regime could choose to receive one total price of a certain number of pesetas per Kwh instead of the market price plus premium option.[23]

134. Article 32 of RD 2818/1998 prescribed reviews of the premiums every four years, according to the following criteria: (i) the evolution of the price of electrical energy on the market, (ii) the participation of said facilities in meeting the demand, and (iii) its impact on the technical management of the system.[24]

Plan to Encourage Renewable Energies 2000-2010

135. In accordance with the mandate of Law 54/1997, in 1999 the Council of Ministers approved the 2000-2010 *Plan de Fomento de las Energías Renovables en España* (Plan to Encourage Renewable Energies 2000-2010, "**2000-2010 Energy Plan**"), prepared by the Institute for Diversification and Saving of Energy ("**IDAE**").[25] The 2000-2010 Energy Plan assessed the situation of the renewable sector in Spain and defined specific objectives (per technology) to be achieved by 2010. This Plan stated that considering the high level of solar radiation existing in Spain, the country might become a pioneer in the commercial development of CSP technologies and set an objective of 200 MW of CSP installed capacity by 2010.[26] This plan also recognized that stability was needed in development and subsidy programs to avoid market uncertainties over a lack of clarity on investment conditions.[27]

136. The Respondent explains that the true purpose of this Plan was simply to assess the costs the Spanish electricity system assumed for the launch of renewable energies according to the reasonable profitability expected to be given to producers of renewable energy[28] and the method used in this plan, in defining, within the scope of each technology and according to the state of the art at the time, consisted (and has always consisted) of different "*typical*

[22] (**C-0050t**) Article 26 (Price for delivered electric power).
[23] Resp. C-Mem., paras. 337 and 338 citing Articles 26 and 28 of RD 2818/1998.
[24] *Ibid*., para. 345.
[25] Plan to Encourage Renewable Energies in Spain 2000-2010. (**R-0100**) (**C-0046/C-0046t resubmitted**)
[26] (**C-0046t**), pp.74-75.
[27] *Ibid*., pp.96-97; Cl. Mem., para 180.
[28] Resp. C-Mem., para. 365.

facilities."[29] According to the Respondent, once said typical facilities had been determined, different standards should 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 profitability according to the cost of money in the capital market.

EU Directive 2001/77/EC

137. On September 27, 2001, 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 ("**2001 EU Renewable Directive**") was approved.[30] It recognized the need for public support in favour of renewable energy sources, taking into account the need to internalise external costs of electricity generation. It stated that "*Member States operate different mechanisms of support for renewable energy sources at the national level*", and that "[o]*ne important means to achieve the aim of this Directive is to guarantee the proper functioning of these mechanisms, until a Community framework is put into operation, in order to maintain investor confidence.*"[31] Under this Directive, Spain's indicative target was to draw 29.4% of its electricity from renewable sources by 2010.[32]

Royal Decree 841/2002

138. On August 2, 2002, Royal Decree 841/2002 ("**RD 841/2002"**) was enacted, which amended RD 2818/1998. RD 841/2002 categorized CSP installations as Sub-group b.1.2. within the Special Regime, separate from other solar technologies like PV.[33] The Sub-group b.1.2 facilities might use fuel to maintain the temperature of their heat accumulator during periods when their electrical generation was interrupted.

[29] *Ibid*., para. 362.
[30] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, published in the Official Journal of the European Union, October 27, 2001. (In English) (**RL-0015**)
[31] *Ibid*., p. I.283/34.
[32] *Ibid.* Annex, p.I.283/39.
[33] Partial translation into English of RD 841/2002, August 2, 2002 (**C-0054t**), Article 2(1).

Royal Decree 436/2004

139. On March 12, 2004, Royal Decree 436/2004, establishing the methodology for updating and systematising the legal and economic framework for electricity generation under the Special Regime ("**RD 436/2004**")[34] was enacted. RD 436/2004 replaced RD 2818/1998. The Respondent explains that the purpose of RD 436/2004 was to achieve the objectives of the 2000-2010 Energy Plan and eliminate the volatility of the previous system for calculating the remuneration for renewable energies.[35]

140. Article 22 (Remuneration mechanisms for the electric power produced in the special regime) of RD 436/2004 granted two remuneration options to the operators of the facilities under the Special Regime as follows[36]:

> *"a) Assignment of the electricity over to the electricity distributor. In this case, the electricity sale price shall be expressed as a regulated tariff which shall be a single, flat rate for all scheduling periods and expressed in euro cents per kilowatt hour.*[37]
>
> *b) Sale of the electricity freely on the market, through the system of offers and bids managed by the market operator, through the bilateral trading, forward trading system or through a combination of all of them. In this case, the sale price of the electricity shall be the price resulting in the organized market or the price freely traded by the plant operator or the representative, supplemented by an incentive and, as the case may be, by a premium, both expressed in euro cents per kilowatt hour."*[38]

141. Article 22(3) of RD 436/2004 provides that "operators of installations falling within the scope of this Royal Decree may choose, for periods of no less than one year, the energy sale option most suitable for them and they shall communicate this information to the distribution company and to the Directorate General of Energy Policy and Mines giving at least one month's advance notice in respect of the date of the option change".[39]

142. The preamble of RD 436/2004 states that "[w]hichever remuneration mechanism is chosen, the Royal Decree guarantees operators of special regime installations fair remuneration for

[34] (**R-0082SP**)(**R-0082EN**)
[35] Resp. C-Mem., para. 370.
[36] (**R-0082EN**), Article 22(1).
[37] The Tribunal will refer this remuneration option as FiT option or regulated tariff option.
[38] The Tribunal will refer this remuneration option as FiP option or pool price plus premium option.
[39] RD 436/2004 (**R-0082EN**)

their investments and an equally fair allocation to electricity consumers of the costs that can be attributed to the electricity system…"[40]

143. According to the Respondent, the market price plus premium option does not only have the purpose of giving plants reasonable profitability, "*it was established in order to encourage the participation of renewable energies in the market. With this purpose, if the facilities chose the market option, they were given an incentive to cover the additional costs involved in participating in the market.*"[41]

144. RD 436/2004 included provisions detailing the mechanism for determining the regulated tariff, premium and incentives for those under the Special Regime.[42] Utilizing the average or reference electricity tariff set by the regulator, Article 33(3) of RD 436/2004 stipulated the remuneration of CSP installations in Subgroup b.1.2 (to which the Solacor Plants belong) to be: "*(i) Tariff: 300% during the first 25 years from their commissioning and 240%*[43] *from then onwards (ii) Premium: 250% during the first 25 years from their commissioning and 200% from then onwards; and (iii) Incentive: 10%*".

145. For CSP installations under Sub-group b.1.2, RD 436/2004 allowed the use of back-up fuel to maintain the temperature of the hot transmission fluid to compensate the lack of solar irradiation, and provided that electricity production from the back-up fuel, annually, must be less than 12% of total electricity production if the facility sold its energy at the regulated tariff ("**FiT**"). The percentage might reach 15% if the facility sold its energy under the market price plus premium ("**FiP**") option.[44]

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[40] (**R-0082EN**). In its Counter Memorial, the Respondent quotes this language in a slight different English translation as follows: "*Whichever remuneration mechanism is chosen, the Royal Decree guarantees to owners of special regime facilities, a reasonable return for their investments; and to electricity consumers, a reasonable allocation of the costs attributable to the electrical system (...)*". Where the Respondent uses in its submission an English translation different from its own English translation submitted as exhibits, the Tribunal will rely on the English translation of the Respondent's exhibits on the record.

[41] Resp. C-Mem., para. 381.

[42] (**R-0082EN**), Article 23 (Regulated Tariff), Article 24 (Premium) and Article 25 (Incentive for market participation).

[43] Spanish version (**R-0082SP**) shows 240%, while English translation (**R-0082EN**) shows 200%. Resp. C-Mem. states that it is 240%. Resp. C-Mem., para. 377.

[44] (**R-0082EN**) (C-0051t), Article 2 (Scope of application).

146. The average or reference electricity tariff was set by the regulator in accordance with Royal Decree 1432/2002 ("**RD 1432/2002**").[45] Sixth additional provision of RD 436/2004 (Average or reference tariff in 2004) stated that the average or reference tariff for the year 2004 had a value of 7.2072 cE/kWh.

147. A notable provision in RD 436/2004 was paragraph 3 of Article 40 (Revision of tariffs, premiums, incentives and supplements for new plants) which provided for a possibility of a revision of tariffs and premiums in 2006, and every four years thereafter. It also included an express provision grandfathering existing plants in operation at the time of such revision. The text reads as follows[46]:

> *"3. The tariffs, premiums, incentives and supplements resulting from any of the revisions provided for in this section 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."*

148. Article 33(4) provides for an earlier revision in case the installed capacity of CSP installations reaches 200 MW as follows:[47]

> *"4. Notwithstanding the provisions of article 40, whenever ... subgroup b.1.2 reaches 200 MW of installed capacity, the figures for the tariffs, incentives and premiums stated in this article shall undergo revision."*

2005-2010 Plan for Renewable Energies

149. In August 2005, the Spanish Government approved the plan for renewable energies in Spain 2005-2010 (the "**2005-2010 Energy Plan**") prepared by IDAE.[48] This plan revised the previous 2000-2010 Energy Plan. The 2005-2010 Energy Plan had a dual objective: to maintain the commitment to meet at least 12% of the total energy consumption in 2010 with renewable sources, as part of the policies to encourage renewable energy in the EU, and to incorporate, among others, a new goal of achieving 29.4% of electricity generation from renewables set for Spain in the EU Directive.[49] According to this plan, in regard to

[45] Royal Decree 1432/2002, December 27, 2002. (**R-0081EN**)
[46] (**R-0082EN**), Article 40(3).
[47] (**R-0082EN**)
[48] Partial translation into English of the 2005-2010 Renewable Energies Plan, August 26, 2005. (**C-0055t**)
[49] Resp. C-Mem., para. 397.

electricity production, generation with renewables reaches 30.3% of the gross electricity consumption in 2010, thus fulfilling the 29.4% target.[50]

150. The 2005-2010 Energy Plan sets the implementation objectives for all renewable technologies to be aspired for 2010. Recognizing that "*at the end of 2004 the percentage contribution of renewable energy to the primary energy consumption had only increased a few tenths with respect to 1998*"[51], the 2005-2010 Energy Plan found it necessary to revise the previous plan and prepare a new one with the design of new scenarios and the establishment of objectives.

151. This plan stated that while wind, biofuels and biogas had evolved in a satisfactory manner, areas such as solar energy were "*developing notably below the rhythm necessary to achieve the final objective*"[52]. The 2005-2010 Energy Plan noted that while not a single solar thermal energy project had been commissioned in Spain as of the end of the year 2004,[53] three projects were then in execution, for a total power capacity of 110 MW[54].

152. With respect to the regulatory aspects, the 2005-2010 Energy Plan stated that RD 436/2004 established an economic framework that was sufficiently favourable for the development of solar thermal energy, but it limited the remuneration conditions by setting a maximum of 200 MW. It also noted that allowing the solar thermal operators to use gas to maintain the temperature and offset the lack of solar radiation up to 12% if sold at a fixed price, and 15% if sold on the market, reinforced the operation and viability of the projects.[55]

153. Noting the absence of a certain degree of commercial development in the solar thermal area, this plan identified three economic barriers in the use of solar resources: (i) need for subsidies to promote investment in initial projects; (ii) low degree of precision in the valuation of the initial projects, which led to an increase in their costs; and (iii) uncertainty regarding the institutions that could be sources of financing.[56] It also identified as one of

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[50] (C-0055t), p. 9.
[51] *Id.*
[52] *Ibid.*, Section 2.2., pp. 19 and 20.
[53] *Ibid.*, Section 3.4.2.1., p. 133.
[54] *Ibid.*, Section 3.4.1., p. 132.
[55] *Ibid.*, Section 3.4.2.4, p.138.
[56] *Ibid.*, Section 3.4.2.7, pp. 142-143.

the regulatory barriers the limitation of existing premiums and tariffs up to a limit of 200MW set by RD 436/2004. It stated that this limitation represented a limitation of the development of the sector because there were projects in execution of the total 110 MW and in the permit-processing phase of 325 MW.[57] This Plan proposed the maintenance of the conditions in RD 436/2004 with the increase of the limit of the legal framework to 500 MW installed capacity and 1,298 GW/h production in 2010, and 2,882 GWh during the period 2005-2010.[58]

Royal Decree-Law 7/2006

154. On June 23, 2006, Royal Decree-Law 7/2006, ("**RD-L 7/2006**"), adopting urgent measures in the energy sector, was approved.[59]

155. The Respondent explains the background of introducing RD-Law 7/2006 and RD 661/2007 as follows: There had been an extraordinary increase in the market price of energy due to the increase in the price of oil and the inclusion of greenhouse gas emission rights in the price of energy. Thus, the price of energy reached 50-60 euros/MW. Then, the situation changed from all facilities having the option to a regulated tariff to a situation where most of the facilities opted for the remuneration according to the market price plus premium, obtaining a level of remuneration that was much higher than what the Respondent's regulator foresaw. To address this issue, the Respondent approved, with extraordinary urgency, RD-L 7/2006, which froze the subsidies to those under the Special Regime until a new remuneration regime would be developed based on the amendment that RD-L 7/2006 introduced to Law 54/1997. The new remuneration framework announced by RD-Law 7/2006 was implemented by RD 661/2007.[60]

[57] *Ibid*., Section 3.4.4.1, p.148
[58] *Id.*
[59] RD-L 7/2006, June 23, 2006. (**C-0056**) (**R-0071**)
[60] Resp. C-Mem., paras. 420 through 422.

Report 3/2007 of the National Energy Commission

156. On February 14, 2007, the National Energy Commission ("**CNE**" or "**NEC**")[61] issued its Report 3/2007 concerning a proposal for a Royal Decree that regulated electric power production under the Special Regime and that of certain similar technological installations under the Ordinary Regime ("**CNE Report 2007**").[62]

157. The CNE Report 2007 recognized that under EU Directive 2001/77/EC Member States were left free to establish the economic support systems for the development of such energy, as well as the technical and administrative rules for approval of the installations.[63]

158. Recognizing that "economic incentives in a liberalized framework such as that of electricity production, represent a significant tool of energy and environmental policy"[64], this Report highlighted the importance of minimizing regulatory uncertainty in the following words:

> *"The NEC understands that transparency and predictability in the future of economic incentives reduces regulatory uncertainty, incentivising investments in new capacity and minimizing the cost of financing projects, thus reducing the final cost to the consumer. The regulation must offer sufficient guarantees to ensure that economic incentives are stable and predictable throughout the service life of the facility, In each case, regulation must provide both transparent annual adjustment mechanisms, associated to robust trend indexes (such as the average or reference tariff, the CPI, ten-year bonds, etc.) and regular reviews that only affect new facilities (e.g., every four years) with regard to investment costs, which could also affect the reduction of operating costs at existing installation."* [65] [Emphasis added]

[61] In Spanish, *Comisión Nacional de Energía*.
[62] CNE Report 3/2007, February 14, 2007. (**C-0044**) (**R-0110**)
[63] (**C-0044t**) (**R-0110EN**), Section 5.1, p.10.
[64] (**R-0110EN**) Section 5.3, p. 15.
[65] *Ibid.,* Section 5.3 b), p. 16.

Royal Decree 661/2007

159. On May 25, 2007, the Respondent enacted Royal Decree 661/2007 ("**RD 661/2007**") regulating the activity of electricity production under the special regime.[66] RD 661/2007, which replaced its predecessor RD 436/2004, entered into force on June 1, 2007.

160. The preamble of RD 661/2007 stated that the economic framework established in RD 661/2007 developed the principles provided in EPA 1997, which guaranteed 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 was also reasonable.[67] It further stated that in certain technologies the targets in respect of the promotion of renewable energy covered in the 2005-2010 Energy Plan were still far from being reached, and the modification of the existing economic and legal framework regulating the Special Regime had become necessary. The economic circumstance made it necessary to de-link the remuneration system from the average electricity tariff, or reference tariff formula established by RD 436/2004.

161. The official press release issued by the Spanish Government on May 25, 2007 was titled as "The Government assigns priority to profitability and stability in the new Royal Decree on renewable energy and cogeneration". [68] It stated that:

> *"The purpose of this Royal Decree is to improve the remuneration of those less mature technologies, such as biomass and thermosolar, so as to be able to meet the objectives of the 2005-2010 Renewable Energies Plan (Plan de Energías Renovables 2005-2010), as well as the commitments entered into by Spain at the European level. Through the development of these technologies, 12% of Spain's energy consumption in 2010 will be met from renewable sources."*[69] [Emphasis added]

162. Considering the importance of RD 661/2007 acknowledged by both Parties, key features of RD 661/2007 are described in detail in the following paragraphs.

[66] RD 661/2007, May 25, 2007. (**C-0037t**) (**R-0084EN**)
[67] (**R-0084EN**), BOE May 26, 2006, no. 126,
[68] Ministry of Industry, Tourism and Commerce, "*The Government assigns priority to profitability and stability in the new Royal Decree on renewable energy and cogeneration*", May 25, 2007. (**C-0075t**)
[69] *Id.*

163. Article 2 (Scope of Application) of RD 661/2007 classified CSP plants as Subgroup b.1.2 as was the case in RD 436/2004.[70] The same article retained the feature in the RD 436/2004 allowing CSP installations to use fuel for the maintenance of the temperature in order to compensate for a lack of solar irradiation up to 12% of the total production of electricity if the facility chose the regulated tariff (FiT) option, and 15% if the FiP option was chosen.

164. RD 661/2007 offered operators of CSP plants under the Special Regime two options to remunerate production of electricity: (i) the regulated tariff (or feed-in tariff) option expressed in Euro cents per kWh ("**Regulated Tariff**" or "**FiT**") and (ii) the market price plus premium expressed in Euro cents per kWh ("**FiP**").[71]

165. While both RD 436/2004 and RD 661/2007 offered both FiT and FiP options to CSP plants under the Special Regime, the difference between the two is that under RD 661/2007, the regulated tariff should be expressed in fixed figures expressed in Euro cents per kWh and the premium under the FiP option should also be set in Euro cents per kWh rather than leaving the determination to the regulator (see paras. 144 and 146 *supra*). Thus, the uncertainty arising from linking the remuneration to the concept of average electricity tariff or reference tariff formula determined by the regulator under RD 436/2004 was eliminated in RD 661/2007. RD 667/2007 also introduced the concept of "cap" and "floor" for the FiP option.

166. Specifically, Table 3 of Article 36 of RD 661/2007 (Tariffs and premiums for facilities in Category b)) set forth the rates and premiums for facilities classified as category b. in concrete numbers. According to this Table, for the category b.1.2) to which CSP plants belonged, for the first 25 years, the regulated tariff (cE/kWh) was set at 26.9375 for the first 25 years, and 21.5498 thereafter, the reference premium (cE/kWh) is 25.4000 for the first 25 years, and 20.3200 thereafter, with the upper limit of 34.3976 and lower limit 25.4038 applicable both to the first 25 years and thereafter.[72] There was no limit on the period of time except that after the first 25 years, the reduced rate applied..

[70] (**R-0084EN**) (**C-0037t**), RD 661/2007, Article 2(1).
[71] *Ibid*., Article 24(1).
[72] *Ibid*., Article 36, Table 3.

Table 3

Group	Sub-Group	Power	Term	Regulated Tariff, c€/kWh	Reference premium c€/kWh	Upper Limit, c€/kWh	Lower Limit, c€/kWh
b.1							
	b.1.2		First 25 years	26.9375	25.4000	34.3976	25.4038
			Thereafter	21.5498	20.3200		
b.2	b.2.1		First 25 years	7.3228	2.9291	8.4944	7.1275
			Thereafter	6.1200	0.0000		

167. Article 37 provided that the target reference installed power for CSP installations (Sub-group b.1.2) was set at 500 MW.

168. Under RD 661/2007, the rights of the producers under the Special Regime included the right to enjoy priority in access and connection to the electricity grid.[73]

169. Article 9 of RD 661/2007 provided that to ensure proper monitoring of the Special Regime and in particular in order to ensure the management and control of the receipt of the regulated tariffs, the premiums and supplements, facilities under the Special Regime should be subject to compulsory registration in the Public Authority Register of power production facilities under the Special Regime in two steps: an initial registration and a final registration.[74] Article 11 of RD 661/2007 set forth details of the initial registration, and Article 12 set forth details of the final registration.

170. With respect to the effect of the final registration, Article 14(1) of RD 661/2007 provided, in pertinent part, that:

> *"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*

[73] *Ibid*., Article 17.

[74] *Ibid.,* Article 9.

facility, with effect from the first day of the month following the date of the final deed of entry into service of the facility."[75] [Emphasis added]

171. In its official press release issued on May 25, 2007, the Ministry of Industry, Tourism and Commerce explained the remuneration for the CSP sector under RD 661/2007 as follows:

> *"For other technologies which require a boost due to their limited development, as with… thermoelectric solar power, the profitability increases to 8% with the transfer of production to distributors and between 7% to 11% if they participate in the market."*
>
> *"Thus, increases in the regulated tariff compared with that envisaged in Royal Decree 436/2004 are …… 17% for thermosolar installations….*
>
> *When installations opt to participate in the production market, the premium obtained shall be variable according to the hourly market price. To this end, lower and upper limits are established for each of the technologies, known as cap and floor limits. Under this system, the premium will be adjusted in such a manner that the total remuneration obtained by an installation shall remain within such limits in each hourly period.*
>
> *The tariffs, premiums and upper and lower limits, as well as other supplements, shall be updated on the basis of the CPI, less 0.25 until 2012 or less 0.50 from then onwards."*[76]

172. Article 44(1) of RD 661/2007 addressed the update and revision of tariffs, premiums and supplements for various groups in detail. The provision relevant to CSP sector (Sub-group b.1.2) reads as follows:

> *"The values of the tariffs, premiums, supplements, and lower and upper limits to the hourly price of the market as defined in this Royal Decree, for category b) […], shall be updated on an annual basis using as a reference the increase in the RPI less the value set out in the Additional Provision One of the present Royal Decree."*[77]

173. The Additional Provision One of RD 661/2007 referred to in the above provision stated that:

> *"The reference value set out for the subtraction of the RPI indicated in the present Royal Decree for updating certain established values shall be twenty-five basis points up to 31 December 2012, and fifty basis points thereafter."*[78]

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[75] *Ibid.*, Article 14.
[76] Official Press Release of the Ministry of Industry, Tourism and Commerce, May 25, 2007. (**C-0075t**)
[77] (**R-0084EN**) Article 44(1) of RD 661/2007.
[78] *Ibid*., Additional Provision One of RD 661/2007.

174. Article 44(3) addressed the potential revision of the tariffs, premiums, supplements and lower and upper limits, and the effect of such future revisions on existing facilities. The Parties disagree on the interpretation and the legal effect of this provision. The text reads 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."*[79] [Emphasis added]

175. The above-mentioned official press release of the Ministry of Industry, Tourism and Commerce of Spain issued on May 25, 2007 explained Article 44(3) of RD 661/2007 in the following words:

> *"In 2010 the tariffs and premiums established in the proposal will be reviewed in the light of the aims established in the 2005-2010 Renewable Energies Plan and the Energy Saving and Efficiency Strategy (Estrategia de Ahorro y Eficiencia Energética), and in accordance with the new targets to be included in the next Renewable Energies Plan for the 2011-2020 period.*
>
> *Any revisions of tariffs to be carried out in the future shall not affect the facilities already in operation. This guarantee provides legal certainty for the producer, providing stability for the sector and promoting its development."* [80] [Emphasis added]

176. The same official press release stressed the importance of the stability and the sufficient and reasonable return to make the investment and engagement in the new technology activity attractive by stating that:

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[79] (**R-0084EN**)
[80] (**C-0075t**)

> *"The government's commitment to this energy technologies has been the reason why in the new regulation stability in time is sought allowing business owners to plan in the medium and long term, as well as a sufficient and reasonable return which, like the stability, makes the investment and engagement in this activity attractive."* [81] [Emphasis added]

Directive 2009/28/EC

177. On April 23, 2009, the Directive 2009/28/EC of the European Parliament and of the Council of April 23, 2009 on the promotion of the use of energy from renewable sources was approved. [82] It repealed earlier Directives 2001/77/EC and 2003/30/EC. [83] This Directive reaffirmed the EU's commitment to the promotion of renewable energies and established the objective that by 2020 the EU would seek to obtain 20% of its total energy consumption requirements from renewable energy sources. The Directive stated that "*it is appropriate to establish mandatory national targets consistent with a 20% share of energy from renewable sources…by 2020*." [84] It further states that "[t]*he main purpose of mandatory national targets is to provide certainty for investors and to encourage continuous development of technologies which generate energy from all types of renewable sources.*" [85] The Directive set the national target for Spain for the share of energy from renewable sources in gross final consumption of energy in 2020 at 20%. [86]

Royal Decree-Law 6/2009

178. On April 30, 2009, in the aftermath of international financial crisis, the Respondent enacted Royal Decree-Law 6/2009 ("**RD-L 6/2009**") of April 30, 2009, adopting certain measures in the power sector and approving reduced rates. [87] It went into effect on May 7, 2009. The preamble of RD-L 6/2009 states that the growing tariff deficit is "*producing serious problems, which, in the current context of international financial crisis is profoundly affecting the system.*" It further states that "[*t*]*his maladjustment is unsustainable and has*

[81] *Id.*
[82] Directive 2009/28/EC of the Parliament and of the Council, April 23, 2009, on the promotion of the use of energy from renewable sources and the amendment and repeal of Directives 2001/77/EC and 2003/30/EC, published in the Official Journal of the European Union on June 5, 2009. (In English) (**RL-0017**)
[83] *Ibid.*, Article 26 (Amendments and repeal)
[84] *Ibid.*, Preamble 13.
[85] *Ibid.,* Preamble 14.
[86] *Ibid.,* Annex I.
[87] RD-L 6/2009, April 30, 2009. (**C-0038**) (**R-0072**)

serious consequences, by deteriorating the security and capacity of the financing of investments needed for the supply of electricity at the levels of quality and security that the Spanish society demands."[88]

179. In order to address the identified problems, RD-L 6/2009 adopted certain urgent measures to protect consumers and ensure the economic sustainability of the electricity system as well as the regulatory measures aimed at reactivating and re-launching investment in the power sector. RD-L 6/2009 stipulated that the income deficit of the settlement of the regulated activities of the electricity sector for years 2009, 2010, 2011 and 2012 should be no greater than EUR 3,500 million, EUR 2,000 million, EUR 2,000 million and EUR 1,000 million respectively, and as of January 1, 2013, the access fees should be sufficient to satisfy all the costs of the regulated activities without appearing as *ex ante* deficit.[89] Moreover, in order to regulate the financing of the deficit and the legal regime governing the tariff deficit, RD-L 6/2009 introduced provisions regarding the securitization of collection rights by creating the Securitization Fund for the Deficit of the Electricity System.[90]

180. Another important feature of RD-L 6/2009 was the creation of a new sub-section in RAIPRE for the registration of pre-approved projects, called "*Remuneration Pre-Assignment Register*". This Register was created to allow the government to carry out the appropriate planning for those under the Special Regime as well as to guarantee the necessary legal security for those who have made investments. On this point, the preamble of RD-L 6/2009 stated that

> *"This [the measure provided for in the Royal Decree-Law, by setting up the pre-assignment of payment register] will enable information to be available within the time periods provided for in the Royal Decree-Law, not only for the currently planned installations, but also that these comply with the conditions for implementation and access to the electricity system with all the legal and regulatory requirements, the volume of power associated with the same, and the impact on the electricity tariff costs and their schedule. In any case, the rights and expectations of the owners of the installations are respected, setting the precise*

[88] (**R-0072EN**) Preamble of RD-L 6/2009.
[89] (**R-0072EN**) (C-0038t), Article 1.
[90] *Id*.

precautions and providing a transitional scheme need for the adaptation."[91] (the Respondent's English translation)

"It will make it possible to know, within the periods established under the Royal Decree-Law, what facilities are currently planned but also that they meet the requirements for executing and accessing the electrical system with all the legal and regulatory provisions, the power capacity they will have, and their impact on the cost of the electric tariff and its calendar. In any case it respects the rights and expectations of the power plant owners, establishes the precautionary measures that are necessary and the transitory regime need for adaptation."[92] (the Claimant's English translation)

181. Registration in such Pre-Assignment Register was necessary to obtain the right to the economic scheme established in RD 661/2007.[93] This allowed project developers to begin construction of plants with the benefit of knowing beforehand that their facilities would qualify under the Special Regime, subject to compliance with specific deadlines and conditions.[94] This new registry required renewable project developers to provide extensive information, as well as proof of initial permits and supply contracts.[95] Facilities not registered within a period of 30 calendar days, starting from May 7, 2009 could not apply for the right to the RD 661/2007 economic regime.[96]

182. Facilities registered on the Remuneration Pre-Assignment Register had a maximum period of thirty-six months from the date of notification, to be finally registered on the RAIPRE and to start the sale of energy. Otherwise, their economic right associated with inclusion in the Pre-Assignment Register should be revoked.[97]

183. The fifth transitional disposition of RD-L 6/2009 stated that when the capacity associated with the pre-registered projects were higher than the stipulated target of capacity, the economic regime established under RD 661/2007 should apply and it should be used up with the pre-registered facilities. In such case, by means of resolution of the Council of Ministers, at the proposal of the Ministry of Industry, Tourism and Commerce, annual

[91] (**R-0072EN**)
[92] (**C-0038t**)
[93] (**C-0038t**) (**R-0072EN**), Articles 4(1) and 4(2).
[94] (**CWS-ES**), Mr. Eduard Soler Babot's witness statement, para. 28; email from Mr. Eduard Soler Babot to Mr. Yusuke Yamazaki of May 13, 2009. (**C-0129/C-0129t**).
[95] Cl. Mem., para. 319.
[96] RD-L 6/2009, Fourth Transitional Provision
[97] (**C-0038t**) (**R-0072EN**), Article 4(8).

restrictions might be established with regard to the execution and entry into operation of the pre-registered facilities and they might be granted priority in order to avoid compromising the technical and economic sustainability of the system.

Council of Ministers' Resolution of November 13, 2009

184. On November 13, 2009, the Spanish Council of Ministers issued a Resolution which established that the pre-registered installations utilising CSP technology would enter into operation in four successive phases ("**Resolution of the Council of Ministers of November 13, 2009**").[98]

185. The background of the resolution was explained in its preamble as follows: The capacity associated with the CSP facilities definitely registered in the RAIPRE before May 7, 2009 was of 81 MW while RD 661/2007 set the capacity targets for CSP technology at 500 MW. However, pursuant to the provisions of RD-Law 6/2009, the applicants utilizing CSP technology submitted 104 applications with a total capacity of 4,499 MW, well in excess of the 500 MW limit. The wind technology sector faced similar over-capacity issue. As the capacity applied for the CSP technology together with the capacity already installed exceeded the 500 MW target set by RD 661/2007, an analysis was performed on both the technical and economic impact entailed by the entry into operation of a much higher capacity than the target. According to the analysis on the economic impact of the entry into operation of renewable energy production facilities for the 2014 horizon prepared by the Secretary of State for Energy, (i) the extra cost to the system derived from the fulfilment of the objectives of the 2005-2010 Energy Plan would amount to around EUR 3.66 billion in 2010, valued at the current market prices; and (ii) this situation would worsen if all the facilities registered in the Pre-Assignment Register entered into operation in 2010, which would push the extra cost of the Special Regime to EUR 7.254 billion. The analysis concluded that the gradual entry into operation of CSP facilities (as well as wind technology facilities) registered in the Pre-Assignment Register, during the period 2010-2013, would permit a much more moderate absorption of the costs associated with these

[98] Resolution of the Council of Ministers of November 13, 2009. This Resolution was published on the BOE on November 24, 2009. (**C-0134**) (**R-0098**)

technologies. The proposed start-up scenario involved an additional cost of the Special Regime of EUR 5.959 billion in 2010.[99]

186. Based upon the economic analysis referred to above, the Council of Ministers determined that:

> *"for thermoelectric and wind power technologies, where the capacity applied for significantly exceeds the pace of implementation provided for so far, it is necessary to schedule its entry into operation so as not to compromise the technical and economic security of the Electrical System, taking into consideration the planned pace of implementation of the remaining technologies, and the aforementioned technical and economic restrictions."*[100]

187. On this rationale, this Resolution established annual restrictions on the implementation and commissioning of the registered facilities and their prioritization. This Resolution ordered that the commissioning of the facilities using CSP technology in four phases with the cumulative implementation rate as follows: (i) Phase 1: 850 MW; (ii) Phase 2: 1,350 MW; (iii) Phase 3, 1,850 MW; and (iv) Phase 4, remaining registered capacity.[101] The Resolution set forth the timetable for each phase, and stipulated that the facilities registered in the Remuneration Pre-Assignment Register associated with each of the phases may not start feeding power to the network of the distribution or transmission operator before the date designated for each phase: (i) Phase 2: January 1, 2011; (ii) Phase 3: January 1, 2012 and (iii) Phase 4: January 1, 2013.[102] It further provided that such facilities must be definitively registered in the RAIPRE and must start selling power before the designated date for each Phase: for Phases 2 and 3 by January 1, 2013 and for Phase 4 by January 1, 2014.

188. The Resolution made it explicit that these restrictions did not involve the alteration of the economic rights recognized by RD-L 6/2009.[103] This confirmed that the feed-in regime would remain applicable to pre-registered installations.[104]

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[99] *Ibid.*, III of the Preamble.
[100] (**C-0134t**), p.3.
[101] (**C-0134**) (**R-0098**), para. 2.
[102] *Ibid.*, para. 4.
[103] *Ibid.*, Section IV.
[104] (CWS-ES), Mr. Eduard Soler Babot's witness statement, paras. 41-42; emails between Mr. Yusuke Yamazaki and Mr. Eduard Soler Babot of November 12, 2009. (**C-0135/C-0135t**).

189. The concurrent Council of Ministers Reference issued by the Secretary of State for Communication of Spain on November 13, 2009 included statements under the caption of "*Approval of Schedule for new wind and thermosolar facilities for the next three years*" as follows:

> *"Today's resolution means that developers can now see the landscape for the next three years, thus allowing them to plan their business well in advance. Further it brings in the necessary certainty for promoters and for the industry associated with these important sectors of renewable energies, as well as rationalizing the annual increase in the cost of power that for consumers has meant the rolling of these facilities."*[105] [Emphasis added]

190. On December 15, 2009, the Ministry of Industry, Tourism and Commerce made a press release announcing that it had completed the Remuneration Pre-Assignment registration for renewable electric energy installations.[106] According to this press release, for thermosolar technology, a total of 56 applications with a total capacity of 2,339.89 MW had been registered in four different phases. The press release included a statement which reads that:

> *"Completion of the pre-registration stage confirms the Government's commitment to provide the sector with visibility and long-term stability, making the huge development of these technologies compatible with their secure integration in the system with an acceptable impact on electricity prices"* [Emphasis added]

July 2, 2010 Official Press Release

191. Since April 2010, the Ministry of Industry, Tourism and Commerce had been discussing with the wind and thermosolar industry associations regarding possible modifications to be made to the remuneration framework applicable to them.[107] On July 2, 2010, the Ministry of Industry, Tourism and Commerce issued a press release ("**July 2, 2010 Press Release**") announcing that the Ministry had closed an agreement with the wind and thermosolar energy sectors to revise their remuneration frameworks ("*Industria cierra con los sectores*

[105] Official Press Release of the Council of Ministers of November 13, 2009. (**C-0138t**)
[106] Official Press Release of the Ministry of Industry, Tourism and Commerce of December 15, 2009 (**C-0132t**)
[107] Cl. Mem., paras. 355 through 375.

eólico y termosolar un acuerdo para revisar sus marcos retributivos") ("**July 2, 2010 Agreement**").[108]

192. The July 2, 2010 Press Release stated that the agreement between the Ministry of Industry, Tourism and Commerce and the wind and thermosolar energy industry representatives, i.e., Spanish Wind Energy Association (AEE) and the Spanish Thermosolar Industry Association (Protermosolar), included:

> *"short-term measures that will reduce the impact of these technologies on the price of electricity as well as long-term measures which will provide these technologies with stability and certainty for their future development".*[109] [Emphasis added]

193. Specifically, with respect to the CSP sector, the announced measures included the following: (i) CSP plants would be prevented from opting for the pool price plus premium (FiP) option for one year of operation, in which they would only be able to access the regulated tariff (FiT) established in RD 661/2007, of a lower value; (ii) the entry into operation of the CSP facilities would also be delayed per the July 2, 2010 Agreement; and (iii) the number of hours entitled to the remuneration above the market price is limited for the calculation of the facilities' profitability.

194. The July 2, 2010 Press Release stated that this agreement did not compromise the profitability of existing facilities. It also stated that:

> *"[t]his agreement strengthened the visibility and stability of the regulation of these technologies for the future, guaranteeing the premiums and tariffs of RD 661/2007 for facilities in operation (and for those included in the pre-register) after 2013."*[110] [Emphasis added]

[108] Press release issued by the Ministry of Industry, Tourism and Commerce, July 2, 2010. (**C-0040/C-0040t**). Also, (**C-0213**) email of July 2, 2010 from the Director-General for Energy Policy and Mining (Mr. Antonio Hernández García) to Dr. Luis Crespo (Secretary General of Protermosolar, the association of companies with interests in the CSP subsector in Spain to which Abengoa belongs) of July 2, 2010 at 22:00 confirming the text of the Agreement). CWS-LC, para. 71; CWS-ES, para. 58; email from Mr. Eduard Soler Babot to Dr. Luis Crespo of July 2, 2010 (**C-0223/C-0223t**) and email from Dr. Luis Crespo to Mr. Eduard Soler Babot of July 2, 2010 (**C-0224/C-0224t**). The Parties disagree on the legal nature of what was announced by the Ministry on July 2, 2010. The Claimant submits that it is a binding agreement between the Ministry and the industry associations, while the Respondent contends that it is a part of the public consultation process and as such is not legally binding. For convenience reasons only, the Tribunal will use the term "July 2, 2010 Agreement", but the use of this term should not be viewed as the Tribunal's determination of the legal nature thereof.

[109] (**C-0040/C-0040t**)

[110] *Id*.

195. Finally, it indicated that the Ministry would immediately begin the process which would allow the contents of the agreement to be converted into a law.

196. On the same day (July 2, 2010), Protermosolar representing the thermosolar sector issued a press release confirming that it had entered into the agreement with the Ministry of Industry, Tourism and Commerce.[111] This press release, titled as "*The Thermosolar sector reaches an agreement with MITyC that contributes to cost savings in the electric sector while assuring stability and transparency in the regulatory framework*", indicated the CSP industry's understanding of what was agreed by the July 2, 2010 Agreement.[112] It quoted the statement of Valeriano Ruiz, the President of Protermosolar, which reads as follows:

> *"[t]he Thermosolar al [sic] sector has made a significant effort to contribute to saving costs in the electrical system during the 2010-2013 period without compromising the stability and transparency of the regulatory framework which is essential to ensure economic development and job creation in a key innovative sector. This agreement brings an end to the uncertainty regarding the sector's regulation".* [Emphasis added]

197. On July 8, 2010, Rosa Francisca Gutiérrez Pérez, on behalf of Mr. Antonio Hernández (Director General of Energy Policy and Mines of Ministry of Industry, Tourism and Commerce) sent an email to Dr. Luis Crespo of Protermosolar, attaching a document titled as "*Acuerdo Con el Sector Termosolar*" in Spanish (the Agreement with the thermo-solar sector). At the top of the first page of this document, the logos of the Ministry of Industry, Tourism and Commerce and Protermosolar were displayed (in Spanish, MINISTERIO DE INDUSTRIA, TURISMO Y COMERCIO and PROTERMOSOLAR).[113]

198. This document started with the statement that "The MITYC (Spanish, Ministry of Industry, Turism [sic] and Commerce) has reached an agreement with the thermosolar sector by which the promotion of the following actions is undertaken." It then listed seven agreed items including (i) elimination of the market plus premium option for one year; (ii) the sectors' commitment to delay the entry into operation of several of the plants listed in the attached list; (iii) amendment of Article 44(3) of RD 661/2007 establishing that any future revisions of the premiums and upper and lower limits would not affect existing facilities

[111] Press release issued by Protermosolar, July 2, 2010 (**C-0222/C-0222t**); CWS-ES, para. 58.
[112] (**C-0222/C-0222t**)
[113] Email from Mr. Antonio Hernández García to Dr. Luis Crespo of July 8, 2010. (**C-0219/C-0219t**)

or those already entered in the Pre-Assignment Register; (iv) the limit of the number of equivalent hours of operation with the right to the tariff; (v) that "the conditions of this agreement that are legally suitable will be reflected in the administrative decisions corresponding to each facility"; (vi) introduction of administrative control over changes of plant ownership; and (vii) return of bonds.

199. In particular, item 3 among the agreed items list reads as follows:

> *"3. Amendment of Section 44.3 of Royal Decree 661/2007 establishing that any future revisions of the premiums will not affect existing facilities, as it currently established for regulated tariffs, and upper and lower limits, nor those that at the time of approval of the review were already entered in the Feed-in Tariff Pre-assignment Registry created by Royal Decree-Law 6/2009, April 30, or that were definitively entered in the REPE prior to May 6 2009."*[114] [Emphasis added]

200. At the end of the main text, the following statement was included in bold and capitalized letters:

> *"THE LEGAL INSTRUMENT EMBODYING THIS AGREEEMENT SHALL BE PREVIOUSLY SAHRED (sic) WITH THE SECTOR BEFORE THE APPOVAL (sic) PROCESS THEREOF IN (sic) COMMENCED." (In Spanish Original, EL TEXTO NORMATIVO QUE SE DERIVE DE ESTE ACUERDO SERÁ COMPARTIDO PREVIAMENTE CON EL SECTOR ANTES DEL INICIO DE SU TRAMITACIÓN.)*

201. The Appendix to this document titled as "*Limitation to the entry into operation*" listed Solacor 1 and Solacor 2 together with other CSP producers which made firm commitment to delay their respective entry into operation.

Royal Decree 1565/2010

202. On November 19, 2010, the Respondent passed Royal Decree 1565/2010 ("**RD 1565/2010**"), which regulates and modifies certain aspects of the electricity production activities under the Special Regime regarding the Feed-in remuneration scheme applicable to the PV subsector.[115]

[114] *Id*.
[115] RD 1565/2010, November 19, 2010. (**C-0078**) (**R-0087**)

Royal Decree 1614/2010

203. On December 7, 2010, the Respondent enacted Royal Decree 1614/2010 ("**RD 1614/2010**"), regulating and modifying certain aspects of the activity of electrical power production through solar thermo-electric and wind technologies.[116] RD 1614/2010 took effect on December 9, 2010.

204. Noting that the growth of wind, thermal solar and photovoltaic technologies was especially remarkable, having reached and even surpassed the installed power objectives planned for the year 2010, the preamble of RD 1614/2010 stated the reasons for this legislation in the following words:

> *"the support system, as it was drafted, must be adapted, safeguarding the legal security of the investments and the principle of reasonable return, to the dynamic reality of the learning curves of the different technologies and the technical constraints that have emerged with the increased penetration of these technologies in the power generation mix, in order to maintain an adequate and necessary support system that is consistent with market conditions and the strategic energy objectives and that contributes to transferring the gain from the appropriate development of these technologies to society."*[117]

205. The preamble further stated that it aimed to resolve certain inefficiencies in the implementation of RD-L 6/2009 for wind and thermosolar technologies.

206. RD 1614/2010 incorporated the contents of the July 2, 2010 Agreement announced by the Ministry of Industry, Tourism and Commerce. For instance, with respect to the CSP facilities, RD 1614/2010 stipulated a one year compulsory application of the regulated tariff only.[118] In return, it raised the limit of the percentage of electric energy generated from back-up fuel from 12% to 15% during this period.[119]

[116] RD 1614/2010, December 7, 2010. (**C-0039**) (**R-0088**)
[117] (C-0039t), Preamble.
[118] (**C-0039t**)(**R-0088EN**), Article 3(1) of RD 1614/2010.
[119] *Ibid*., Article 3(3).

207. RD 1614/2010 included a limitation to 2,855 of the number of equivalent hours of operation entitled to the premium or premium equivalent CSP plants using parabolic trough technology, with no storage (the category to which Solacor 1 and Solacor 2 belong).[120]

208. Article 4 of RD 1614/2010 set out the principle of non-retroactivity as follows:

> *"For thermosolar technology facilities under Royal Decree 661/2007, of May 25, the revisions of tariffs, premiums and lower and upper limits, to which Article 44.3 of said Royal Decree refers, shall not affect those facilities finally registered in the administrative Register of power production facilities under the special regime of the General Directorate of Energy Policy and Mining as of May, 7 2009, nor to those facilities pre-registered on the remuneration pre-allocation Register pursuant to the Fourth Transitional Provision of Royal Decree-Law 6/2009 of April 30…"*[121] [Emphasis added]

209. The Council of Ministers Reference issued by the Secretariat of State for Communication dated December 3, 2010, announcing the approval of RD 1614/2010, explained RD 1614/2010 as follows:

> *"The new regulations, which were agreed with both sectors last July, have the main objectives of obtaining savings to benefit consumers and to make the objectives of promotion of renewable energies compatible with those of limiting electricity production costs to guarantee the sustainability of the electricity system.*
>
> *The regulation also involves reinforcement of the visibility and stability of the regulation of these technologies in the future, and guarantees the present premiums and tariffs of Royal Decree 661/2007 as of 2013 for installations in operation and for those included on the pre-register."*[122] [Emphasis added]

Royal Decree-Law 14/2010

210. About two weeks after RD 1614/2010 took effect, the Respondent passed Royal Decree-Law 14/2010, on December 23, 2010 ("**RD-L 14/2010**"), establishing urgent measures to correct the tariff deficit in the electricity sector, and major changes to the regulatory framework applicable to the PV subsector.[123]

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[120] *Ibid*., Article 2. P. Mir, "*La regulación fotovoltaica y solar termoeléctrica en España", p. 199* (**C-0045/C-0045t**): *"One of the key points of such regulation was to limit the number of operating hours entitled to premium, establishing up to eight categories of solar thermal power generation*"; P. Mir, Economía de la Generación Eléctrica Solar, p. 457 (**C-0030/C-0030t**).
[121] (**R-0088EN**)
[122] Council of Ministers Reference, December 3, 2010, p. 3. (**C-0277/C-0277t**)
[123] RD-L 14/2010, December 23, 2010. (**C-0236t**) (**R-0073EN**)

211. RD-L 14/2010 increased the maximum tariff deficit cap as established by RD-L 6/2009 for years 2011 and 2012 in view of the impossibility of meeting the previous limits. It also introduced cuts to the number of hours for which PV facilities would benefit from the tariffs of the RD 661/2007 Special Regime.[124]

Royal Decree-Law 1/2012

212. On December 19, 2011, Mariano Rajoy made the following remarks on the reform of the Spanish electricity system in his inaugural speech as the President of the Spanish Government:

> *"It is important for us to realise Spain has a major energy problem, especially in the electricity sector, with an annual deficit in excess of 3,000 million Euros, and an accrued tariff deficit of more than 22,000 million. Electricity tariffs for domestic consumers are the third most expensive in Europe, and the fifth highest for industrial consumers.*
>
> *[…]*
>
> *If reforms are not made, the imbalances will be unsustainable, and increases in prices and tariffs will place Spain at the greatest disadvantage in terms of energy costs in the entire developed world. We must therefore introduce policies based on putting a brake on and reducing the average costs of the system, take decisions without demagoguery, employ all the technologies available, without exception, and regulate with the competitiveness of our economy as our prime objective."* [125]

213. Against this background, on January 27, 2012, the new Spanish Government passed Royal Decree-Law 1/2012("**RD-L 1/2012**"), which suspended the remuneration pre-assignment procedures and eliminated economic incentives for new electric energy production plants based on renewable energy sources.[126] According to the Respondent, this was the first measure adopted with the rank of law relating to the reform of the electricity sector.[127]

214. The preamble of RD-L 1/2012 stated that the growth of technologies under the Special Regime made it possible to far exceed the installed capacity targets for 2010 under the 2005-2010 Energy Plan as regards wind and particularly solar thermoelectric and solar photovoltaic technologies and that exceeding the objectives revealed an imbalance between

[124] (**C-0236t**) (**R-0073EN**), First Additional Provision of RD-L 14/2010.
[125] (**R-0173EN**)
[126] See Articles 3 and 4 of RD-L 1/2012, January 27, 2012. (**C-0359**) (**R-0074**).
[127] Resp. C-Mem., para. 734.

production costs and the value of premiums, with an additional cost for the system of more than 2 billion euros stemming from solar technology premiums in 2010. Noting that as from 2014, this figure would increase annually by 2 billion euros, the preamble further stated that the measures previously adopted such as RD-L 6/2009 and RD-L 14/2010 so far had not been sufficient and the final purpose of eliminating the tariff deficit as from 2013 was still in jeopardy.

215. The preamble of RD-L 1/2012 further explained the background of this legislation in the following words:

> *"it was considered appropriate to withdraw the economic incentives for certain special regime facilities and for certain ordinary regime facilities using similar technologies, as well as to suspend the remuneration pre-allocation procedures established for them, in order to address the problem of the electricity sector high tariff deficit in a more favourable environment. By adopting this measure, the Government has chosen to limit its scope to special regime facilities not yet registered in the Remuneration Pre-Allocation Registry, except where such condition is due to the Administration's failure to comply with the relevant time limit for making a decision."*[128] [Emphasis added]

216. However, RD-L 1/2012 maintained "the remuneration regime established in the legal system for facilities already in operation and for those already registered on the Remuneration Pre-Allocation Registry."[129]

217. The preamble of the RD-L 1/2012 signalled an introduction of a new remuneration model taking into the new economic system as follows:

> *"It is necessary to design a new remuneration model for these technologies taking into account the new economic situation and encouraging an efficient allocation of resources through market mechanisms. The aim is to create a system that fosters market competition through mechanisms similar to those used in other European Union Countries while ensuring the future viability of the system."*[130] [Emphasis added]

[128] (**C-0359t**)
[129] *Id*.
[130] *Id*.

CNE Report 2/2012

218. On March 7, 2012, CNE issued the Report 2/2012 ("**CNE Report 2/2012**")[131] in response to the request of the Spanish Government on January 27, 2012 for a report on regulatory adjustment measures aimed at tackling the tariff deficit in the electricity sector.[132] After describing the then current situation, this report proposed a series of measures with a short term economic impact on the tariff deficit and a medium term economic impact and efficiency improvements.

219. With respect to solar thermal technology, one of the approaches this CNE Report proposed was a reduction by 12% of the premium of the facilities that were already pre-registered, which would allow savings of about EUR 47 million in 2012, EUR 90 million in 2013 and EUR 200 million as of 2014.[133] The report also proposed a reduction of the rate of using back-up fuel to 5%.[134]

National Reform Programme of 2012 and IMF Consultation

220. On April 27, 2012, the Spanish Government approved the National Reform Programme, which set out a broad economic strategy to address the economic and financial crisis in Spain and the growing public debt. The tariff deficit in the electricity sector was also addressed therein. The 2012 National Reform Programme noted that there was an imbalance between the costs and the revenues of the electricity sector with the accumulated tariff deficit in the electricity sector having reached EUR 24,000 million[135], and that the Spanish Government was committed to eliminating the tariff deficit by equally distributing burdens amongst consumers and the public and private sectors as part of a comprehensive reform of the electricity sector which should involve cost reduction measures for regulated activities and the establishment of a stable regulatory framework. The premium for the

[131] CNE, Report on the Spanish Energy Sector, March 7, 2012. (**R-0113EN**)
[132] Resp. C-Mem., para. 738.
[133] (**R-0113EN**), Section 3.2 of the CNE Report 2/2012.
[134] *Ibid*., Section 3.3.
[135] National Reform Program of 2012, p. 207. (**R-0103EN**)

Special Regime was identified as one of the most significant costs of the electricity system.[136]

221. On June 14, 2012, the International Monetary Fund ("**IMF**") delivered the "2012 Article IV Consultation with Spain -- Concluding Statement of IMF Mission. Madrid, June 14, 2012"[137], stating, under section 19, that:

> *"The implementation of the other planned structural reforms will be important to complement labor reform [...] and the government's reform agenda is adequately focused on eliminating the tariff deficit. It would be important for these reforms to be implemented quickly and effectively - a detailed and ambitious timetable would help in structuring and communicating efforts."*[138]

Memorandum of Understanding between the Kingdom of Spain and the European Union

222. On July 20, 2012, a Memorandum of Understanding was signed between the Kingdom of Spain and the European Union.[139] The Memorandum expressly mentioned the need to "*address the electricity tariff deficit in a comprehensive way"*.[140]

223. On September 27, 2012, the Spanish Government, by means of the Council of Ministers, adopted the "*Spanish economic policy: Balance sheet and structural reforms for the next half-year*".[141] This document clearly indicated the direction of the new government's reform of the electricity sector. With respect to the energy reform, it stated that forthcoming measures would include (i) adoption of "*structural measures to correct the tariff deficit in permanent manner, by enacting the Act on Fiscal Measures for Energy Sustainability (4th Quarter 2012)*"; and (ii) presentation of "*a new Electricity Sector Act, in order to progress with liberalisation of the sector, improve consumer protection and resolve inefficiencies detected based on accumulated experience (1st Quarter 2013)*".[142]

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[136] *Ibid.*, p. 208.
[137] "Consultations of Article IV with Spain, Final Statement of the FMI Mission, Madrid, 14 June 2012" International Monetary Fund. (**R-0177**)
[138] Footnote 509 of Resp. C-Mem., citing (**R-0177**). The Tribunal notes that the quoted portion is not exactly the same as the English translation in (**R-0177EN**).
[139] Memorandum of Understanding on Financial-Sector Policy Conditionality. (**RL-0050**)
[140] *Ibid.*, at page 15.
[141] (**R-0104**)
[142] (**R-0104EN**), p. 3.

224. In September 2012, the Spanish Government delivered the document "*The Spanish Government's reforms. Determination in response to the crisis*".[143] With regard to the reform of the energy sector, this document stated that:

> *"The reform of this sector will shortly be approved, through the Draft Bill on Energy Reform, for the purpose of not getting the cost of energy to condition the competitiveness of our economy so much. This aims at providing a final solution to the problem of the hefty tariff deficit of our energy system."*[144]

Law 15/2012

225. On December 27, 2012, the Respondent enacted Law 15/2012 which entered into force on January 1, 2013 ("**Law 15/2012**") on fiscal measures for energetic sustainability.[145] Law 15/2012 introduced two major changes to the remuneration regime applicable to CSP producers under the Special Regime of RD 661/2007 as modified by RD 1614/2010. It eliminated the feed-in remuneration regime for the production of electricity attributable to the use of LNG as back-up fuel starting from January 1, 2013.[146] Another important change was the introduction of a 7% charge on the value of the electric power production ("**TVPEE**" or "**7% charge**").

226. This Law levied TVPEE on the production of all electricity generation facilities. The preamble of Law 15/2012 stated that this reform "*contributes to the integration of environmental policies into our tax system in which there may be both specifically environmental taxes while the environmental element may also be [sic] incorporate into other pre-existing taxes*."[147]

RD-L 2/2013

227. On February 1, 2013, the Respondent approved Royal Decree-Law 2/2013 ("**RD-L 2/2013**"), on urgent measures in the electric system and the financial sector to guarantee budget stability and encouragement of competition.[148] RD-L 2/2013 introduced further

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[143] (**R-0155EN**)
[144] *Ibid*., p. 17.
[145] Law 15/2012, December 27, 2012. (**C-0372**) (**R-0030**)
[146] (**C-0372t**), p. 8. A section 7 is added to Article 30 of Law 54/1997.
[147] (**R-0030EN**), Section I of the Preamble.
[148] RD-L 2/2013, February 1, 2013. (**C-0373**) (**R-0077**).

changes to the remuneration of the Special Regime. It replaced, with effect from January 1, 2013, the Consumer Price Index ("**CPI**") that governed the updating of the remunerations, tariffs and premiums of activities of the electricity sector, including the production of renewable energy, by another consumer price index which excluded unprocessed food or energy products ("**IPD-IP**"). It also reduced the amount of the premium to a value in the remunerative pool plus premium option prescribed in RD 661/2007 to zero and supressed the upper limit and lower limit values.

228. The preamble of RD-L 2/2013 explained that the replacement of the CPI with IPD-IP was "with the purpose of using a more stable index which is not affected by the volatility of unprocessed foodstuff price no [sic] those from domestic fuels."[149]

229. The preamble of RD-L 2/2013 stated the purpose of the reduction of the premium as follows:

> *"taking into account the volatility of the market production price, the remuneration option for energy generated under the premium special regime which supplements the aforementioned price, makes it difficult to comply with the dual objective of guaranteeing reasonable profitability for these facilities and, at the same time, avoid their over-remuneration, which would fall on the other parties subject to the electricity system".*
>
> *"Thus, the premium economic regime must sustain itself solely on the regulated tariff option, without prejudice to the fact that the owners of the facilities may sell their energy freely in the production market without receiving a premium."*[150] [Emphasis added]

230. Under RD-L 2/2013, the Special Regime producers which previously had opted to sell their energy under the FiP option would be deemed subject to the Regulated Tariff (FiT) option as of February 2, 2013 with effect from January 1, 2013, unless they notified the Government that they desired to opt for the FiP option, in which case they would not be allowed to opt for the FiT option subsequently.[151]

[149] (**C-0373t**)
[150] *Id*.
[151] *Ibid*., Article 3.

231. The Respondent implemented the changes introduced by RD-L/2013 through the approval of MO IET/221/2013.[152]

Royal Decree-Law 9/2013

232. On July 12, 2013, the Respondent enacted Royal Decree-Law 9/2013 ("**RD-L 9/2013**"), establishing urgent measures to ensure the financial stability of the electricity system.[153] RD-L 9/2013 went into effect on July 14, 2013.

233. Amending, among others, Article 30.4 of EPA 1997 and repealing RD 661/2007 and certain provisions of RD-L 6/2009[154], RD-L 9/2013 introduced a new remuneration model (the "**New Remuneration Model**") based upon the concept of the "*efficient and well-managed standard facilities*" and the "*reasonable rate of return*" to be determined by the regulators. RD-L 9/2013 empowered the Government to approve a new legal and economic regime for existing electric energy production facilities using renewable energy sources.

234. The preamble of RD-L 9/2013 stated that the Spanish electricity system had generated a tariff deficit for a decade, due to the fact that the actual costs related to regulated activities and the operation of the electricity sector were higher than the collection of the tolls set by the Government, which were paid by consumers. Noting that among the cost headings that had contributed the most to the increase were the Special Regime premiums and the annuities of accumulated deficits, the preamble stated that these figures testified to the unsustainable nature of the deficit of the electricity sector and the need to adopt urgent measures of an immediate effect that would put an end to this situation.

235. The preamble of RD-L 9/2013 further stated that:

> *"These circumstances are proof of the imperative need to take immediately a series of urgent measures to ensure the financial stability of the electricity system, as well as the need to undertake a review of the regulatory framework that allows for its adaptation to the events that define the reality of the sector in each of the periods specified in the interest of maintaining the sustainability of the electricity system."*

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[152] Ministerial Order IET/221/2013 of February 14, 2013.(**C-0374/C-0374t**); Cl. Mem., paras. 681-683.
[153] RD-L 9/2013, July 12, 2013 (BOE, July 13, 2013). (**C-0386**) (**R-0024**)
[154] *Ibid*., Single repealing provision of RD-L 9/2013.

236. The preamble explained that RD-L 9/2013 articulated, as a matter of urgency, a series of measures that were balanced, proportionate and wide-ranging, aimed at ensuring the financial stability of the electricity system as indispensable premise of its economic sustainability and the security of its supply, and addressed at all the activities of the electricity sector.

237. According to the preamble, the new framework articulated a remuneration that should allow renewable energy, cogeneration, and waste facilities to cover the costs necessary to compete in the market at an equal level with the rest of technologies and get a reasonable return using a concept of a standard facility being an efficient and well-managed producing company.

238. Under the New Remuneration Model, a specific remuneration ("**Specific Remuneration**") was exceptionally granted only if it was necessary for the installation to participate in the market and to recover the costs that the market price alone could not remunerate. Specifically, RD-L 9/2013 amended a number of provisions of Law 54/1997. One of the key features of RD-L 9/2013 was an amendment made to Article 30(4) of Law 54/1997. The amendment, in pertinent part, read as follows:

> *"4. Additionally, and in the terms determined legally by Royal Decree of the Council of Ministers, for the remuneration for the sale of the energy generated, valued at market price, the facilities shall be able to receive a specific remuneration made up of one term per power unit installed, that covers, when appropriate, the investment costs of standard facility that cannot be recovered by the sale of energy and an end to the operation that covers, as applicable, the difference between the operating costs and revenue by participation in the market of such standard facility.*
>
> *For purposes of calculating this specific remuneration, the Law shall consider the following for any standard facility throughout its useful life and in reference to the business activity carried out by an efficient and well-managed company:*
>
> > *a) The standard revenue for the sale of the energy generated, valued at the production market price.*
> >
> > *b) The standard operating costs.*
> >
> > *c) The standard value of the initial investment.*
> >
> > *(…)*

> *This remuneration scheme does not exceed the minimum level necessary to cover the costs that allow for the facilities to compete equally with the rest of technologies in the market and that would lead to a reasonable rate of return by reference to the standard facility applicable in each case. Notwithstanding the foregoing, exceptionally the remuneration scheme may also include an incentive for investment and the execution within a specific time period when the facility in question involves a significant reduction of costs in the insular and extra-peninsular systems.*
>
> *This reasonable rate of return shall focus, before tax, on the average yield in the secondary market of the Obligations of the State within ten years by applying the appropriate differential.*
>
> *The parameters of the remuneration scheme may be revised every six years."*[155] [Emphasis added]

239. The preamble elaborated that:

> *"In order to calculate the specific remuneration the following shall be considered for a standard facility: the proceeds from the sale of the energy generated, valued at the market production price, the medium operating that are necessary to carry out the activity, and the value of the initial investment of the standard facility, all of this for an efficient and well-managed company. This establishes a remuneration scheme on standard parameters per the various standard facilities that are established."*[156] [Emphasis added]

240. Under the amended Article 30(4), facilities under the Special Regime could only receive a payment additional to the market value of electricity calculated on the basis of the reasonable rate of return. The previous option to choose between the FiT and FiP options were eliminated. Moreover, such additional payment (i) would be calculated by reference to the costs of a standard facility, as determined by the Government, and by reference to the activity carried out by an efficient and well-managed business, and (ii) would in no case surpass the minimum level required for facilities to obtain a reasonable rate of return, based on the return on state bonds in the secondary market. Moreover, the parameters of the remuneration regime may be reviewed and revised every six years.

241. RD-L 9/2013 applied to both existing and new facilities. However, with respect to the existing facilities that had a right to the feed-in tariff scheme as of the effective date of RD-L 9/2013, it provided that:

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[155] (**R-0024EN**)

[156] *Id.*

> "...*for the facilities that as of date of the entry into force of this Royal Decree law have the right to a feed-in tariff scheme, the reasonable rate of return shall focus, before taxes, on the average yield in the secondary market for ten years prior to the entry into force of this Royal Decree-Law of the Obligations of the State within ten years increased by 300 basic points*..."[157] [Emphasis added]

242. RD-L 9/2013 stated that a royal decree should be approved by the Government at the proposal of the Minister of Industry, Energy and Tourism setting forth details of the legal and economic schemes for electricity production facilities from renewable sources of energy with feed-in remuneration which would amend the remuneration model of the existing facilities.[158]

243. RD-L 9/2013 provided that the New Remuneration Model would be applicable with immediate effect (from the entry into force of this Royal Decree-Law, i.e., as of July 14, 2013)[159].

IDAE Tender

244. On July 23, 2013, IDAE tendered its terms and conditions for "*Contracting of Specialized Assistance Services to the Ministry of Industry, Energy and Tourism*".[160] This was in response to the call on the IDAE by the Department of Energy of the Ministry of Industry, Energy and Tourism to urgently produce a study evaluating and establishing investment and operational cost standards for electricity generation technologies operating under the Special Regime in connection with the New Remuneration Model in the new regulation.

245. The specification in the terms and conditions included a special requirement in its description of the scope of the service in anticipation of potential legal disputes as follows:

> *"The awarding of this service is dependent on a performance commitment and guarantee on the part of the company or companies selected to provide the technical support required by the IDAE AND THE MINISTRY OF INDUSTRY, ENERGY AND TOURISM IN ANY LEGAL AND/OR ARBITRATION PROCEEDINGS TO WHICH THE GENERAL STATE ADMINISTRATION MIGHT BE PARTY, by defending the data, hypotheses, calculations, results, conclusions and other relevant elements proposed in their reports, in the*

[157] *Ibid*., First Additional Provision (Reasonable profitability of production facilities with the right to feed-in tariff scheme) of RD-L 9/2013.
[158] *Ibid*., Second Final Provision of RD-L 9/2013.
[159] *Id*.
[160] IDAE's Technical Terms & Conditions. (**C-0645**)

aforementioned proceedings, when so required by the IDAE and/or the MINETUR, and on the terms established at the time in question by means of the processing of the relevant procurement case or cases."[161] [Emphasis from the translation which reflected the emphasis in the Spanish original]

246. On November 28, 2013, IDAE issued its Resolution awarding the contracts to The Boston Consulting Group, S.L. ("**BCG**") and Roland Berger Strategy Consultants, S.A. ("**RB**").

Law 24/2013

247. On December 26, 2013, the Respondent enacted Law 24/2013, on the Electricity Sector ("**EPA 2013**" or "**Law 24/2013**").[162] This law, which superseded Law 54/1997, went into effect on December 28, 2013.[163]

248. Law 24/2013 eliminated the distinction between the Ordinary Regime and the Special Regime under the previous regime. Under Law 24/2013 the renewable energy producers became exclusively subject to the new regime created by RD-L 9/2013. It also eliminated the right of priority of grid access and priority of dispatch for facilities under the previous Special Regime.

249. The preamble of EPA 2013 explained that a decisive element for undertaking this reform was, among others, "*the accumulation during the last decade of annual imbalances between the income and costs of the electrical system which has brought about the appearance of a structural deficit*". Adding that "*the failure to correct the imbalance has introduced the risk of the bankruptcy of the electrical system*", the preamble stated that:

> *"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."*[164] [Emphasis added]

250. The preamble further explained the background of this legislation in the following words:

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[161] (**C-0645t**), Section 3. Scope of Service.
[162] Law 24/2013, December 26, 2013. (**C-0377**) (**R-0048**)
[163] *Ibid.*, Law 24/2013, Final provision six.
[164] (**R-0048EN**)

> *"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."* [Emphasis added]

251. The preamble of EPA 2013 repeated what was stated in RD-L 9/2013 as follows:

> *"The remuneration regime for renewable energies… will be based on the necessary participation in the market of these installations, complemented by market income with specific regulated remuneration which enables these technologies to compete on an equal footing with the other technologies on the market. This specific complementary remuneration will be sufficient to attain the minimum level required to cover any costs which, by contrast to conventional technologies, they cannot recover on the market and will allow them to obtain a suitable return with reference to the installation type applicable in each case."* [Emphasis added]

252. With respect to the new remuneration regime, the preamble explains that:

> *"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."* [Emphasis added]

253. The preamble further stated that:

> *"The remuneration regime for renewable energies… will be based on the necessary participation in the market of these installations, complemented by market income with specific regulated remuneration which enables these technologies to compete on an equal footing with the other technologies on the market. This specific complementary remuneration will be sufficient to attain the minimum level required to cover any costs which, by contrast to conventional technologies, they cannot recover on the market and will allow them to obtain a suitable return with reference to the installation type applicable in each case."* [Emphasis added]

254. The guiding principle of EPA 2013 was the principle of economic and financial sustainability of the electrical system which "will be taken to mean the capacity to meet all

the costs thereof in accordance with that set out in this Law and in its implementing regulations."[165]

255. Article 14(7) of EPA 2013 set out the basic parameters to calculate the "*reasonable rate of return*" along the lines enunciated by RD-L 9/2013 as follows[166]:

> *"b) To calculate said specific remuneration, for an installation type, throughout its regulatory working life and with reference to the activity carried out by an efficient, well-managed company, the figures set out below will be assumed:*
>
> *i. Standard income from the sale of energy generated, valued at the production market price.*
>
> *ii. The standard operating costs.*
>
> *iii. The standard initial investment figure.*
>
> *The remuneration regime will not exceed the minimum level required to cover costs which allow production installations from renewable energy sources, high-efficiency and waste cogeneration to compete on an equal footing with the other technologies on the market and which allows a reasonable return to be earned on the installation type in each applicable case. This reasonable return will refer, before tax, to the mean yield on the secondary market for Ten-Year State Bonds, applying the appropriate differential.*
>
> *[…]*
>
> *d) Electrical energy imputable to the use of a fuel at a generation installation which uses as its primary energy any of the non-consumable renewable energies will not be subject to a specific remuneration regime…*
>
> *With this in mind, by order of the Minister of Industry, Energy and Tourism the methodology will be published for calculating the electrical energy imputable to the fuels used."* [Emphasis added]

256. EPA 2013 provided that irrespective of the starting date of each of the activities, the first regulatory period would end on December 31, 2019, and as from January 1, 2020 the following regulatory periods would occur consecutively.[167] With respect to production from renewable energy sources with the new specific remuneration regime, it provided that the first regulatory period would start on the date of the coming into force of RD-L 9/2013.

[165] *Ibid*., Article 13 (1).
[166] *Ibid*., Article 14(7).
[167] *Ibid*., Additional Provision Ten, Section 1.

257. By the time both RD-L 9/2013 and EPA 2013 were adopted, the Respondent had yet to formulate a new legal and economic regime applicable to renewable energy facilities. Thus, until the new regime would be adopted in the ensuing months, it was stipulated that the feed-in tariff continued to apply and the payments received during such time would be discounted from any special payment to be received once such special payments would be defined at some later date in the new regime.

Royal Decree 413/2014

258. On June 6, 2014, Royal Decree 413/2014 ("**RD 413/2014**"), which regulated the production of electrical energy from renewable energy sources, cogeneration and waste was approved.[168] This RD went into effect on June 11, 2014.[169]

259. RD 413/2014 set out in greater detail the methods governing the new Specific Remuneration frameworks for renewable energies in order to implement the provisions of RD-L 9/2013 and EPA 2013.

260. The remuneration framework laid down in RD 413/2014 was composed of compensation for investments and compensation for operations applicable to a standard facility. RD 413/2014 provided that the applicable compensation benchmarks would be set forth in a ministerial order issued by the Ministry of Industry, Energy and Tourism once approved by the Government's Executive Committee for Economic Affairs[170], and thereby granted the regulator the power to determine by way of a Ministerial Order the remuneration parameters for "*standard installations*" that would be applicable to existing installations.[171]

261. The preamble offered key features of RD 413/2014 as follows:[172]

> *"Under the new framework, in addition to the remuneration earned by selling energy at market rates, facilities may also receive specific remuneration throughout their regulatory useful lives. This specific remuneration comprises an amount per unit of installed capacity, intended to cover any investment costs*

[168] RD 413/2014, June 6, 2014. (**C-0388**) (**R-0093**)
[169] RD 413/2014, Eighth Final Provision. RD 413/2014 was published on June 10, 2014 on the official gazette of the Respondent. (**R-0093EN**)
[170] (**R-0093EN**), RD 413/2014, Articles 12(2) and 13(1) and (2).
[171] *Ibid*., Second Additional Provision, para. 5 of RD 413/2014.
[172] (**R-0093EN**)

incurred by a standard facility that cannot be recovered through the sale of its energy on the market, known as compensation for investments and an amount linked to operations, intended to cover any difference between a standard facility's operating costs and the revenue generated from its participation in the energy production market, known as compensation for operations."

"The compensation for investments and compensation for operations applicable to a standard facility are to be calculated based on standard revenues from the sale of energy valued at market rates, standard operating costs required to perform the activity and the standard value of the initial investment - all three standard values established on the basis of an efficient, well-managed company."

"The compensation for investments and, where applicable, the compensation for operations - aims to cover the higher costs incurred by facilities that produce electricity from renewable energy ..., so that they may compete on an equal footing with other technologies and obtain a reasonable return by reference to the standard facility applicable in each case."

"Moreover, the concept of "reasonable return" on a project is introduced into the regulatory framework. In line with legal scholarship on this matter in recent years, reasonable return is set as a pre-tax return approximately equal to the average yield on ten-year government bonds in the secondary market for the 24-month period leading up to the month of May of the year prior to the commencement of a given regulatory period, increased by a spread."

"Regulatory periods are to have a six-year duration. The first regulatory period spans from the date of entry into force of Royal Decree-Act 9/2013, of 12th July, to 31st December 2019. Each regulatory period is divided into two half-periods of three years each; the first half-period runs from the date of entry into force of Royal Decree 9/2013, 12th July, to 31st December 2016."

"The compensation benchmarks may be adjusted as part of a review conducted at the end of each regulatory half-period or period, pursuant to Article 14.1 of Act 24/2013, of 26th December."

"All compensation benchmarks may be adjusted in the corresponding review, including the value upon which reasonable return is to be based over the remaining regulatory life of standard facilities"

"Once a facility's regulatory useful life has elapsed, it will no longer receive the compensation for investments or compensation for operations. Such facilities may remain in operation, receiving only the remuneration earned on energy sales on the market." [Emphasis added]

262. Under RD 413/2014, the most significant compensation benchmarks needed to calculate the Specific Remuneration framework included (i) compensation for investments; (ii) compensation for operations; (iii) investment incentive to reduce generation costs; (iv) useful regulatory life; (v) minimum number of operating hours; (vi) operating threshold; (vii) maximum number of operating hours for the receipt of compensation for operations,

where applicable; (viii) annual upper and lower market price limits; and (ix) average annual daily and intraday market price.[173]

263. RD 413/2014 provided that the most significant criteria necessary to calculate compensation benchmarks should include, but not be limited to, (i) standard value of the initial investment in the standard facility; (ii) estimate of the daily and intraday market price; (iii) number of operating hours of the standard facility; (iv) estimate of future revenue resulting from participation in the generation market; (v) other defined operating costs; (vi) estimate of future operating costs; (vii) re-adjustment rate based on reasonable return; (viii) adjustment coefficient of the standard facility; (ix) net asset value.

264. Under RD 413/2014, the compensation benchmarks might be adjusted as part of a review conducted at the end of each regulatory half-period (3 years) or period (6 years) pursuant to EPA 2013. All compensation benchmarks might be adjusted in the corresponding review, including the value upon which reasonable return is to be based over the remaining regulatory life of standard facilities.

265. Under RD 413/2014, for CSP facilities, the electricity produced from other fuels would not be included in the calculation of the remuneration.

266. With respect to "*reasonable return*", Article 19(1) of RD 413/2014 stated that:

> *"*The value upon which the reasonable return of standard facilities is based shall be calculated as the *average yield on ten-year government bonds in the secondary market for the 24-month period leading up to the month of May of the year prior to the commencement of a given regulatory period, increased by a spread. Review of the value upon which reasonable return is based shall apply to the standard facility's remaining regulatory useful life."*[174]

267. RD 413/2014 offered a special treatment of existing facilities that were already in receipt of the feed-in-tariff when RD-L 9/2013 came into force. Those existing facilities were entitled to benefit from the Specific Remuneration framework introduced under RD 413/2014, but for those facilities "*pre-tax reasonable return shall be based on the average yield on ten-year government bonds in secondary markets over the ten years prior to the*

[173] *Ibid.*, Article 13(2).
[174] *Ibid.*, Article 19(1).

entry into force" of RD-L 9/2013, increased by a spread of 300 basis points, without prejudice to any of the reviews foreseen for each regulatory period.[175]

Ministerial Order IET/1045/2014

268. On June 16, 2014, the Ministerial Order IET/1045/2014 ("**MO IET/1045/2014**") was approved.[176] It entered into force on June 21, 2014.[177] Based on the mandate given by RD 413/2014, it defined in further detail the remunerative parameters applicable to the standard facilities under the Specific Remuneration regime of EPA 2013.[178]

269. Under Annex III, MO IET/1045/2014 established 7.398% as the "*reasonable return*" value for renewable energy producers. This value would apply until the end of the first regulatory period (July 12, 2013 - December 31, 2019) and would be subject to discretionary reviews for subsequent regulatory periods.[179]

270. Article 5(1) of MO IET/1045/2014 provided that the regulatory useful life for the CSP facilities was 25 years.[180] Article 5(2) provided that the standard amount of initial investment for each of the standard facilities allocated to the facilities falling within the scope of this order should be set forth in Annex VIII.

Ministerial Order IET/1168/2014

271. On July 3, 2014, Ministerial Order IET/1168/2014 ("**MO IET/1168/2014**") was approved. It determined the date of automatic registration of certain facilities on the Specific Remuneration regime register regulated in Title V of RD 413/2014.[181]

[175] *Ibid.,* Second Additional Provision.
[176] Ministerial Order IET/1045/2014, of June 16, 2014. (**C-0383**) (**R-0229**).
[177] The final provision stated that this order should be effective as of the following date of its publication in the "Official State Gazette". (**R-0229EN**), p. 46454. The order was published on the official State Gazette (BOE) on June 20, 2014.
[178] (**R-0229EN**), MO IET/1045/2014, Article 1(1).
[179] *Ibid.*, Annex III, 1.3. 300 basis points above the average yield of 4.398% on Spanish ten-year government bonds.
[180] *Ibid.*, Article 5 (1).
[181] Ministerial Order IET/1168/2014, of July 3, 2014. (**C-0391t**)

Ministerial Order IET/1882/2014

272. On October 14, 2014, Ministerial Order IET/1882/2014 ("**MO IET/1882/2014**") was approved. It determined the calculation methodology for the electric energy generated from the usage of fuels in thermosolar facilities.[182] Pursuant to Law 15/2012, such electricity produced using back-up fuels would not be entitled to the special payment regime applicable to solar thermal facilities. MO IET/1882/2014 provided that any payments received as premiums or tariffs for electricity produced by using back-up fuels from January 1, 2013, the date of entry into force of Law 15/2012, would have to be returned.

Ministerial Order ETU/130/2017

273. On February 17, 2017, Ministerial Order ETU/130/2017 was approved. It updated the remuneration parameters for the standard facilities applicable to certain electric power production facilities based on renewable energy sources, cogeneration and waste, for the purpose of their application to the regulatory half-period beginning January 1, 2017.[183]

Decision of the European Commission rendered on November 11, 2017

274. The European Commission rendered a decision on November 11, 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (State Aid S.A. 40348 (2015/NN)) (the "**EC's State Aid Decision**").[184] In this decision, the European Commission assessed whether existing installations received overcompensation for their entire life under the new remuneration scheme Spain notified to the European Commission, and found that on the basis of the total payments received under both schemes (the specific remuneration scheme and the premium economic scheme), that was not the case. The European Commission observed that as Spain had decided to replace the premium economic scheme with the notified aid measure, it was not relevant for the scope

[182] Ministerial Order IET/1882/2014, of October 14, 2014. (**C-0376t**)
[183] (**W-0493SP/W-0493ENG**)
[184] Decision of the European Commission, rendered on November 11, 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (State Aid S.A. 40348 (2015/NN). (**RL-0091ENG**)

of that decision to assess whether the originally foreseen payments under the previous schemes would have been compatible or not.[185]

275. The EC's State Aid Decision included a general comment which reads that:

> *"As a general comment, the Commission recalls that there is 'no right to State aid'. A Member State may always decide not to grant an aid, or to put an end to an aid scheme. Where the aid has not been authorized by the Commission, the Member State is obliged to suspend the scheme until the Commission has declared it compatible with the internal market pursuant to Article 108(3) TFEU."*[186]

276. With respect to the investors' legitimate expectations arguments submitted to European Commission as well as before investor-State arbitration, the European Commission expressed its view as follows:

> *"The investors argue, both before investor-State arbitration tribunals and in their submissions to the Commission, that by modifying the support scheme with regard to existing installations, Spain has violated the general principles of Union law of legal certainty and legitimate expectations."*[187]
>
> *"In the very specific situation of the present case, where a Member State grants State aid to investors, without respecting the notification and stand-still obligation of Article I 08(3) TFEU, legitimate expectations with regard to those State aid payments are excluded. That is because according to the case-law of the Court of Justice, a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission."*[188]

D. THE CLAIMANT'S INVESTMENTS

277. In this section, the factual background of the Claimant's investment in the Solacor Plants in Spain will be reviewed. While this section is based upon the Parties' respective chronology and the evidence on the record of the proceedings, it does not purport to be exhaustive of all the matters of fact upon which the Parties have placed reliance in advancing their respective positions in the course of these proceedings. The Tribunal has nonetheless considered all the facts and evidence produced by the Parties in these proceedings. The Tribunal considers that it would be helpful to set out certain salient facts

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185 (**RL-0091ENG**), para 156.
186 *Ibid.*, para 155.
187 *Ibid.*, para 157.
188 *Ibid.*, para 158.

or events relating to the Claimant's investment in chronological order which are relevant to the Tribunal's analysis of the merits of the Claimant's claims later in this Decision.

278. The Claimant is one of Japan's biggest global engineering companies and specializes in the design and construction of large energy infrastructure projects around the world. Traditionally, JGC's business has been strongly focused on the hydrocarbons sector.[189]

279. In 2010 the Claimant invested in two of the Spanish special purpose vehicle companies which own and operate CSP plants in Andalusia, Spain. The Claimant acquired 26% interests each in Solacor Electricidad Uno, S.A. which owns Solacor 1 plant, and Solacor Electricidad Dos, S.A. which owns Solacor 2 plant (Solacor Electricidad Uno, S.A and Solacor Electricidad Dos, S.A. will collectively referred to as "**Solacor SPVs**". The Solacor 1 and Solacor 2 plants, as previously indicated, will be collectively referred to as the "**Solacor Plants**" or "**Solacor Projects**", as appropriate). As of the closure of this arbitral proceedings, the Claimant has 13% interests each in Solacor SPVs.

280. During a conference on energy-related matters held in Abu Dhabi (UAE) in January 2009, the Claimant learned about projected CSP installations of Abengoa Solar ("**Abengoa Solar**") in southern Spain. Thereafter, JGC contacted the Economic and Trade Office of the Spanish Embassy in Tokyo, which arranged JGC representatives' visit to Spain.[190]

281. In mid-March 2009, members of JGC's Project Investment & Market Development (Global Marketing) department visited Abengoa Solar in Seville to get to know first-hand its CSP technology.[191] In this trip, the JGC delegation visited Madrid to meet with the officials of the Spanish administrative agencies such as *Invest in Spain* and IDAE. They met Ms. Manuela Garcia, Service Manager for Investors of *Invest in Spain*[192] who carried out a presentation for JGC, and Ms. Amparo Fresneda and Mr. Carlos Montoya, both of IDAE.[193] Subsequent to the meeting, Mr. Shibuya of JGC and Ms. Manuela García of *Invest*

[189] CWS-ME1, para. 16.
[190] Cl. Mem., para. 529 and footnote 584 of Cl. Mem.; CWS-ME1 para 42-44.
[191] CWS-ES, para. 23.
[192] JGC understood that *Invest in Spain* was an administrative unit of the Spanish Government in charge of promoting foreign investment in Spain. See CWS-ME1, footnote 5.
[193] JGC understood that IDAE was an administrative agency dependent on the Spanish Government focused on improving energy efficiency, renewable energies and other low-carbon technologies. See CWS-ME_t, footnote 6.

in Spain exchanged several communications during the ensuing months with regard to the Spanish regulatory framework governing CSP plants.[194]

282. Favourably impressed by its delegation's trip to Spain, the Claimant initiated discussions with Abengoa Solar. Abengoa Solar submitted an investment proposal to JGC in April 2009 with details of projected CSP installations and information on the feed-in incentives of the Special Regime. Abengoa Solar proposed to JGC to co-invest in plants in two alternative locations in Andalusia or Extremadura.[195]

283. Specifically, in a PowerPoint presentation dated April 2009, Abengoa Solar presented to the Claimant the permit status of the plants in Andalusia and stated that the Andalusia plants were granted status as a "Special Regime Generator (rights to feed-in-tariff)".[196] Abengoa Solar proposed that Abengoa Solar and JGC be the owners of the projects, with Abengoa Solar retaining a majority, and JGC helping the project companies to get bank financing from Japanese institutions.[197]

284. This presentation included project details proposed by Abengoa Solar, outlining the key goals in terms of deal structure, roles of the parties and necessary timing for internal approvals (including due diligence needs) as well as a high-level description of the financing role that Japanese banks could play and their requirements. It stated that Abengoa Solar would expect to receive an expression of interest from JGC.[198] This presentation also included a statement that Abengoa Solar's CSP plants would receive "a subsidy (feed in tariff), being the incomes according to one of the two options under the Special Regime of RD 661/2007".[199]

285. On April 21, 2009, JGC submitted an Expression of Interest ("**EOI**") to Abengoa Solar.[200]

[194] Cl. Mem., para. 530; CWS-ME_t, para. 44.
[195] PowerPoint presentation made by Abengoa Solar to JGC titled as "Investment case to JGC, April 2009". (**C-0332**)
[196] *Ibid.*, Slide 29.
[197] *Ibid.*, Slide 33.
[198] *Ibid.,* Slides 34 and 35.
[199] *Ibid.,* Slide 37.
[200] Yamazaki's email to Eduard Soler, dated April 21, 2009 enclosing a letter from Endo of JGC to Soler of Abengoa Solar, dated April 21, 2009, titled "Expression of Interest on Concentrating Solar Power Project in Spain". (**C-0334**)

286. Thereafter, JGC began an internal due diligence process and initiated discussions with Sumitomo Mitsui Banking Corporation ("**SMBC**") and Hong Kong Shanghai Banking Corporation ("**HSBC**") to arrange for a project finance scheme for the Solacor Project.[201]

287. The Claimant also agreed with Abengoa Solar to arrange overseas institutional insurances of Nippon Export and Investment Insurance ("**NEXI**"), the Japanese State-owned export credit agency, which issues overseas institutional guarantees for the banks (Overseas United Loan Insurance, "**OULI**") to provide the banks with greater comfort in securing the financing.[202]

288. On May 27, 2009, JGC and Abengoa Solar signed a Memorandum of Understanding ("**MOU**").[203] This MOU set forth the parties' agreement in principle in relation to the first actions to be taken for the implementation and subsequent exploitation of the Solacor Project they intended to collaborate. The exclusivity period of this MOU was 30 days.

289. In its preamble, the MOU identified, as the project to be covered by the MOU, two 50MW solar thermal power plants in Cordoba, Andalucia, in a very advanced stage of permission, owned by two special purpose companies, which were in turn owned 100% by Abengoa Solar through subsidiaries.

290. Key features of this MOU included the following:

(i) Subject to JGC securing the financing of the project acceptable to the parties, satisfactory due diligence of the project by JGC and the parties entering into a joint development agreement, JGC would become equity owner of the project by purchasing or subscribing the shares of the two SPVs.

(ii) JGC intended to invest a maximum amount of EUR 50 million and its target ownership in SPVs is a minimum of 25%, but would not exceed 49% of total shares outstanding of SPVs.

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[201] Cl. Mem., para. 532.
[202] Cl. Mem., para. 533.
[203] Memorandum of Understanding signed between JGC and Abengoa Solar of May 27, 2009. (**C-0335**)

(iii) If NEXI insurance was not obtained or financing was not secured in satisfactory conditions to both parties, both parties had the right to revisit, at mutual agreement, all objectives and scope of this agreement.

291. On June 2, 2009, Abengoa Solar made formal requests for registration of the Solacor 1 and Solacor 2 Plants in the Remuneration Pre-Assignment Registry within the time limit set by RD-L 6/2009.[204]

292. In June 2009, Mr. Shibuya of JGC held a meeting with Ms. Garcia, Services Manager of *Invest in Spain*, in Madrid to discuss the regulatory framework applicable to CSP installations. Ms. Garcia made a presentation on the legal framework to Mr. Shibuya and later sent her presentation file (translated into Japanese) to Mr. Shibuya in her email dated June 18, 2009.[205]

293. The presentation was titled as "*Legal Structure*". On the cover page, Ms. Garcia was described as Service Manager for Investors of *Invest in Spain*. At the bottom of the cover page had two logos, "Gobierno de España Ministerio de Industria, Turismo y Comercio" and "*INVEST IN SPAIN*".[206]

294. This presentation included the following explanation of the remuneration regime for CSP plants under the heading of RD 661/2007:

(i) "This law[207] aims to secure sufficient profits commensurate with investment by means of enabling the industry to set a mid-term and long-term target, establishing stability of this sector gradually, and attracting considerable interest in investment and aid in this industry"

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[204] CWS-ES, para. 34; (**C-0139**) and (**C-0140**)
[205] Cl. Mem., paras. 534 and 535; CWS-ME1, para. 60 -62; (**C-0093t**)
[206] (**C-0093**) and (**C-0093t**); *Invest in Spain*, presentation to JGC, June 18, 2009 (**C-0092**) and (**C-0092t**). The file attached to Ms. Garcia's email of June 18, 2009 was in Japanese (C-0093), translated from an English version (**C-0092t**) used in her meeting with Mr. Shibuya in Madrid. CWS-ME1, para. 62.
[207] There appears some confusion in referring to RD 661/2007 in (**C-0092t**). In the English translation (**C-0092t**), RD 661/2007 was referred to as Royal Decree Law 661/2007 in a few places where the Japanese version from Ms. Garcia referred Royal Decree to Royal Decree Law in Japanese (政令法) as compared to Royal Decree ((政令).

(ii) "Furthermore, this Royal Decree Law is intended to contribute to achieving the target set in 'Renewable Energy Plan 2005-2010' and the target set by the Spanish provincial governments. By means of development of these technologies, it is anticipated that renewable energies will amount to 12% of all domestic energy consumption in Spain in 2010 and the amount of CO2 emissions will be reduced by 27 million tons in the same year."

(iii) "It is planned that the fixed tariff and the premium will be revised in 2010. This revision is in accordance with a new target set in a new 'renewable energy plan' towards the next term 2011-2020, provided that the target set in the 'Renewable Energy Plan 2005-2010' and 'Policy of Saving and Efficiency of Energy' is achieved."

(iv) "Any revision in the feed-in tariff thereafter will not apply to the plants already in operation. This is the commitment to the stability and development of this sector which is to be a legal backup for generators."

(v) "The new regulation guarantees to hydroelectric and wind power plants 7% average profit rate when the generated electric power is supplied to electric power suppliers and 5-9% profit rate when it enters into the electric power generation market. For the other power generation technologies, <u>because development of biomass, biogas, or solar thermal power whose development is limited, special subsidies are provided. The profit rate amounts to 8% when electric power is supplied to electric power suppliers and 7-11% when it enters into the electric power generation market.</u>"

(vi) "The fixed tariff, the premium and the maximum and the minimum will be renewed by the standard of RPI minus 0.25 until 2012 and RPI minus 0.50 thereafter like any other subsidies." [Emphasis added]

295. The same presentation included, among others, the following statements under the heading of Royal Decree Law 6/2009, referring to Article 4(1) (Mechanism involving Feed-in Tariff Pre-registration for the plants operating under the special regime):

(i) "An application for registration of the Feed In Tariff Pre-registration shall be a necessary condition to be entitled to the economic regime established in Royal Decree 661/2007, of May 25."

(ii) "Plants registered on the Feed In Tariff Pre-registration registry shall have a maximum period of thirty-six months from the date of notification of an official registration on the registry of power generation plants of the competent authorities under the special regime to its proceedings and the start of the sale of energy. If this is not complied, a right to the economic subsidies as a result of their official registration based on the registration on the Feed In Tariff Pre-registration registry shall be revoked."

296. In June, 2009, JGC prepared a presentation for discussion at an internal committee within JGC titled "*The equity investment in the 100MW Concentrated Solar Power Project in Spain*".[208] It outlined JGC's planned investment in the Solacor Project, and included a slide describing the tariff regime in Spain. Under the heading of "*Favorable Tariff Regime in Spain*", it stated that the feed-in tariff was guaranteed by the Spanish government for a certain period of time, and described the specific amount per/kWh applicable to FiT and FiP options for the first 25 years and thereafter. It also mentioned an inflation adjustment connected to Consumer Price Index in Spain.[209]

297. On June 28, 2009, the Claimant and Abengoa Solar agreed to extend the exclusivity period of the MOU for sixty days.[210]

298. On July 30, 2009, JGC entered into a Joint Development Agreement ("**JDA**") with Abengoa Solar to develop the Solacor Project.[211] The JDA elaborated the contents of the MOU in further details. Under the JDA, JGC was willing to become a 25% to 49%

[208] CWS-ME1, para 63; JGC's preliminary assessment for the Solacor Project, discussed within the Investment Team's internal committee, June 2009. (**C-0548t**).
[209] (**C-0548t**), slide 5.
[210] The Tribunal notes that the Claimant's chronological list of main facts states that the date of extension was July 6, 2009. The Complementary Agreement is dated as of June 28, 2009. The email from Mr. Soler of Abengoa Solar to Mr. Yamazaki of JGC is dated July 6, 2009. (**C-0516**)
[211] Cl. Mem., para. 542; Joint Development Agreement ("**JDA**") signed between JGC and Abengoa Solar of July 30, 2009. (**C-0338**)

shareholder of two Solacor SPVs and the Solacor Project was planned to be implemented under Spanish feed-in tariff regime pursuant to RD 661/2007.[212]

299. In the recital of the JDA, it was stated that Abengoa Solar had filed an application of pre-registration under RD-L 6/2009 on June 4, 2009, in order to secure the Special Regime for the Solacor Plants. Under the JDA, JGC's becoming an equity owner of Solacor SPVs was subject to four explicit conditions such as (i) successful completion of due diligence by JGC, (ii) successful definitive closing of financing in conditions and amount acceptable to both parties, (iii) reaching an agreement on key contracts related to the projects, mainly Shareholders Agreement, EPC Contract and O&M Contract and (iv) successful registration of the Solacor Project under RD-L 6/2009.[213] The parties agreed that Abengoa Solar would lead the development of the Solacor Plants and that JGC would take responsibility of arranging the financing for the project and securing the participation of NEXI by providing its OULI policies over the senior loans.[214]

300. The JDA also provided that "[w]hen AS and JGC agree that the terms and conditions of senior loan reach those acceptable to both Parties, the Parties shall execute the Shareholder Agreement" and "[t]he execution of the Shareholders Agreement means the Parties' commitment of the equity funding pursuant to the provisions of the Shareholders Agreement."[215] The deadline for the execution of the Shareholders Agreement under the JDA was November 30, 2009.

301. On August 24, 2009, Clifford Chance issued to the lenders a draft "*Report on the Economic Regime Applicable to Solar Thermal Plants*" ("**Clifford Chance Report**").[216] The Claimant reviewed this report and shared it with NEXI.[217] In view of the importance attached by the Respondent in its defence to the Clifford Chance Report[218], core contents of this report are described in detail in the following paragraphs.

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[212] JDA, Clause 1.1. (**C-338**)
[213] *Ibid*., Clause 2.1.
[214] Cl. Mem., para. 543.
[215] JDA, Clause 3. (**C-0338**)
[216] Clifford Chance draft report, dated as of August 24, 2009. (**C-0574**)
[217] Cl. Reply para. 323.
[218] For instance, Resp. Rej., paras. 925-943.

302. The Clifford Chance Report stated that European legislation directly affected the national legal framework applicable to Special Regime installations and noted that the European Parliament and the Council had approved Directive 2009/28/EC, dated April 23, 2009, on the promotion of the use of energy from renewable sources. It also noted that Directive 2009/28/EC set forth specific national overall targets for the share of energy from renewable sources in gross final consumption in energy in 2020, the target set out for Spain being 20 per cent.[219]

303. With respect to the possibility of modifying the economic regime established in RD 661/2007 affecting solar thermal plants included within its scope, the Clifford Chance Report stated that:

> *"On different occasions the Spanish Supreme Court has established that the economic regime applicable to special regime electric energy production installations can be modified affecting installations included under the previous regime."*
>
> *"…the Administration may, in exercise of its reglamentary (sic) authority (that is, the authority to approve rules which are inferior in rank to laws), modify the economic conditions applicable to special regime facilities as long as such modification respects the principles set out in the Spanish Constitution and the legal imperatives established within the Spanish legal system".*[220]

304. The Clifford Chance Report further opined that:

> *"However, there are certain limits to any such modification. In this sense, the disposition modifying the economic regime established in RD 661/2007 affecting solar thermal plants included within its scope cannot be restrictive of individual rights, thus the degree of retroactivity of the disposition would have to be analysed in order to ensure that it does not do so, as per the prohibition of retroactive restrictions on individual rights established in article 9.3 of the Constitution, in accordance with the below. Equally, said disposition cannot infringe the principle of legal certainty, which is intimately related to the principle of legitimate expectations. Lastly, said disposition has to respect the limitations imposed by Law 54/1997, in particular the provisions contained in article 30 of said Law."*[221]

[219] (**C-0574**), pp.1-2.
[220] (**C-0574**), pp. 21-22. The Clifford Chance Report cites the ruling of the Spanish Supreme Court dated October 10, 2007 [RJ 2007/7050].
[221] *Ibid*., p. 22. The Clifford Chance Report cites the Ruling of the Supreme Court dated December 15, 2005 [RJ 2006/246].

305. The Clifford Chance Report concluded that[222]:

> *"1. It is possible for a reglamentary (sic) disposition to modify the economic regime established in RD 661/2007 affecting solar thermal plants included in its scope.*
>
> *2. However, in order for said disposition to be valid, it must respect the following:*
>
> *a) It cannot retroactively affect the payment of tariffs or premiums corresponding to energy that has already been sold by the owner of a special regime production facility.*
>
> *b) It cannot infringe the principles of legal certainty and legitimate expectations, taking into account the following:*
>
> *- The importance of the modification introduced.*
>
> *- The predictability of the modification.*
>
> *- The existence of exterior signs by the Administration creating the belief that a reglamentary change will not take place.*
>
> *- The existence of sufficient transitory measures or compensatory measures.*
>
> *c) It has to ensure that the special regime electric energy installations receive reasonable rates of return with regard to the investment costs incurred as established in Law 54/1997."*

306. With respect to the principle of legal certainty and legitimate expectations mentioned above, the Clifford Chance Report explained that the principle of the protection of legitimate expectations had been recognized as a legal principle of the European legal system by the jurisprudence of the Court of Justice of the European Communities and by the jurisprudence of the Spanish Supreme Court. It further stated that this principle was established in Article 3.1. of Law 30/1992, which imposed the obligation to respect the principles of *bona fide* and legitimate expectations in their actions on the Spanish Public Administration and that the aim of this principle was "*to protect legitimate expectations, and more specifically, those situations worthy of protection due to a violation of the confidence placed in the actions of the public authorities, which determined a specific conduct from the people receiving said action*."[223]

[222] *Ibid.,* pp. 28-29.
[223] *Ibid*., pp. 24-25.

307. According to the Clifford Chance Report, in order to determine the validity of a possible disposition modifying the economic regime established in RD 661/2007 affecting solar thermal plants included in its scope with regard to the limit mentioned in this section (that is, the limit of the respect of the principles of legal certainty and legitimate expectations), it was necessary to analyse the elements which characterised the violation of said principles. It identified four criteria with the aim of determining which situations would cause an infringement of the principle of legitimate expectations, as set forth in 2.b) of the paragraph 305 above.

308. With respect to the "*The predictability of the modification" criterion mentioned above,* the Clifford Chance Report opined that the principle of legitimate expectations was more likely to be deemed infringed when the modification had been brought about suddenly, with few or no indications as to the possibility of said modification taking place. It continued to state that with regard to the predictability of a new rule reducing the current tariffs and premiums received by solar thermal plants in operation, it would seem this was quite a real possibility, taking into account especially the short period of time between the entry into force of RD 436/2004 and that of RD 661/2007. It cited the decision of the Spanish Supreme Court, dated October 25, 2006 [RJ 2006/8824] which affirmed that "*the companies that, of their own accord, decide to establish themselves within a market such as that of special regime electricity generation, are or should be aware of the fact that these can be modified, within the legal limits, by the relevant authorities".*[224]

309. With respect to the "existence of exterior signs by the Administration creating the belief that a reglementary change will not take place" criterion mentioned above, the Clifford Chance Report opined that:

> *"In the case at hand, said belief could be founded on the fact that the Spanish Government, by means of the provisions contained in articles 36 and 44.3 of RD 661/2007, has established a series of tariffs, premiums and supplements to be received during the whole useful life of solar thermal plants for the sale of the electricity they generate. Additionally, notwithstanding the prevision of future reviews of said tariffs, premiums, supplements and upper and lower limits in view of the results of the reports monitoring the compliance with the Renewable Energies Plan (PER) 2005-2010, the Energy Efficiency and Saving Strategy in*

[224] *Ibid*., pp. 25-26.

> *Spain (E4) and of those new objectives included in the next Renewable Energies Plan for the period 2011-2020, article 44.3 of RD 661/2007 expressly states that the reviews of the regulated tariff and the upper and lower limits on the aggregate of the reference market price and the reference premium will not affect those installations that have entered into service prior to 1 January of the second year after the year during which the review has taken place."*[225]

310. On November 13 and 15, 2009, Mr. Shibuya of JGC sent an email inquiry to Mr. Altozano of Lovells, JGC's legal counsel at the time, seeking an advice on certain aspects of the official press release issued by the Ministry of Industry, Tourism and Commerce on November 13, 2009 titled as "*Approval of Schedule for New Wind and Thermosolar Facilities for the Next Three Years*".[226] On November 16, 2009, Lovells responded to Mr. Shibuya by email as follows:

> *"1. All projects already registered in the pre-assignation registry (i.e. 2440 MW) shall be entitled to feed-in tariff as per RD 661/2007.*
>
> *2. Those projects shall be commissioned as per the calendar established in the agreement of the Council of Ministers. This means that, for instance, if a project has been registered pursuant to Transitory Provision 4 of RDL 6/2009 it shall be entitled to feed-in tariff although it shall start sale of electricity in the annual period established in teh [sic] calendar.*
>
> *3. The 36 months period to complete the relevant plant shall is extended in accordance with the relevant year of planned commission for that relevant plant."*[227]

311. In November 2009, Pöyry Energy Consulting issued "*Spanish Solar Update*" report to Abengoa Solar.[228]

312. On November 25, 2009, an amendment agreement to the JDA was made between JGC and Abengoa Solar extending the deadline for the execution of the Shareholders Agreement until March 30, 2010.[229]

313. On December 2, 2009, Mr. Altozano of Lovells issued a Memorandum on the Official Commissioning Certificate and Right to the Feed-in Tariff, addressed to Mr. Yamazaki and

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[225] *Ibid.*, p. 26.
[226] (**C-0339**).
[227] *Id.*
[228] "Spanish Solar Update" issued by Pöyry Energy Consulting to Abengoa Solar in November 2009. (**C-0623**)
[229] (**C-0521**) The amendment agreement was dated as of November 25, 2009.

Mr. Ishii of JGC.[230] This memorandum was in response to JGC's inquiry regarding the application for final registration of the Solacor Plants in the RAIPRE and application of feed-in tariff, and starting of commercial operation of the Solacor Plants.

314. On December 11, 2009, the Ministry of Industry, Tourism and Commerce issued a resolution titled "*Resolution from the General Directorate for Energy Policy and Mining including the SOLACOR 1 facility in the remuneration pre-allocation Register, property of SOLACOR ELECTRICIDAD UNO, SA, which is granted the economic regime regulated in Royal Decree 661/2007, May 25*" in the name of Antonio Hernández García, General Manager.[231] This resolution resolved that Solacor 1 was registered in the Remunerations Pre-assignment Register, and identified Solacor 1 as Phase 2 as defined in the Resolution of the Council of Ministers dated November 13, 2009. It stated that the maximum deadline of thirty-six months referred to in RD-L 6/2009 should start to count from the date of notice of this resolution.

315. On the same date, the Ministry of Industry, Tourism and Commerce issued the same resolution for Solacor 2 with the same wording as the Solacor 1 plant.[232]

316. Soon after the Solacor Plants were registered in the Remuneration Pre-assignment Register, SMBC and HSBC reached an agreement with Mizuho Corporate Bank Netherland N.V., ("**Mizuho**") and BNP Paribas (Tokyo Branch) ("**BNP**") (together, the "**Lenders**") to constitute a banking syndicate that would guarantee sufficient financing to construct the Solacor Plants.[233]

317. Subsequent to the Solacor Plants' registration on the Remuneration Pre-assignment Register, NEXI started an internal due diligence process for the issuance of its OULI policies. In February 2010, NEXI's representatives made a business trip to Madrid and Seville. The purpose of the NEXI's business trip was to determine whether the Special

[230] Memorandum on the Official Commissioning Certificate and Right to the Feed-in tariff issued by Lovells on December 2, 2009. (**C-0568**)
[231] Registration of Solacor 1 in the Remuneration Pre-allocation Register, December 11, 2009. (**C-0141**) (**C-0141t**)
[232] Registration of Solacor 2 in the Remuneration Pre-allocation Register, December 11, 2009. (**C-0142**)
[233] Cl. Mem., para. 550.

Regime incentives would remain stable throughout the project life. NEXI representatives met with officers of CNE, IDAE and BBVA, a major Spanish Bank.[234]

318. NEXI's internal business report stated that the purposes of visit was to interview the Spanish authority in charge of designing and operating the feed-in tariff system (IDAE and CNE) and the market participants on the identification of source of fund for the feed-in tariff and possibility of the reduction of the fixed tariff given in the FIT system.

319. Stating that "whether FIT remains stable throughout the project life and whether the fixed tariff applicable to the projects remain as originally decided are critical elements in deciding whether to underwrite insurance because it will enhance credit in a project finance scheme", the NEXI report included NEXI representatives' understanding of the feed-in tariff regime in Spain in the following words:

> *"The current system is based on the Royal Decree ("RD") 661/2007 established in 2007 and RD6/2009 which provides the revised procedure for solar thermal projects."*
>
> *"PV and solar thermal developers one after another have entered into the business and the electricity generating capacity of the renewable energies has been increasing more rapidly than the government of Spain expected because the stable revenue is secured by the long-term off-take guarantee at the fixed price. The government of Spain significantly reduced the fixed tariff and the premium for the PV projects in order to secure the system stability. For the solar thermal technology, it decided to revise the registry system and give constraints of the number of the applicable projects and the timing of commencing application. As a consequence, only the projects which were enumerated on the list published in December 2009 were eligible to receive the current fixed tariff."* [235]

320. The report included the debriefing of the interviews conducted by NEXI representatives in their visit to Spain as follows:

> *"The FIT is effective to expand the installation of the renewable energies. We think the stable operation of the system is feasible. (IDAE)"*
>
> *"The FIT promotes investor's participation into projects by designing the system which enables long-term anticipated earnings (guarantee on the fixed tariff during*

[234] Cl. Mem., paras. 553 and 554; (C-0340) (C-0340t) Report of Business Trip.
[235] NEXI's agenda and report of JGC and NEXI's business trip to the Plants' site, February 22, 2010, pp. 2-3. (**C-340t**)

> *plan operation period and no retroactive application of regulatory change. (CNE)"*
>
> *"Although we cannot entirely deny a possibility that the fixed tariff will be reduced by any future regulatory change, such reduction if any is applied to new projects only and will not affect to the projects which are already entitled to receive the tariff before such reduction. (CNE)"*
>
> *"We provide loans on the premise that once a project is entitled to a fixed tariff such fixed tariff will not be affected by any future regulatory change (not retroactively). (BBVA)"*
>
> *"On top, as mentioned in 2) above, regulatory measures have been already adopted to reduce "over burden on the public" which was the biggest problem of the FIT system. Therefore, the system is sufficiently reliable in terms of the price stabilities for the existing projects and stabilities of future projects (#). (IDAE, CNE, [*** redacted ***])"*
>
> *"There was large deficit in the cash flow of the electricity generators in 2008 in Spain. It was mainly due to the fact that the large capacity of the PV, which was entitled to the higher tariff compared with other renewable energies, was installed. When it takes into account that the tariff for the solar thermal technology is relatively low, the probability of the occurrence of the same phenomena happened in 2008 is low by introduction of concentrated solar power. (IDAE)"* [236]

321. In the meantime, the Claimant and Abengoa Solar were negotiating the EPC and O&M contracts for the construction of the Solacor Plants and began drafting a share purchase agreement, whereby JGC would acquire 26% stakes in each of two Solacor SPVs.[237]

322. On February 18, 2010, Pöyry Energy Consulting issued "*Answers to Solacor Questionnaire: A note from Pöyry Energy Consulting to Solacor*".[238] This report included Pöyry's answer to Solacor's specific questions related to the remuneration regime for CSP projects and the potential impact of the tariff deficit thereon. In response to a question asking the consultant's "*view on how Spanish legislation is attractive for investors, which contribute to the increase of CSP project*", the answer included, among others, the following statements:

> *"Government long term commitments with renewables are clear."*

[236] *Ibid*., pp. 3-5.
[237] Cl. Mem., para. 559.
[238] "Answers to Solacor Questionnaire" issued by Pöyry Energy Consulting to Solacor on February 18, 2010. (**C-0624**)

> *"Political commitment to respect and more importantly not harm investors. This has been done in many occasions in which legal changes have being [sic] introduced but also introducing mitigating measures in order to diminish the potential impact."*
>
> *[…]*
>
> *"The main driver behind the level of success of this industry is the level of remuneration which coupled with good natural conditions (solar radiation and availability of Land) make CSP market extremely attractive in Spain."*[239]

323. In response to another question which reads "[p]lease include the detailed explanation on the source of premium. We concern that hike of end user tariff (last resort tariff) for compensate the increase of premium may become political agenda and, then lead to have negative impact on stability of curre [sic]", Pöyry's answers included, among others, the following statements:

> *"In line with the calendar set out in RDL 6/2009 and the pre-assigned register approved, the government has the obligation to gradually raise the TPA to cover the required subsidies. In this regard there is a clear intention from the government to do it. However, we believe this might be under stress if certain conditions occur (i.e., demand and oil prices to rise coupled with low hydro generation will press prices upwards generating pressure on end user tariffs). The government might want to reduce the level of support as they did for wind in 2007. The issue here is that changes have not been retrospective and have provided mechanisms (i.e., transitory periods, or the option to remain under the prior scheme under the regulated option) to cause small impact on investors IRR and over the ability of projects to repay debt.*
>
> *If a project is under the market option, changes have been introduced in a way that allow projects to remain under the previous regime (indefinitely if choosing the regulated option or during a transitory period if staying under the market option). This was the case of the wind industry in 2007.*
>
> *Moreover in case of Solar PV the change introduced through RD 1578 to reduce the previous tariff by 30% did apply for new projects, thus those PV projects already built before RD 1578 still have the right to the old tariff (substantially higher).*
>
> *This situation has been consistent over time when looking at the behaviour of the Spanish Government and we think it will keep the same way for legal reasons."*[240]

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[239] *Ibid*., Answer to Question 2.
[240] *Ibid*., Answer to Question 3.

324. In response to a question asking an explanation on the tariff deficit in relation to the increase of CSP project, Pöyry responded that:

> *"Consequently there was an impact from renewable subsidies increasing the tariff deficit in the past, and as long as regulated prices which do not reflect all system costs exist the deficit will go on. The government however has tackled this issue through RDL 6/2009 by allowing TPAs to rise in a controlled manner."*[241]

325. On March 25, 2010, the JDA was extended again until May 31, 2010.[242]

326. On April 19, 2010 Lovells issued a "*Legal Due Diligence Report*" for the Claimant.[243] It was marked as draft as at April 19, 2010. The report, addressed to JGC Corporation, stated that this report was prepared for use in connection with the proposed acquisition by JGC of a minority stake in the share capital of SPVs holding all rights and interests in the Solacor Plants. Lovells report confirmed that the Solacor Plants had been registered in the Pre-assignation Register pursuant to RD-L 6/2009 and, therefore, qualify for the feed in tariff of RD 661/2007.[244]

327. In May 2010, JGC learnt from Abengoa Solar that the Respondent was holding negotiations with Protermosolar with regard to potential changes to the regulatory framework applicable to CSP plants. Thereafter, JGC and Abengoa Solar held regular communications to discuss and update on the status of the negotiations.[245]

328. On May 26, 2010, Mr. Soler Babot of Abengoa Solar travelled to Tokyo and met with representatives of JGC and NEXI and discussed the negotiations between the Respondent and Protermosolar. NEXI was reassured about the positive outcome of the on-going negotiations.[246]

329. On June 7, 2010, JGC's Board of Directors approved a resolution authorizing the signature of an agreement for JGC to acquire 7,826 shares each out of the 30,100 issued shares in each of Solacor SPV, with the purchase price of EUR 15,652 each, representing 26% of

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[241] *Ibid*., Answer to Question 4.
[242] Email from Mr. Eduardo Soler Babot to Mr. Yusuke Yamazaki of March 29, 2010. (**C-0523**)
[243] Legal Due Diligence Report issued by Lovells on April 19, 2010. (**C-0567**)
[244] *Ibid*., Section 2, p. 14 and Section 2.4, pp, 16-17.
[245] Cl. Mem., para. 560; CWS-ME1, paras. 82-84.
[246] Cl. Mem., para. 562; CWS-ME1, para. 85; Yamazaki's email to Mr. Soler dated May 20, 2010. (**C-0342**)

the shares in two Solacor SPVs.[247] In this board meeting, the management of JGC explained to the board members that JGC intended to invest in CSP projects having a total capacity of 100MW (50MWx2) to be constructed by Abengoa at Cordoba, Andalusia, Spain and sought an approval to acquire 26% of the shares in Solacor SPVs with put and call options. The management further explained that the resolutions for participation in the transaction should be finally put on the agenda of the board after detailed conditions of the financing were determined. The agenda presented to the board of directors of the JGC also included a statement that if the financial closing was not consummated by the end of September 15, 2010, there was a special condition to the effect that JGC should have the right to sell the said shares at the same price to the seller. The outline of the project stated that with respect to tariff, "*Spanish laws and regulations on the Feed-in-Tariff shall apply*."

330. On June 22, 2010, JGC and Abengoa Solar S.A. and other Abengoa subsidiaries entered into a Sale and Purchase Agreement of Shares whereby JGC acquired from Abengoa Solar 7,826 shares of each Solacor SPV with a face value of two Euros per share, representing 26% equity interests in each of them.[248] This agreement included a right of put and call option if the "*Financial Close*" as defined in the agreement did not occur on or before August 2, 2010 (with a possibility of extension until September 15, 2010 if NEXI and the Lenders had given internal approval to proceeding with the "*Financial Close*" on or before August 2, 2010).[249]

331. On the same day (June 22, 2010), representatives of JGC and Abengoa Solar held a meeting with the Lenders to update them on the status of the negotiations between the Respondent and Protermosolar. According to the Claimant, during this meeting, Mr. Seage of Abengoa Solar communicated to JGC and the Lenders that "*Protermosolar and the Spanish Government were about to reach an "Agreement" (probably within the following days), under which both parties (Spain and the CSP industry represented by Protermosolar) would commit to certain essential points.*"[250]

[247] Cl. Mem., para. 563; Extract of JGC's Board Resolutions of June 7, 2010. (**C-0343**) (**C-0343t**)
[248] Cl. Mem., para. 564, (C-0344)
[249] Article 6 (CSI Purchase of Shares) of the Agreement. (**C-0344**)
[250] CWS-ME1 paras. 94-95; Cl. Mem. para. 567; CWS-ES, para. 55.

332. On June 26, 2010, Altermia Asesores Tecnicos S.L. ("**Altermia**") issued the final drafts of "*Technical assessment of a 50 MW solar thermal project "Solacor 1" at El Carpio (Córdoba)*"[251] and "*Technical assessment of a 50 MW solar thermal project "Solacor 2" at El Carpio (Córdoba)*".[252] These draft assessments were in response to Abengoa Solar's request to perform an independent technical due diligence of the Solacor Project. The reports focused on the technical risk related to the project and technology.

333. On July 1, 2010, Mr. Seage sent an email to Mr. Yamazaki and Mr. Endo of JGC attaching a Spanish version of the draft of the Respondent's agreement with the solar thermal sector together with an informal English translation.[253]

334. On July 2, 2010, the Respondent publicly announced by means of an official press release that it had reached an agreement with the CSP subsector.[254] Abengoa Solar received this press release directly from the Ministry as soon as it was made public.[255]

335. On July 3, 2010, Mr. Soler Babot of Abengoa Solar sent an email to Mr. Endo and Mr. Yamazaki of JGC informing that the Spanish Government had announced that an agreement with the wind and CSP sectors had been reached on July 2, 2010. In this email, he stated that while not all details were announced, it was "*sufficient to know that there is no impact in the tariff or the premium (except for 1 year on the premium as you know).*"[256]

336. On July 4, 2010, Mr. Soler Babot sent an email to Mr. Yamazaki of JGC attaching the official press release of the Ministry of July 2, 2010. He stated that:

> *"It is high level, but the highlighted paragraph clearly says that tariff and premiums of the RD 661/2007 will be applied to all plants in operation and in the pre-registry (Do not worry for the reference to 2013 in that paragraph, the only change before that is that we will not be able to sell at pool+premium during the first year of operations)."*[257]

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[251] (C-0625)
[252] (C-0626)
[253] (C-0217t); CWS-ES, para. 57.
[254] (C-0040/C-0040t) Official Press Release issued by the Ministry of Industry, Tourism and Commerce on July 2, 2010.
[255] CWS-ES, para. 58; (C-0214), an email from Mr. Seage to Mr. Soler Babot forwarding an email from Crescente De Antonio of the Ministry to Mr. Seage.
[256] (**C-0215**)
[257] (**C-0345**)

337. On July 7, 2010, Lovells sent an email to Mr. Yamazaki and Mr. Ishii of JGC attaching "the wording (in Spanish) of the recent agreement reached between the thermosolar industry and the Spanish Ministry of Industry".[258] Lovells outlined the "main features of the understanding between the Industry and the Ministry" in this email. One of such features was the "amendment of art.44 RD 661/2007 so that any future revision of the FIT or premiums shall not affect existing plants or projects registered in the pre-assignation registry prior to the date of the relevant revision or those plants finally registered in the RAIPRE prior to 6 May 2009."

338. On July 28, 2010, JGC's Board of Directors adopted a resolution approving the investment in the Solacor Project.[259] The management sought an approval of the Board that JGC invest in the project by acquiring 26% interest in each of the two Solacor SPVs with the total project costs of around EUR 570 million. The conditions presented to the Board for its approval included (i) financing by senior lenders composed of SMBC, HSBC, Mizuho and BNP, subject to the overseas untied loan insurance by NEXI; (ii) financial closing date expected to be in August 2010; (iii) commercial operation commencement date expected to be in March 2012; and (iv) expected internal rate of return (IRR) of around 10%. The Outline of the Project stated that with respect to Tariff, "*Spanish laws and regulations on the Feed-in-Tariff shall apply*."

339. On July 30, 2010, in response to Abengoa Solar's request on behalf of JGC for a comfort letter specifically addressed to NEXI, Mr. Antonio Hernandez Garcia, General Director for Energy Policy & Mining of the Ministry of Industry, Tourism and Commerce, wrote a letter addressed to the Chairman of the Board of NEXI on the official letterhead of the Ministry.[260] Abengoa Solar forwarded this letter to JGC in order for JGC to share the document with NEXI.[261] This letter, written in English, reads as follows:

> *"We issue this letter at the request of Abengoa Solar to confirm to the Board of Directors of the Nippon Export and Investment Insurance (NEXI) that we*

[258] (**C-0573**)
[259] Extract of JGC's Board Resolution of July 28, 2010. (**C-0346/C-0346t**)
[260] (**C-0261**)
[261] Cl. Mem. para 579; e-mail on August 1, 2010 from Mr. Eduard Soler Babot to Mr. Yusuke Yamazaki (Mr. Endo and Mr. Ikeda Kazuki were copied) of August 1, 2010 (**C-0348**); exchange of emails on August 5, 2010 between Mr. Eduard Soler Babot and Mr. Yusuke Yamazaki. (**C-0349**)

> *are initiating today the procedure for the approval of the revised regulation for Concentrating Solar Power technology in Spain. This new Royal Decree includes the results of the meetings maintained with the sector for the last weeks."*

340. On August 5, 2010, NEXI's Board Committee agreed to start *naidaku* (informal consent in Japanese) proceedings to issue its OULI policies. NEXI approved the transaction without any particular conditions.

341. On the same day, NEXI sent an email to SMBC informing that its "Board's conclusion today was that it is acceptable for the "naidaku" procedures to proceed. Hereafter, the "naidaku" document will be issued after the insurance reapplication, etc." This email was copied to JGC's representatives who in turn communicated this information to Abengoa Solar on the same day.[262]

342. On August 6, 2010, the financial closing of the project was conducted. The following agreements were signed by Solacor Electricidad Uno S.A., Solacor Electricidad Dos S.A., the Lenders and other parties, as appropriate[263]:

    (i) Senior Credit Facility Agreement between SMBC (as Agent and NEXI Agent), Sumitomo Mitsui Finance Dublin Limited, HSBC Tokyo Branch, Mizuho Corporate Bank Netherland N.V., and BNP Paribas Tokyo Branch (as Lenders) and Solacor Electricidad Uno, S.A. as Borrower, dated as of August 6, 2010.[264]

    (ii) Senior Credit Facility Agreement between SMBC (as Agent and NEXI Agent), Sumitomo Mitsui Finance Dublin Limited, HSBC Tokyo Branch, Mizuho Corporate Bank Netherland N.V., and BNP Paribas Tokyo Branch (as Lenders) and Solacor Electricidad Dos S.A. as Borrower, dated as of August 6, 2010.[265]

[262] (**C-349t**), (**C-0350**)
[263] Cl. Mem., para. 582.
[264] (**C-0560**)
[265] (**C-0559**) Senior Credit Facility Agreements ((**C-0560**) and (**C-0559**)) will be collectively referred to as "**Loan Agreements**".

(iii) Shareholders Agreement signed by CSI, Abengoa Solar, JGC and Solacor Electricidad Uno, S.A. dated as of August 6, 2010.[266]

(iv) Shareholders Agreement signed by CSI, Abengoa Solar, JGC and Solacor Electricidad Dos, S. A. dated as of August 6, 2010.[267]

(v) Construction Contract among Solacor Electricidad Uno, S.A., Carpio Solar Inversiones, S.A., JGC Corporation, Abener Energía S.A. y Teyma, Gestión de Contratos de Construcción e Ingeniería, S.A., Unión Temporal de Empresas, Ley 18/1982, Solacor El Carpio I and Abengoa S.A., dated as of August 6, 2010.[268]

(vi) Construction Contract among Solacor Electricidad Dos, S.A., Carpio Solar Inversiones, S.A., JGC Corporation, Abener Energía S.A. y Teyma, Gestión de Contratos de Construcción e Ingeniería, S.A., Unión Temporal de Empresas, Ley 18/1982, Solacor El Carpio II and Abengoa S.A., dated as of August 6, 2010.[269]

(vii) Operation and Maintenance Agreement for Solacor 1 signed between Abengoa Solar España, S.A. and Solacor Electricidad Uno, S.A.[270;] and

(viii) Operation and Maintenance Agreement for Solacor 2 signed between Abengoa Solar España, S.A. and Solacor Electricidad Dos, S.A.[271]

343. On August 27, 2010, NEXI issued "*naidaku*" document (informal consent document) addressed to SMBC to enter into the insurance agreement regarding the OULI for Solarcor Project.[272]

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[266] (**C-0557**)
[267] (**C-0558**) Shareholders Agreements ((**C-0557**) and (**C-0558**)) will be collectively referred to as "**Shareholders Agreements**".
[268] (**C-0601**)
[269] (**C-0602**) Construction Contracts ((**C-0601**) and (**C-0602**)) will be collectively referred to as "**EPC Contracts**".
[270] (**C-0603**)
[271] (**C-0604**) Operation and Maintenance Agreements ((**C-0603**) and (**C-0604**)) will be collectively referred to "**O&M Contracts**".
[272] NEXI's naidaku to issue the OULI policy to Solacor 1, of August 27, 2010 (**C-0555**) and NEXI's naidaku to issue the OULI policy to Solacor 2, of August 27, 2010. (**C-0556**).

344. On September 7 and October 14, 2010, JGC subscribed to the corresponding capital increases of Solacor SPVs to maintain a 26% stake therein.[273] By these two subscriptions to capital increases, JGC became the owner of 425,919 shares of Solacor SPV 1, representing in total 26% of the share capital of Solacor SPV 1[274] and 430,963 shares of Solacor SPV 2, representing in total 26% of the share capital of Solacor SPV 2.[275]

345. On December 1, 2010, each of the Solacor SPVs sent a letter to the Director-General for Energy Policy and Mining communicating its "*Waiver letter of entry into operation on a specific date" "pursuant to the Resolution of the General Directorate of Energy Policy and Mining dated 12/11/2009"*, and requesting *"a Resolution communicating the remuneration conditions for the operational life of the facility*".[276]

346. On March 1, 2011, in response to the December 1, 2010 letters, Mr. Antonio Hernández García, the Director-General for Energy Policy and Mining issued an acceptance letter to each of Solacor SPVs.[277] The contents of these two letters are exactly the same except for the identity of the addressee and the project name.

347. The acceptance letter addressed to Solacor SPV 1 included, among others, the following statements:

> *"According to the provisions of section 1 of the fifth transitional provision of such Royal Decree-Law, the remuneration regime applicable to the facilities registered on the Remuneration Pre-allocation Register under the provisions of the fourth transitional provision of such Royal Decree-Law, will be the regime provided by Royal Decree 661/2007, of September 26."*

> *"Accordingly, this General Directorate, under the powers conferred by the prevailing legislation, and considering that the request for registration on the Remuneration Pre-allocation Register was timely and duly filed by the owner SOLACOR ELECTRICIDAD UNO, S.A., sufficiently demonstrated the compliance with the requirements applicable to the technology it employs, as regulated in Article 4.3 of Royal Decree-Law 6/2009, of April 30, which adopts certain*

[273] Cl. Mem., para. 586.
[274] Whereas IV of Share Purchase Agreement between Carpio Solar Inversiones, S.A. as Purchaser, JGC Corporation as Seller and Abengoa, S.A. as Guarantor, dated June 30, 2015. (**C-0026**)
[275] Whereas IV of Share Purchase Agreement between Carpio Solar Inversiones, S.A. as Purchaser, JGC Corporation as Seller and Abengoa, S.A. as Guarantor, dated June 30, 2015. (**C-0027**)
[276] (**C-0294/C-0294t**); (**C-0296/C-0296t)**
[277] (**C-0295/C-0295t**); (**C-0297/C-0297t)**

measures in the energy sector and passes the discount tariff, resolved to register the following project or facility on the Remuneration Pre-allocation Register:"

"...this Directorate ... [c]ommunicates that, at present, under the provisions of paragraph 1 of the fifth transitional provision of Royal Decree-Law 6/2009, of April 30, the remuneration applicable to the facility is made up of the tariffs, premiums, upper and lower limits and supplements established by RD 661/2007, of May 25, and updated annually by Order of the Minister of Industry, Tourism and Commerce, with the current values from January 1, 2011 being as follows: [Emphasis added]

Term	*Regulated tariff €0.01/kWh*	*Reference Premium €0.01/kWh*	*Upper Limit €0.01/kWh*	*Lower Limit €0.01/kWh*
first 25 years	29.0916	27.4312	37.1483	27.4353
thereafter	23.2731	21.9449		

Reference value of the supplement for reactive energy by application of the bonus or penalty percentages: 8.4681 €0.01/kWh.

348. On January 19, 2012, the Final Registration on the RAIPRE of Solacor 1 was done and the Commissioning Certificate was issued as of the same date.[278]

349. On February 21, 2012, the Final Registration on the RAIPRE of Solacor 2 was done and the Commissioning Certificate was issued as of the same date.[279]

350. On February 23, 2012, Mr. Satoru Satoh, Japanese Ambassador to Spain met with Minister José Manuel Soria López (Minister of Industry, Energy and Tourism of the Respondent), and subsequently sent him a follow up letter, dated March 13, 2012, to convey "*concern that certain measures which the Spanish Government may adopt in order to reduce the deficit of the electricity tariff will have a retroactive effect on thermosolar plants*".[280] In this letter, referring that the recommendations of the CNE report dated March 9, 2012 included retroactive measures affecting the renewable energy sector, Ambassador Satoh stated that

[278] **(C-0088/C-0088t)**
[279] **(C-0089/C-0089t)**
[280] **(C-0368/C-0386t)**

"*I strongly hope that these retroactive measures are not implemented and that legal certainty and the confidence of investors remain safeguarded.*"

351. On April 9, 2012, Minister José Manuel Soria López sent a reply letter to Ambassador Satoh.[281] In this letter, he stated that:

> *"the Government continues to maintain its commitment to renewable energies as part of our country's energy mix. Legal certainty is one of the basic pillars of any reform measure regarding the energy system in order for Spain to meet the 2020 binding targets.*
>
> ……
>
> *The Government's action will be focused on the adoption of measures to correct current imbalances. Our priority is to reduce the tariff deficit of the electricity sector in order to set up a stable energy model for the coming years, ensuring legal certainty and regulatory stability for foreign investors."*

352. On April 30, 2012, CNE issued its first invoice for the energy produced by Solacor 1.[282]

353. On May 31, 2012, CNE issued its first invoice for the energy produced by Solacor 2.[283]

354. On June 18, 2012, Mr. Inagaki, the Vice Chairman of NEXI sent a letter to Mr. Fernando Martí Scharfhausen of the Ministry of Industry, Energy and Tourism, conveying NEXI's concern "*about the sustainability of the Feed-in Tariff regime, in particular for retroactive legal changes which will negatively affect the profitability of the solar thermal projects*", and requesting thoughtful consideration in maintaining the legal sustainability of the pre-registered solar thermal projects.[284]

355. On July 5, 2012, Ambassador Satoh sent a letter to Minister Manuel Soria López (Minister of Energy) conveying a particular concern about the implementation of a tax on renewable energy generation based on production efficiency as a part of a possible new energy reform.[285] He stated that "*[a]ny new generation taxes or fees would entail significant reductions in their income, resulting in many cases in serious losses or even the shutdown*

[281] (**C-0370/0370t**)
[282] (**C-0143/C-0143t**)
[283] (**C-0144/C-0144t**)
[284] This letter was attached to an e-mail from Mari Yamamoto (NEXI) to Mr. Yusuke Yamazaki (JGC) of June 18, 2012. (**C-0458/0458t**)
[285] (**C-0454/0454t**)

of the projects. Furthermore, such drastic measures may cause the flight of foreign capital and harm Spain's image as an investment destination."

356. On September 27, 2012, Mr. Endo of JGC had a meeting with Mr. Rafael Coloma of the Spanish Embassy in Japan and sent a letter to him the next day.[286] In this letter[287], stating that the new rule announced by the Ministry of Industry, Energy and Tourism on September 14, 2012 would have a critical impact on its CSP projects in Spain, JGC expressed its concern in the following words:

> *"The new rule would be a retroactive measure in the FIT regime (Royal Decree 661/2007) and is of a discriminatory nature affecting only CSP…*
>
> *The negative impact would be huge, reducing revenues by around 12% in addition to the 6% revenue tax.*
>
> *CSP projects would be unable to obtain even a reasonable return under the prescribed Spanish Laws, and some would face difficulty in serving their debt."*

357. On September 28, 2012, Mr. Rafael Coloma (Economic and Commercial Counsellor, Spain's Embassy in Japan) sent an email to the Minister of Energy's Chief of Staff, titled as "*New tax rule under consideration in Spain for power producers impact on JGC as investors in Solacor 1 and 2*" attaching the JGC's letter of September 28, 2012.[288]

358. On October 3, 2012, Mr. Koichi Kawana, President and Representative Director of JGC sent a letter to Mrs. Soraya Sáenz de Santamaría, Vice-President of the Government of Spain conveying JGC's concern and requesting reconsideration of taking retroactive measures negatively impacting international and local investors.[289]

359. On October 4, 2012, Mr. Isetani of JGC, Director and Senior General Manager of JGC, sent a letter to the officials of the Government of Spain conveying JGC's concern and forwarding a copy of Mr Kawana's letter of October 12, 2012 referred to above to Deputy Prime Minster of Spain.[290]

[286] (**C-0450**)
[287] (**C-0449**)
[288] (**C-0451**)
[289] (**C-0452**)
[290] (**C-0453**)

360. On October 4, 2012, Japan's Ministry of Economy, Trade and Industry sent a letter to Spain's Ministry of Energy expressing its concern and requesting "*thoughtful consideration in maintaining legal sustainability*".[291]

361. On October 4, 2012, Messrs. Alan D. Solomont (Ambassador of the United States of America) and Satoru Satoh (Ambassador of Japan) jointly sent a letter to H.E. Mr. Mariano Rajoy Brey (President of the Government of the Kingdom of Spain) conveying concern over the retroactive legislative changes damaging Spain's overall investment climate by negatively affecting investor's confidence and requesting reconsideration.[292]

362. On March 20, 2013, JGC, ITOCHU Corporation, Mitsubishi Corporation and Mitsui & Co, Ltd. jointly sent a letter to Mr. José Manuel Soria López, Minister of Industry, Energy and Tourism of Spain.[293]

363. On March 21, 2013, JGC sent a letter, dated as of March 18, 2013, to the Prime Minister of Spain, Mariano Rajoy, to inform of the existence of the present dispute under the ECT and requested the commencement of a three-month negotiation (cooling-off) period in order to avoid resorting to international arbitration.[294]

364. On April 3, 2013, Mr. Grangel Vicente, chief of staff of the Secretary of State for Energy Matters of the Respondent, sent a letter in Spanish to counsel for the Claimant (Cuatrecasas)[295]. In this letter, he acknowledged receipt of the March 18, 2013 letter but requested the Claimant to comply with the provisions of Spanish administrative law by submitting a translation into Spanish of the said letter.

365. On April 12, 2013, the Claimant answered by means of a second letter[296] which enclosed a Spanish translation of the March 21 and April 12, 2013 letters.

[291] (**C-0455**)
[292] (**C-0456**)
[293] (**C-0462**)
[294] Cl. Mem., para 905; (**C-09a**).
[295] (**C-0010**)
[296] (**C-0011**)

366. During the three-month cooling-off period under the ECT, the Clamant and the Respondent had three meetings, on June 26 and 27 and July 17, but failed to resolve the dispute.[297]

367. On July 29, 2013, Mr. Toshimitsu Motegi, Minister of Economy, Trade and Industry of Japan sent a letter to the Deputy President of the Spanish Government, Ms. Soraya Sáenz de Santamaría Antón, the Minister of Economy and Competitiveness, Mr. Luis de Guindos Jurado, and the Minister of Energy, Mr. José Manuel Soria López.[298] On September 9, 2013, H.E. Mr. José Manuel Soria López (Minister of Energy) sent a reply to Mr. Toshimitsu Motegi.[299]

368. On September 27, 2013, Ambassador Satoh sent a letter to Minister José Manuel García-Margallo Marfil, Minister of Foreign Affairs and Cooperation; Mr. Luis de Guindos Jurado, Minister of Economy and Competitiveness, and Mr. José Manuel Soria López, Minister of Energy.[300]

369. On January 17, 2014, another meeting took place between the Claimant and the Respondent which ended without any agreement on the dispute.[301]

370. On August 22, 2014, the Claimant sent a letter to the Respondent about the new measures and requested a further negotiation for an amicable settlement of the dispute.[302]

371. On February 19, 2015, the final meeting took place between the Claimant and the Respondent without any resolution of the dispute.

372. On June 8, 2015, the Claimant submitted a Request for Arbitration to ICSID.

373. On June 30, 2015, the Claimant entered into two Share Purchase Agreements to sell each of its 13% equity interest in Solacor SPVs to Carpio Solar Inversiones, S.A. ("**Carpio**"), an Abengoa Solar group company.[303] Each agreement provided that subsequent to the

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[297] Cl. Mem., para 908.
[298] (**C-0466**)
[299] (**C-0467**)
[300] (**C-0468**)
[301] Cl. Mem., para 909.
[302] (**C-0012a**)., Cl. Mem., para. 914.
[303] (**C-0026**); (**C-0027**)

transfer of title to the shares sold under the agreement, Carpio owned 87% of the Company's share capital and JGC continued to own the remaining 13% of the Company's share capital. The closing of those sales of shares took place on January 7, 2016.[304]

374. The prices for the sold shares were EUR 8,447.946 for Solacor 1 SPV shares, and EUR 8,548,826 for Solacor 2 SPV shares, each with a certain additional adjustment amount to be calculated under the Share Purchase Agreement.[305]

375. Article 2.3 of each Share Purchase Agreement provides for JGC's rights under international law as follows:

> *"For the avoidance of doubt, the Seller's rights under international law (in connection with the ECT Claim and any other related claims) that shall have accrued prior to the Closing shall remain with the Seller and not be affected by the Closing."*

IV. THE PARTIES' RELIEF SOUGHT

A. THE CLAIMANT'S REQUEST FOR RELIEF

376. The Claimant included the following *Petitum* and reservation of rights in its Memorial on the Merits:

> *"1427. For the foregoing reasons, the Claimant hereby respectfully requests that the Arbitral Tribunal issues an Award as follows:*
>
> *DECLARING that the Respondent's actions and omissions with respect to the Claimant's Investment in the CSP subsector in Spain amount to breaches of the Respondent's obligations under Part III of the Energy Charter Treaty and MFN treatment, as well under the applicable rules and principles of international law;*
>
> *ORDERING the Respondent to pay to the Claimant compensation in the amount of EUR 93.5 million free of/from taxes and of/from any type of withholding or equivalent; compensation which may be increased;*
>
> *ORDERING the Respondent to pay the entire costs of the arbitration and all legal costs incurred by the Claimant;*
>
> *ORDERING the Respondent to pay to the Claimant pre- and post-award interest accrued on all amounts claimed, compounded, until full payment thereof; and,*

[304] Cl., Reply, para. 559; CWS-TM2, para. 34.
[305] Article 3.1 of (**C-0026**) and (**C-0027**).

> *ORDERING any such further relief as the Arbitral Tribunal may deem appropriate.*
>
> *1428. The Claimant hereby reserves its right to make further submissions on fact and/or law, to respond to any allegations or defenses put forward by the Respondent, to provide and request any evidence that it deems appropriate and to amend and/or supplement the relief sought in this arbitration."*

377. The Claimant included the following *Petitum* and reservation of rights in its Reply on the Merits and Counter-Memorial on Jurisdiction:

> *"711. For the foregoing reasons, JGC hereby respectfully requests that the Arbitral Tribunal issues an Award as follows:*
>
> *DECLARING that the Arbitral Tribunal has jurisdiction to hear all claims submitted by JGC under the Energy Charter Treaty and, consequently, rejecting the preliminary objections that the Respondent raised against the jurisdiction of the Arbitral Tribunal;*
>
> *DECLARING that the Respondent's actions and omissions with respect to JGC in the CSP subsector in Spain amount to breaches of the Respondent's obligations under Part III of the Energy Charter Treaty, as well as under the applicable rules and principles of international law;*
>
> *ORDERING the Respondent to pay JGC compensation in the amount of EUR 105.2 million (amount calculated as of September 30, 2017 as a temporary proxy to the date of award and including interests until January 31, 2018, and being an amount that may be increased to provide full compensation); or alternatively, in the amount of EUR 161 million (amount based on the alternative but-for calculation by Compass Lexecon as of September 30, 2017 as a temporary proxy to the date of award and including interests until January 31, 2018, and being an amount that may be increased to provide full compensation);*
>
> *ORDERING the Respondent to pay the entire costs of the arbitration and all legal costs and other expenses incurred by JGC;*
>
> *ORERING the Respondent to pay to JGC (a) pre-award interest at a rate equal to the cost of equity at the relevant valuation date (4.99% assessed as of September 30, 2017, the proxy to the date of award) and (b) post- award interest at a rate equal to the cost of equity at the relevant valuation date (4.99% assessed as of September 30, 2017, the proxy to the date of award) plus an additional 2%; interest accrued on all amounts claimed, com- pounded, until full payment thereof*
>
> *DECLARING that the Arbitral Tribunal's Award is made net of all taxes and/or withholdings, and ORDERING the Respondent to indemnify JGC for any taxliability or withholding that may be imposed in Spain or Japan, in relation to the compensation awarded in the Tribunal's Award; and*
>
> *ORDERING any such other and further relief as the Arbitral Tribunal may deem appropriate.*
>
> *712. JGC hereby reserves their rights to make further submissions on fact and/or law, to respond to any new allegations or defenses that the Respondent may put*

forward, as well as to provide and request any evidence that they deem appropriate and, accordingly, to amend and/or supplement the relief sought in this arbitration."

378. The Claimant included the following *Petitum* and reservation of rights in its Rejoinder on Jurisdiction:

> *"125. For the foregoing reasons, JGC hereby respectfully requests that the Arbitral Tribunal issues an Award as follows:*
>
> *DECLARING that the Arbitral Tribunal has jurisdiction to hear all claims submitted by the Claimant under the Energy Charter Treaty and, consequently, REJECTING each of the preliminary objections that the Respondent raised against the jurisdiction of the Arbitral Tribunal in its Counter-Memorial on the Merits and Memorial on Jurisdiction of December 2, 2016 and kept or introduced in its Rejoinder on the Merits and Reply on Jurisdiction of April 20, 2018;*
>
> *DECLARING that the Respondent's actions and omissions with respect to JGC in the CSP subsector in Spain amount to breaches of the Respondent's obligations under Part III of the Energy Charter Treaty, as well as under the applicable rules and principles of international law;*
>
> *ORDERING Respondent to pay to JGC compensation in the amount of EUR 105.2 million (amount calculated as of September 30, 2017 as a temporary proxy to the date of award and including interests until January 31, 2018, and being an amount that may be increased to provide full compensation); or alternatively, in the amount of EUR 161 million (amount based on the alternative but-for calculation by Compass Lexecon as of September 30, 2017 as a temporary proxy to the date of award and including interests until January 31, 2018, and being an amount that may be increased to provide full compensation);*
>
> *ORDERING the Respondent to pay the entire costs of the arbitration and all legal costs and other expenses incurred by JGC;*
>
> *ORDERING the Respondent to pay to JGC (a) pre-award interest at a rate equal to the cost of equity at the relevant valuation date (4.99% assessed as of September 30, 2017, the proxy to the date of award) and (b) post-award interest at a rate equal to the cost of equity at the relevant valuation date (4.99% assessed as of September 30, 2017, the proxy to the date of award) plus an additional 2%; interest accrued on all amounts claimed, compounded, until full payment thereof;*
>
> *DECLARING that the Arbitral Tribunal's Award is made net of all taxes and/or withholdings, and ORDERING the Respondent to indemnify JGC for any tax liability or withholding that may be imposed in Spain or Japan, in relation to the compensation awarded in the Tribunal's Award; and,*
>
> *ORDERING any such other and further relief as the Arbitral Tribunal may deem appropriate.*
>
> *126. JGC hereby reserves its rights to make further submissions on fact and/or law, to respond to any new allegations or defenses that the Respondent may put forward, as well as to provide and request any evidence that it deems appropriate*

> *and, accordingly, to amend and/or supplement the relief sought in this arbitration."*

379. The Claimant included a similar *Petitum* and reservation of rights in paragraphs 176 and 177 of its Post-Hearing Brief.

B. The Respondent's Request for Relief

380. The Respondent included the following *Petitum* and reservation of rights in its Counter-Memorial on the Merits and Memorial on Jurisdiction:

> *"1616. In view of the arguments set forth in this Document, the Kingdom of Spain respectfully requests the Arbitral Tribunal to:*
>
> *Declare that there is no jurisdiction to recognise the Claimant's claims in relation to the TVPEE, in accordance with what is stated in section III of this Counter-Memorial.*
>
> *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 section IV of this Counter-Memorial.*
>
> *Furthermore, all claims for compensation of the Claimant should be dismissed as they are not entitled to compensation in accordance with Section V of this Counter-Memorial;*
>
> *Sentence the Claimant to pay all the costs and expenses arising from this arbitration, including administrative expenses incurred by CIADI 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, as well as any other costs or expenses that may have incurred. These costs and expenses must also incur a reasonable interest rate from the date these costs are incurred until the date of their actual payment.*
>
> *1617. The Kingdom of Spain reserves the right to supplement, modify or add to these claims and to present any additional arguments required under the ICSID Convention, the ICSID Arbitration Rules, the Procedural Orders and the Arbitral Tribunal's directives in order to respond to all claims made by the Claimant in connection with the present case."*

381. The Respondent included the following *Petitum* and reservation of rights in its Rejoinder on the Merits and Reply on Jurisdiction:

> *"2074. In view of the arguments put forward in this Memorial, the Kingdom of Spain respectfully requests the Arbitral Tribunal that:*
>
> *It declares its lack of jurisdiction to hear the claims of the Claimant, or where appropriate, the inadmissibility, in accordance with what is stated in section III of this Memorial in reference to Jurisdictional Objections;*

> *Secondarily in the event that the Arbitration Tribunal were to decide that it has jurisdiction to hear the present dispute, that it rejects all the claims of the Claimant on the merits, since the Kingdom of Spain has not in any way breached the ECT, in accordance with what is set forth in sections IV and V of the present Memorial, regarding the Facts and the Merits of the Matter, respectively.*
>
> *Secondarily, that it dismisses all of the Claimant's compensatory claims, as the Claimant has no right to compensation, pursuant to that stated in section VI herein; and*
>
> *To Order the Claimant to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators' fees, and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred and the date of their actual payment.*
>
> *2075. The Kingdom of Spain reserves the right to supplement, modify or complement these pleadings and present any and all additional arguments that may be necessary in accordance with the ICSID Rules of Arbitration, procedural orders and the directives of the Arbitral Tribunal in order to respond to all allegations made by the Claimant in regards to this matter."*

382. The Respondent included the following *Petitum* and reservation of rights in its Post-Hearing Brief:

> *"126. In view of the arguments put forward in its Memorials and the present Skeleton Brief, the Kingdom of Spain respectfully requests the Arbitral Tribunal that:*
>
> *It declares its lack of jurisdiction to hear the claims of the Claimant, or where appropriate, [their] the inadmissibility, in accordance with what is stated in section II of this Respondent's Skeleton in reference to Jurisdictional Objections;*
>
> *Secondarily in the event that the Arbitration Tribunal were to decide that it has jurisdiction to hear the present dispute, that it rejects all the claims of the Claimant on the merits, since the Kingdom of Spain has not in any way breached the ECT, in accordance with what is set forth in sections III of the present Brief, regarding the Facts and the Merits of the case.*
>
> *Secondarily, that it dismisses all of the Claimant's compensatory claims, as the Claimant has no right to compensation, pursuant to that stated in section III.E herein; and*
>
> *To Order the Claimant to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators' fees, and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred and the date of their actual payment.*
>
> *127. The Kingdom of Spain reserves the right to supplement, modify or complement these pleadings and present any and all additional arguments that*

may be necessary in accordance with the ICSID Rules of Arbitration, procedural orders and the directives of the Arbitral Tribunal."

V. JURISDICTION

A. OVERVIEW

383. The Respondent initially raised two objections to jurisdiction of the Tribunal:

a. Complete lack of jurisdiction of the Tribunal to hear the dispute put forward by the Claimant claiming that EU law and principles are international law applicable to the ruling on this dispute for the purpose of Article 26(6) of the ECT and EU law prevents this dispute from being submitted to arbitration (the "**EU law Jurisdictional Objection**" or the "***Achmea* Objection**"),[306]

b. Lack of jurisdiction of the Tribunal to hear an alleged breach by the Respondent of the obligations under Article 10(1) of the ECT, i.e., the FET, MCPS, Non-Impairment and Umbrella Clause protection standards, through the introduction of the TVPEE by Law 15/2012 since the Kingdom of Spain did not consent to submit this issue to arbitration, claiming that pursuant to Article 21 of the ECT, said standards are not applicable to the TVPEE neither by virtue of Articles 10(1) nor 10(7) of the ECT[307].

384. The Respondent notes that its first objection is of a complete nature, and if upheld, it would entail the exclusion of the entire dispute from the jurisdiction of the Tribunal, whereas the second one is of a partial nature related to the TVPEE, and, if upheld, would only affect the dispute concerning the TVPEE.[308]

385. In its Post-Hearing Brief, the Respondent indicated in regard to the *Achmea* Objection that "[f]or reasons of consistency and loyal cooperation with the EU which are binding obligations on the Kingdom of Spain as a Member State, this Jurisdictional Objection is

[306] The Respondent submitted this objection with its Rejoinder on the Merits and Reply on Jurisdiction dated April 20, 2018. ("**Resp. Rej.**").
[307] Resp. C-Mem., pp. 26-54.
[308] Resp. Rej., para. 7.

maintained insofar as the CJEU [the Court of Justice of the European Union] does not reach a different conclusion in its Opinion 1/2017 regarding the "CETA" agreement with Canada, still pending at the date of submission of this Post-Hearing Brief" (the "**Opinion 1/2017**").[309]

386. Noting that in the Opinion 1/2017, the CJEU indicated that "*the principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State*", on November 8, 2019, the Respondent informed the Tribunal of its decision to withdraw its *Achmea* Objection to the jurisdiction of the Tribunal based on EU law.[310]

387. Having confirmed that the Claimant had no objection, the Tribunal took note of the Respondent's withdrawal of the EU law Jurisdictional Objection in its PO. No. 8 issued on December 4, 2019. The Tribunal also took note that the Respondent maintained its jurisdictional objection relating to the TVPEE.

388. With respect to the jurisdictional objection relating to the TVPEE, the Respondent submits that the provisions relating to the TVPEE of Law 15/2012, passed by its Parliament (Congress of Deputies and Senate), are considered a "*taxation measure*" for the purposes of the ECT in accordance with Article 21(7)(a)(i) of the ECT. Pursuant to Article 21(1) of the ECT, Article 10(1) of the ECT does not give rise to obligations with respect to taxation measures of the Contracting Parties, and accordingly the Respondent has not given consent to submit the disputes relating to the TVPEE to arbitration. The Respondent submits that it only provided its consent to submit to investment arbitration disputes related to alleged breaches of obligations derived from Part III of the ECT (Article 26 of the ECT).[311]

389. The Claimant claims that the protection standards set forth in Article 10(1) of the ECT (namely, FET, MCPS, Non-impairment and Umbrella Clause) allegedly generate obligations of the Respondent with regard to the TVPEE by virtue of Article 10(1) of the ECT itself, or subsidiarily, by virtue of the MFN treatment obligation set forth in Article

[309] Resp. PHB, para. 6.
[310] The Respondent's November 8, 2019 letter ("**Withdrawal**"), para. 2 and footnote 2.
[311] Resp. C-Mem., paras. 66-69 and 174-176.

10(7) of the ECT. Specifically, the Claimant contends that the tax carve-out in Article 21(1) of the ECT cannot apply to the TVPEE, because it only applies to *bona fide* taxation measures and the TVPEE is not a *bona fide* taxation measure; even if the TVPEE was a *bona fide* taxation measure under Article 21(1) of the ECT, it would be a tax "*other than those on income or on capital*". Accordingly, the Claimant submits that the Tribunal has jurisdiction by virtue of the claw-back in Article 21(3) of the ECT.[312]

390. The Respondent rebuts that the FET, MCPS, Non-impairment and Umbrella Clause standards in Article 10(1) of the ECT are not applicable to the TVPEE by virtue of the MFN treatment obligation in Article 10(7) of the ECT either, given that such section does not apply to taxes on income and that the TVPEE is a tax on income.[313]

391. Given the respective submissions of the Parties, the Tribunal considers that the jurisdictional objection of the Respondent relating to the TVPEE hinges upon the following two questions: (i) whether the TVPEE is a "*Tax Measure of the Contracting Parties*" for the purpose of Article 21(1) of the ECT which carves out "*Tax Measures*" from the ambit of the ECT; and (ii) if the answer to the first question is affirmative, then whether the TVPEE is one of the "*Taxation Measures of the Contracting Parties other than those on income or on capital*" which are subject to the claw-back provision of Article 21(3) of the ECT for the purpose of the MFN treatment obligation set forth in Article 10(7) of the ECT. The Tribunal will first review the Parties' respective position in greater detail in the following paragraphs.

B. WHETHER THE TVPEE IS A TAX MEASURE OF THE RESPONDENT FOR THE PURPOSE OF THE TAX CARVE-OUT PURSUANT TO ARTICLE 21(1) OF THE ECT

(1) The Respondent's Position

392. The Respondent emphasizes that taxation measures of the Contracting Parties are excluded from the scope of protection of the ECT, with the only exceptions stipulated in Article 21

[312] Cl. Reply, para. 45; Cl. Rej., paras. 97-98.
[313] Resp. Rej., para. 167.

of the ECT[314], and that Article 10(1) of the ECT does not impose any obligations for the Contracting Parties regarding the taxation measures.[315]

393. The Respondent submits that according to Article 21 of the ECT, the only paragraphs of Article 10 that do apply to taxation measures of the Contracting Parties are paragraphs (2) and (7).[316]

394. The Respondent asserts that the TVPEE is a taxation measure for the purposes of the ECT for two reasons: (i) because it complies with the definition of taxation measure under Article 21 (7)(a)(i) of the ECT, and (ii) because the TVPEE is, in any case, a *bona fide* taxation measure.[317]

395. Referring to Article 21(7)(a)(i) of the ECT which provides that "the term "taxation measure" includes any provisions relating to taxes of the domestic law of the Contracting Party", the Respondent submits that Law 15/2012 introducing the TVPEE is part of the domestic law of the Kingdom of Spain legislated in accordance with the ordinary legislative procedure provided for in the Spanish Constitution and the rest of the Spanish legal system and as such the provisions relating to the TVPEE are in any case provisions relating to a tax, under the concept of tax of the domestic law of the Kingdom of Spain.[318]

396. The Respondent states that the Spanish Constitutional Court recognized the taxation nature and legality of the TVPEE[319] and ruled that the said regulation of the TVPEE contained in Law 15/2012 is valid and in accordance with the Spanish Constitution.[320]

397. The Respondent states that the TVPEE is a tax of general application to the production of all generation facilities, both renewable and conventional. As such, the provisions on the

[314] Resp. C-Mem., para. 94.
[315] *Ibid*., para. 95.
[316] *Ibid*., para 96.
[317] Resp. Rej., para. 171.
[318] Resp. C-Mem., paras. 99 and 111.
[319] *Ibid*., para. 128-129.
[320] *Ibid*., para. 130.

TVPEE of Law 15/2012 are taxation measures for the purposes of Article 21(7)(a)(i) of the ECT, and in any case, the TVPEE is a *bona fide* taxation measure.[321]

398. In addition, the Respondent submits that major features of the Law 15/2012 relating to the TVPEE such as taxable event (Article 4), taxpayers (Article 5), tax base (Article 6), tax rate (Article 8) and tax period (Article 13) demonstrate the nature of the TVPEE as a *bona fide*, general taxation measure.[322]

399. The Respondent asserts that the TVPEE is a tax under international law as well.[323] To support its submission that the TVPEE is a tax under international law, the Respondent refers to the definition of tax by Black's Law Dictionary which reads as follows:

> *"**tax**, n. (14c) A charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue."*[324]

400. The Respondent asserts that the TVPEE meets all the defining characteristics to fall under the concept of tax in international law as used by international arbitration tribunals in *EnCana v. Ecuador*, *Duke Energy v. Ecuador* and *Burlington Resources v. Ecuador*,[325] such that (i) the tax is established by law, (ii) said law imposes an obligation on a class of persons, and (iii) said obligation implies paying money to the State for public purposes.[326]

401. In addition, the Respondent points out that the European Commission has recognized the taxation nature of the TVPEE and the conformity of this tax with EU law.[327]

402. The Respondent asserts that in order to determine that the TVPEE is a taxation measure for the purpose of the ECT, additional analysis of the TVPEE as argued by the Claimant (whether it is a *bona fide* tax measure) does not need to be performed. The Respondent

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[321] *Ibid*., paras. 72 and 79; Resp. Rej. paras 167-168, 246.
[322] Resp. C-Mem., paras. 73-77.
[323] *Ibid*., para. 116; Resp. Rej., para. 173.
[324] Resp. C-Mem., para. 135, quoting Black's Law Dictionary, Ninth Edition, Bryan A. Garner Editor in Chief, p. 1594. (**RL-0025**)
[325] Resp. C-Mem., paras. 138-140, citing *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Award, February 3, 2006, para.142 (**RL-0027**) ("***EnCana* Award**"), *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador,* ISCID Case No. ARB/04/19, Award, August 18, 2008, para. 174 (**RL-0033, CL-0108**) ("***Duke* Award**"), and *Burlington Resources Inc. v. Republic of Ecuador*, ISCID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010, paras. 164 and 165. (**RL-0036**) ("***Burlington* Decision**").
[326] Resp. C-Mem., paras. 141 and 142.
[327] *Ibid*., para 157.

submits that in any case, the TVPEE is a *bona fide* taxation measure and that the Claimant has the burden of proving the alleged bad faith which it has not proved at all.[328]

403. The Respondent contends that the good faith analysis of the taxation measures conducted in *Yukos v. Russian Federation*[329] cited by the Claimant is not applicable in the present case. According to the Respondent, the *Yukos* tribunal considered extraordinary circumstances (that are not present in this case) and that the taxation measures pursued a purpose that was entirely unrelated to the purpose of raising revenue for the State, such as the destruction of a company or the elimination of a political opponent.[330]

404. Citing the tribunal in *EnCana v. Ecuador* which held that "*[t]he question whether something is a tax measure is primarily a question of its legal operation, not its economic impact*"[331], the Respondent asserts that it is not appropriate to examine the economic effect of the TVPEE as sought by the Claimant.[332]

405. In response to the Claimant's criticism that the TVPEE is disproportionate and discriminatory, the Respondent contends that the TVPEE applies to all producers, both renewable and conventional, and that Law 15/2012 grants the same treatment to all of them, without granting a different treatment to renewable producers (through for example, exemptions, reductions or deductions in the tax).[333]

406. The Respondent submits that the general application of the TVPEE is a legitimate option of the State legislator as recognized by the Spanish Constitutional Court and is linked to the environmental nature of the TVPEE.[334] In support of this submission, the Respondent cites the judgement of the Spanish Constitutional Court of November 6, 2014 which held that "*[t]he generalized application of the tax in question [the TVPEE] responds to a choice*

[328] Resp. Rej., para. 181.
[329] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014, para. 1407 and 1431. (**CL-0039**) ("***Yukos* Award**").
[330] Resp. Rej., para. 178.
[331] *Ibid*., para. 179, citing from *EnCana* Award, para. 142. (**RL-0027**).
[332] *Ibid*., para. 180.
[333] *Ibid*., para. 186.
[334] *Ibid*., para. 190.

of the legislator, who, while respecting constitutional principles, has a wide margin for establishing and defining the tax."[335]

407. The Respondent denies that the TVPEE discriminates against renewable producers from either the perspective of legal repercussions or from the perspective of economic repercussion.[336] The Respondent claims that the TVPEE is one of the costs that are remunerated to renewable producers through the specific remuneration they receive.[337]

408. The Respondent submits that the purpose of the TVPEE is to raise revenue for the Spanish State for public purposes and that the TVPEE is a public income of the Spanish State that is integrated into the General State Budget which contributes to form the State resources with which public expenses are financed.[338] In this regard, the Respondent points out that in accordance with the Fifth Additional Provision of Law 17/2012, an amount equivalent to the estimated annual collection arising from the taxes included in Law 15/2012, among which is the TVPEE, is allocated in each year's General State Budget Acts to finance the costs of the electricity system referred to the promotion of renewable energies.[339]

409. In support of its position, the Respondent states that in cases like *Isolux Infrastructure Netherlands BV v. Spain*[340], *Eiser v. Spain*[341], *Novenergia v. Spain*[342], *Masdar v. Kingdom of Spain*[343], and *Antin v. Kingdom of Spain*[344] in which the jurisdictional objection related

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[335] Judgement 183/2014 of the plenary session of the Constitutional Court of November 6, 2014, (Appeal on grounds of unconstitutionality. 1780/2013), rejecting the appeal of unconstitutionality filed by the Government Council of the Regional Government of Andalusia) in relation to Articles 4, 5 and 8 of Act 15/2012 (and other norms). (**R-0043**).
[336] Resp. Rej., para. 197.
[337] *Ibid*., paras. 202-208.
[338] *Ibid*., para. 211 and 212.
[339] *Ibid*., para. 213.
[340] *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain* (SCC V2013/153)), Award, July 12, 2016, paras.717-741, (**RL-0096**) ("***Isolux* Award**").
[341] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.á.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, paras. 266-272, (**RL-0098**) ("***Eiser* Award**").
342 *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain* (SCC Arbitration (2015/063)), Award, February 15, 2018, paras. 516-525, (**RL-0123**) ("***Novenergia* Award**").
[343] *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain,* ICSID No. ARB/14/1, Award, May 16, 2018, para. 257-294, (**CL-0175**) ("***Masdar* Award**").
[344] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain,* ICSID Case No. ARB/13/31, Award, June 15, 2018, para. 300-323(**CL-0182**) ("***Antin* Award**").

to the TVPEE was also raised, the tribunals sided with the Respondent and declared that they lacked jurisdiction to hear the dispute relating to the TVPEE.[345]

410. Following the Tribunal's invitation to the Parties, dated October 10, 2019, to introduce into the record relevant and publicly available award/decisions on the renewable energy sector of Spain to that date, which they may consider that the Tribunal may benefit from having at its disposal, the Respondent added new cases supporting its position, thus having declared that they lacked jurisdiction to hear the dispute relating to the TVPEE[346]. Those cases are *Greentech Energy Systems v Spain*[347], *RREEF v Spain*[348], *9REN v Spain*[349], *NextEra Energy Global v Spain*[350], *Cube Infrastructure v Spain*[351], *OperaFund Eco-Invest v Spain*[352] and *SolEs Badajoz v Spain*[353].

411. Finally, the Respondent argues that the Claimant has not complied with its burden of proof to properly sustain its allegation that the TVPEE is not a *bona fide* taxation measure, and that therefore, the tax carve-out of Article 21 of the ECT preserving the taxation powers of the Contracting States must be applied to the full of its consequences and the jurisdiction of this Tribunal regarding this taxation measure must be rejected.

(2) The Claimant's Position

412. The Claimant does not dispute that Article 21(1) of the ECT carves out taxation measures from the scope of protection of Part III of the ECT. However, it asserts that the carve-out

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[345] Resp. Rej., para. 216; Resp. PHB, paras. 8 and 9.
[346] The Respondent's Comments on ECT Precedents, October 25, 2019.
[347] *Greentech Energy Systems A/S, et al. v. Kingdom of Spain*, SCC Arbitration V (2015/150), Award, November 14, 2018, paras.247-260 (**RL-0139/ CL-0201b**) ("***Greentech* Award**").
[348] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, November 30, 2018, paras.185-191 (**RL-0137**) ("***RREEF* Decision**").
[349] *9REN Holding S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, May 31, 2019, paras.195-208 (**RL-0136/CL-0208**) ("***9REN* Award**").
[350] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. 14/11, Award and Decision on Jurisdiction, Liability and Quantum Principles, May 31, 2019/March 12, 2019 , paras.372-373. (**RL-0135**) ("***Nextera* Award and Decision**").
[351] *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, February 19, 2019 , para. 221-233. (**RL-0133/CL-0203**) ("***Cube* Decision**").
[352] *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, September 6, 2019, paras. 402-405 (**RL-00131**), (**CL-0211**) ("***OperaFund* Award**").
[353] *SolEs Badajoz GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, July 31, 2019, paras.272-277. (**RL-0134, CL-0209**) ("***SolEs* Award**").

under Article 21(1) of the ECT does not apply to actions carried out "*under the guise of taxation*" but which "*in reality aim to achieve an entirely unrelated purpose*". Quoting the tribunal in *Yukos v. Russia*, the Claimant asserts that *bona fide* taxes are those "*that are motivated by the purpose of raising general revenue for the State*".[354]

413. The Claimant contends that the TVPEE is not a genuine, *bona fide* taxation measure to which the tax carve-out in Article 21 of the ECT could apply and that it is a disguised, discriminatory tariff cut, introduced to address the tariff deficit.[355]

414. The Claimant argues that Law 15/2012 imposed an indirect reduction on revenues received by the Solacor Plants from the sale of electricity, including the incentive tariffs and premiums guaranteed under RD 661/2007 by 7% by introducing the TVPEE and was in no way tied to income, operating costs or profitability. As such, its real impact was to reduce the value of the incentives granted to the Solacor Plants in return for the production of renewable energy.[356]

415. The Claimant does not agree with the Respondent's claim that the TVPEE is "*a tax of general application*". The Claimant asserts that the TVPEE had a disproportionate and discriminatory impact on renewable producers. Whereas conventional power producers were partially able to pass through the additional costs imposed by the 7% charge to the electricity price paid by consumers, renewable producers were forced to accept a direct reduction in their income.[357]

416. The Claimant further asserts that whereas the TVPEE was allegedly justified on environmental grounds, it served no such environmental purpose.[358]

417. The Claimant argues that the TVPEE fails Spain's own test, since it did not serve a legitimate "*public purpose*" because the TVPEE does not raise general revenue for the

[354] Cl. Reply, para. 46, quoting from *Yukos* Award, paras. 1407 and 1431 (**CL-0039**); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, (UNCITRAL, PCA Case No. AA 228) Final Award, July 18, 2012, paras. 1407 and 1431 (**CL-0041**); and *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, (UNCITRAL, PCA Case No. AA 226), paras. 1407 and 1431. (**CL-0040**).
[355] Cl. Reply, para. 45(1).
[356] *Ibid.*, para. 47.
[357] *Ibid.*, para. 48.
[358] *Ibid.*, para. 49.

State; rather their revenues must be used to pay down the self-inflicted tariff deficit.[359] The Claimant adds that the TVPEE serves "*the exclusive and unrelated purpose of addressing Spain's self-inflicted tariff deficit*".[360] The Claimant asserts that Spain has no discretion as to how to allocate the revenues raised through the TVPEE: pursuant to the Second Additional Provision of Law 15/2012, all amounts collected must be used to finance the costs of the Spanish electricity system.

418. In sum, the Claimant contends that while implemented under the disguise of taxation, the TVPEE sought to achieve a purpose entirely unrelated both to their stated environmental aim and to the aim of raising general revenue for the Respondent. The Claimant further asserts that this purpose could have been achieved via a direct cut to the renewable feed-in remuneration tariff, rather than a tax – "an alternative that was only discarded precisely because it was contrary to Spain's commitments under RD 661/2007".[361] Accordingly, the Claimant submits that the Respondent cannot benefit from the carve-out extended to *bona fide* taxation measures by Article 21(3) of the ECT.

419. The Claimant further contends that even if the TVPEE constitutes a tax under domestic Spanish law, domestic law is not determinative in classifying a purported taxation measure. The Claimant argues that investment arbitration tribunals have determined that they must look behind the label and examine the legal properties of a measure to determine whether it is a tax.[362]

420. The Claimant asserts that the three investment arbitration cases cited by the Respondent in support of its position do not support the Respondent's arguments because of the difference of the factual situation addressed in these cases.[363]

421. Referring to the three-fold test for classifying a measure as a tax asserted by the Respondent, the Claimant contends that this test completely ignores the *bona fide* criterion established

[359] *Ibid.,* para. 56.
[360] *Ibid.,* para. 50.
[361] *Ibid.,* para. 51.
[362] *Ibid.,* para. 53.
[363] *Ibid.,* paras. 58-61; *Burlington* Decision, paras. 164-165 (**RL-0036**); *EnCana* Award, para. 142 (**RL-0027**); *Duke* Award, para. 174 (**RL-0033**). These cases were mentioned by the Respondent in Resp. C-Mem., paras. 138-140 in support of the notion "*taxation measures*" it advanced. See 400 of this Decision.

by the *Yukos* tribunal and thus cannot possibly be adequate for the purpose of determining whether a measure should be treated as a tax within the scope of the ECT taxation carve-out.[364]

(3) The Tribunal's Analysis

422. The Tribunal's analysis starts with the review of the relevant provisions of the ECT. Article 21(1) of the ECT provides that:

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

423. With respect to the definition of "*Taxation Measures*" for the purpose of Article 21, Article 21(7)(a) and (b) provide, in pertinent part, as follows:

> *"(a) The term "Taxation Measure" includes:*
>
> *(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and*
>
> *(ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.*
>
> *(b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation."*

424. Having reviewed the respective submissions of the Parties, the Tribunal finds no difficulty in accepting that the provisions of Law 15/2012 on the TVPEE *prima facie* fall under "*any provision relating to taxes of the domestic law*" of the Respondent on a plain reading of Article 21 in view of the following considerations, including but not limited to:

(i) the Law 15/2012 was passed by the Parliament of the Kingdom of Spain in accordance with the ordinary legislative procedure provided for in the Spanish legal

[364] Cl. Reply para. 55.

system, in accordance with Article 133 of the Spanish Constitution that grants the State the original authority to establish taxes by means of law[365];

(ii) the preamble of Law 15/2012 clearly stated the public purpose behind the TVPEE and its contribution to the State Budget in the following words[366]:

> *"… one of the main concepts of this tax reform will be the internalization of the environmental costs deriving from the generation of electric power, … Consequently, the Act must serve as a stimulus to improve our levels of energy efficiency, while at the same time making it possible to ensure better management of natural resources and continued progress in the new model of sustainable development from the economic, social, and environmental perspectives.*
>
> *This reform also contributes to the integration of environmental policies into our tax system, which can accommodate taxes that are specifically environmental in nature, as well as the incorporation of environmental elements into existing taxes."*
>
> *"In this sense, and also in order to promote a balanced budget, Title I of this Act establishes a tax on the value of electric power generation, which, in a direct and real manner, taxes the execution of activities that produce and incorporate electric power into the Spanish electrical system."*

(iii) the specific provisions of Law 15/2012 such as taxable event, taxpayers, tax base, tax rate and tax period applicable to the TVPEE indicate that the TVPEE is a tax of general application imposed on the producers of electricity, both renewable and conventional, to generate revenues to the Respondent for public purposes. Those features of the TVPEE are in line with the general concept of a "*tax*" as illustrated by the definition in Black's Law Dictionary relied on by the Respondent that "*[m]ost broadly, the term [tax] embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, imposts, and excises.*"[367]

425. With respect to the Claimant's assertion that the TVPEE is not a *bona fide* tax measure, the Tribunal agrees with the Respondent that the Claimant has the burden of proof to sustain its allegation that the TVPEE is not a *bona fide* tax measure. The Tribunal is of the

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[365] Resp. C-Mem., paras. 99 and 111, 113 to 115.
[366] (**C-0372t**)
[367] Black's Law Dictionary, 10th Edition, p.1685.

opinion that the Claimant has not demonstrated its allegation that the TVPEE is not a *bona fide* tax measure.

426. In the Tribunal view, the economic impact of a tax on a taxpayer could vary for a variety of reasons, and whether certain taxpayers could reduce the effect of tax imposition by passing the burden to consumers should not be the determining factor in deciding the disproportionate and discriminatory impact of a tax. The Tribunal finds it speculative to conclude that conventional power producers were able, although partially, to pass the burden to consumers on the market. The Tribunal also notes the Respondent's statement that the TVPEE is a deductible expense on the Corporations Tax of the TVPEE taxpayers, indicating that means of reducing the tax burden were also available to renewable power producers.[368]

427. With respect to the Claimant's contention that the TVPEE sought to achieve a purpose entirely unrelated both to their stated environmental aim and to the aim of raising general revenue for the Respondent, this Tribunal does not find any credible basis to discredit the Respondent's submission that the revenue corresponding to the TVPEE is public revenue that is included in the Spanish General Budgets[369], which, together with the other State revenue, contributes to form the State's resources with which public expenditures are financed.[370] The Tribunal notes the Respondent's further submission that the second additional provision of Law 15/2012 was complemented and made concrete by the fifth additional provision of Law 17/2012, to the effect that an amount equivalent to the estimated annual collection arising from the taxes included in Law 15/2012, including the TVPEE, would be allocated to finance, among the costs of the electricity system provided by the Electricity Sector Law, specifically those relating to the promotion of renewable energy.[371] The Tribunal notes that in its Rejoinder on Jurisdiction, the Claimant did not specifically rebut the points made by the Respondent on this issue, and simply states that the Claimant confirms and restates its previous allegation.

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[368] Resp. C-Mem., paras. 125 through 127.
[369] *Ibid*., paras. 147-149.
[370] *Ibid*., para. 150.
[371] *Ibid*., para. 152.

428. The Tribunal agrees with the Respondent that the legislator of a sovereign State has a wide margin of discretion for establishing and defining tax, while respecting Constitutional principles, and the general application of the TVPEE is a legitimate option of the legislator of the Respondent.

429. The Tribunal also agrees with the Respondent that the good faith analysis of the taxation measures conducted in *Yukos v. Russian Federation* cited by the Claimant is not applicable in the present case. The tribunal in the *Yukos* case dealt with extraordinary circumstances: there the taxation measures pursued a purpose that was entirely unrelated to the purpose of raising revenue for the State; rather, it aimed at the destruction of a company or the elimination of a political opponent. In the present case, the Claimant has neither presented or substantiated the existence of such extraordinary circumstances.

430. In conclusion, the Tribunal accepts the Respondent's submission that the Claimant has not met its burden of proof that the TVPEE is not a *bona fide* tax for the purpose of Article 21(1) of the ECT. Accordingly, the Tribunal concludes that the TVPEE is a "*Taxation Measure*" for the purpose of Article 21(1) of the ECT, consistent with the findings of other investment tribunals in Spanish renewable cases that dealt with the same issue including *Isolux, Novenergia, Antin* and *Masdar,* as well as *Greentech, RREEF, 9REN, NextEra, Cube, OperaFund and Soles Badajoz*, as shown in paras. 409 and 410 above.

C. WETHER THE TVPEE IS A TAXATION MEASURE OTHER THAN THAT ON INCOME OR ON CAPITAL WHICH IS SUBJECT TO THE CLAW-BACK PROVISION OF ARTICLE 21(3) OF THE ECT FOR THE PURPOSE OF THE MFN TREATMENT OBLIGATION

(1) The Claimant's Position

431. The Claimant submits that in the event that the Tribunal were to determine that the TVPEE was considered a *bona fide* taxation measure for the purpose of Article 21 of the ECT, it should be considered as tax "other than on income or on capital" for the purpose of the claw-back provision of Article 21(3) of the ECT.[372] Thus, the standards of FET, MCPS, Non-Impairment and the Umbrella Clause under Article 10(1) of the ECT are applicable to the TVPEE by virtue of Article 10(7) of the ECT that provides for MFN treatment.

[372] Cl. Reply, para. 62.

Accordingly, the Claimant submits that the Tribunal has jurisdiction on matters relating to the TVPEE.[373]

432. The Claimant maintains that the TVPEE, if considered a *bona fide* taxation measure under Article 21(1) ECT, would be a tax other than on income or capital.[374] Therefore, contrary to the Respondent's criticism, there is nothing contradictory about the Claimant's argument seeking MFN treatment for the TVPEE.

433. The Claimant submits that in respect of taxes not on income or capital, Article 21(3) of the ECT reincorporates within the scope of the ECT's investment protection certain obligations of treatment imposed on the Contracting Parties under Part III, notably the MFN treatment obligation set forth in Article 10(7). The significance of this is that, for "*taxes*" which are not imposed on income or capital, an investor can benefit from more favourable provisions in other investment treaties to which Spain is a party, i.e., investment treaties which do not preclude claims relating to Spain's taxation measures.[375]

434. The Claimant cites Article 21(7)(b) ECT which defines what is meant by taxes on income and capital:

> *"There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation."*

435. The Claimant asserts that taxes on income or capital are those imposed on "*total income*" or "*total capital*" or on "*elements of*" either income or capital, but the TVPEE is levied on gross revenues, which is not encompassed within the Article 21 definition.[376]

436. The Claimant acknowledges that Article 21(7)(b) of ECT does not define what are "*taxes imposed on total income, on total capital and on elements of income or capital*".[377]

[373] *Ibid.*, para. 64.
[374] Cl. Rej., para. 104.
[375] Cl. Reply, para. 64.
[376] *Ibid.*, para. 66.
[377] Cl. Rej., para. 107.

437. In response to the Respondent's argument that the claw-back in Article 21(3) applies only to "*indirect taxes*", the Claimant points out that the text of Article 21(3) does not refer to such classification (i.e., direct or indirect taxes), but rather it only refers to taxes "*other than those on income or on capital.*" The Claimant contends that the Energy Charter Secretariat's Reader's Guide to the Energy Charter Treaty, which the Respondent relies on, does not exclude that indirect taxes may be reviewed under Article 21(3) ECT.[378]

438. For the interpretation of the term "*tax on income*", the Claimant seeks support from the OECD Model Tax Convention. The Claimant asserts that in order to interpret the meaning of the term under Article 21(7)(b) of the ECT, one must resort to Article 2.2 of OECD Model Tax Convention, because the former was drafted mirroring the wording of the latter, as the intention of the ECT's writers was precisely to give the term the same meaning it has in the OECD Model Tax Convention.[379] In this regard, the Claimant relies on the official Commentaries to Article 2 of the OECD Model Tax Convention as well as the OECD's classification of taxes, which, according to the Claimant, states that in general terms, "*income*" is understood as a "*net*" concept (i.e., calculated as gross revenues minus deductible expenses).[380]

439. The Claimant submits that the definition in Article 21 of the ECT mirrors that of the OECD Model Tax Convention which includes within the ordinary meaning of "*taxes on income*" charges on "net income or profits", but not on gross revenues.[381] Citing the OECD Factbook – Economic, Environmental and Social Statistics 2014, the Claimant states that "the OECD defines "*taxes on income*" as "*taxes levied on the net income or profits (gross income minus allowable tax reliefs) of individuals and enterprises*".[382]

[378] *Ibid*., para. 109.
[379] Cl. Reply, para. 67; Cl. Rej., para. 110. The Claimant refers Article 2(2) of the OECD 1992 Model Tax Convention on Income and on Capital (English version), September 1, 2992 which provides that "*[t]here shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.*"
[380] Cl. Reply, para. 68 and para. 69. In the footnote 94 of Cl. Reply, the Claimant refers to an OECD document entitled "*The Classification of Taxes and Interpretative Guide*", 2016 (**CL-0157**).
[381] Cl. Reply, para. 67.
-[382] *Ibid, f*ootnote 92.

440. The Claimant further points out that the taxes listed in Article 2.3 of Spain's double taxation treaties ("**DTT**") include taxes that are levied: (i) on income or profits (net amounts), when the taxpayer is an entity with taxable presence in Spain; (ii) on revenues (gross amount), when such a taxable presence is not met; and (iii) on capital. Thus, taxes levied on revenues (gross amounts) are covered by the DTTs signed by Spain (so they should be within the meaning of the term "taxes imposed on total income, on total capital and on elements of income or capital"), but only to the extent that they are imposed to entities without a taxable presence in Spain. The Claimant asserts that this standard could explain why the TVPEE, which is levied on revenues obtained by entities with taxable presence in Spain (i.e., not matching the afore-mentioned criteria), is not included in the list of taxes drafted in Article 2.3 of the DTTs signed by Spain.[383]

441. On this basis, the Claimant submits that the TVPEE should not be considered "*tax[es] imposed on total income, on total capital and on elements of income or capital*" for the purposes of a DTT, and accordingly, for the ECT either.[384] The Claimant further submits that accordingly, by virtue of Article 10(7) of the ECT, the Respondent is obliged to accord to the Claimant the same treatment in respect of the TVPEE as it accords to other foreign investors.

442. In the light of the arguments outlined above, the Claimant invokes the ECT's MFN clause to import the following in respect of the TVPEE:

(i) The FET standard (from Spain-Costa Rica BIT[385], Spain-Libya BIT[386]; Spain-Morocco BIT[387], Spain-Ukraine BIT[388] and Spain-Uzbekistan BIT[389]) which does

[383] *Ibid*, para 69 ii. Here, the Claimant cites Spain's double taxation treaties available at http://www.minhafp.gob.es/es-ES/Normativa%20y%20doctrina/Normativa/CDI/Paginas/CDI_Alfa.aspx
[384] *Ibid.*, para. 70.
[385] Agreement for the Promotion and Reciprocal Protection of Investments between the Republic of Costa Rica and the Kingdom of Spain, July 8, 1997, Article III (1) (**CL-0038/CL-0038t**) (***Spain-Costa Rica BIT***).
[386] Agreement between the Kingdom of Spain and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Reciprocal Protection of Investments, December 17, 2007, Article 3(1) (**CL-0064/CL-0064t**) (***Spain-Libya BIT***).
[387] Agreement between the Kingdom of Spain and the Kingdom of Morocco on the Promotion and Mutual Protection of Investments, December 11, 1997, Article 3 (**CL-0065**) (***Spain-Morocco BIT***).
[388] Agreement for the Promotion and Reciprocal Protection of Investments between Spain and Ukraine, February 26, 1998, Article 3(1) (**CL-0037/CL-0037t**) (***Spain-Ukraine BIT***).
[389] Agreement for the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Uzbekistan, January 28, 2003, Article 3(1) (**CL-0067**) (***Spain-Uzbekistan BIT***).

not exclude taxes.

(ii) The obligation to accord the most constant protection and security (from Spain-Costa Rica BIT[390], Spain-Libya BIT[391], Spain-Morocco BIT[392], Spain-Ukraine BIT[393] and Spain-Uzbekistan[394]) which does not exclude taxes.

(iii) The non-impairment obligation (from Spain-Costa Rica BIT[395], Spain-Libya BIT[396] and Spain-Morocco BIT[397]) which does not exclude taxes.[398]

443. The Claimant submits that if the Tribunal finds that a BIT to which Spain is a Party allows protection under FET and other standards against tax measures, and that the standards of that BIT are more favorable to investors than Article 10 of the ECT, those standards can be applied to the Claimant's claim on the TVPEE by way of Article 10(7) of the ECT. For these purposes, the Claimant relies, *inter alia*, on Article IV(3) of the Costa Rica-Spain BIT, whose wording is similar to the parallel clause in the BIT between Germany and the Czech Republic allowing the tribunal in *Wirtgen*[399] to affirm jurisdiction against a very similar tax measure.[400]

444. The Claimant admits that four publicly available awards issued by arbitral tribunals analysing Spain's objections to the TVPEE claims (*Isolux v. Spain*, *Novenergia v. Spain*, *Eiser v. Spain* and *Masdar v Spain*) decided that they did not have jurisdiction over the TVPEE with respect to non-expropriatory breaches (i.e., breaches other than expropriation). Nevertheless, the Claimant argues that in these cases, the respective claimant confronted the respondent's jurisdictional objection *only* on the basis that the TVPEE was not a *bona fide* taxation measure to which the tax-carve out in Article 21(1)

[390] Spain-Costa Rica BIT, Article 3(1) (**CL-0038/CL-0038t**).
[391] Spain-Libya BIT, Article 3(1) (**CL-0064/CL-0064t**).
[392] Spain-Morocco BIT, Article 3 (**CL-0065**).
[393] Spain-Ukraine BIT, Article 3(1) (**CL-0037/CL-0037t**).
[394] Spain-Uzbekistan BIT, Article 3(1) (**CL-0067**).
[395] Spain-Costa Rica BIT, Article 3(2) (**CL-0038/CL-0038t**).
[396] Spain-Libya BIT, Article 3(2) (**CL-0064/CL-0064t**).
[397] Spain-Morocco BIT, Article 3(2) (**CL-0065**).
[398] Cl. Reply, para 71.
[399] *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic,* PCA Case No. 2014-03, Final Award, October 11, 2017, para. 270 (**RL-0111) (CL-0180**) ("***Wirtgen* Award**"); Cl. Opening, slides 19-20; Tr. Day 1 10:25-12:6.
[400] Cl. PHB, para. 121; Cl. Opening, slides 19-20.

ECT could apply. The Claimant states that none of these awards have analysed whether the TVPEE would be a tax "other than those on income or on capital" for the purposes of Article 21(3) ECT claw-back provision via the application of the MFN treatment.[401]

445. Following the Tribunal's invitation to the Parties, dated October 10, 2019, to introduce into the record relevant and publicly available awards/decisions on the renewable energy sector of Spain to that date, which they may consider that the Tribunal may benefit from having at its disposal, the Claimant submitted that the question was far from settled given the specific legal arguments it submitted to the Tribunal in this arbitration. In this sense, the Claimant underlined that the majority of the New Awards and Decisions have not analysed whether the TVPEE is a "*tax on income or on capital*" as the claw-back clause in Article 21(3) ECT provides while the tribunals in *NextEra* and *OperaFund* argued in brief terms that the TVPEE is a tax on income.

446. With respect to the Respondent's assertion that the ECT prohibits application of Article 10(7) of the ECT so as to impose MFN treatment obligation, the Claimant rebuts the Respondent's interpretation of the ECT provisions as entirely wrong for the following reasons:

(i) Article 21(7)(a)(ii) of the ECT refers to double taxation treaties and similar agreements. However, none of the BITs relied on by the Claimant (to import the FET, MCPS and Non-Impairment standards and Umbrella clause over tax measures) is a "*convention, agreement or arrangement*" of the type contemplated in Article 21(7)(a)(ii) ECT. The BITs relied on by the Claimant are classic bilateral investment treaties, whose subject-matter provides for standards of investment protection and dispute resolution mechanisms to settle investment disputes. For the purposes of the ECT, BITs are quite different from double taxation treaties and the like. Further none of the BITs relied on by the Claimant include "tax provisions" of the type referred to by Article 21(3) of the ECT.[402]

[401] Cl. Rej., para. 123. See *Isolux* Award, paras.717-741 (**CL-0151**); *Eiser* Award, paras. 266-272(**CL-0149**); *Novenergia* Award, paras. 516-525 (**CL-0173**); *Masdar* Award, paras. 257-294 (**CL-0175**).
[402] Cl. Rej., paras. 116-117.

(ii) There is nothing in the above-referred BITs precluding application of the Umbrella clause, FET, MCPS and Non-Impairment standards to the TVPEE. Indeed, in the case *Jurgen Wirtgen et al v. Czech Republic* (related to a taxation measure) the tribunal confirmed that Article 3(4) of the Germany-Czech Republic BIT shall not "*preclude the application of the umbrella clause, the FET and FPSs standards to tax measures*."[403] This clause is included with nearly the exact same wording in the Spain-Costa Rica BIT and with a similar content in the Spain-Libya BIT, the Spain-Ukraine BIT, and the Spain-Uzbekistan BIT - all BITs relied on by the Claimant.[404]

(2) The Respondent's Position

447. The Respondent submits that pursuant to Article 21(3) of the ECT, Article 10(7) of the ECT applies only to "*Taxation Measures of the Contracting Parties other than those on income or on capital*" and therefore does not apply to the TVPEE which is a "tax on income". Referring to Article 6 (Taxable Base) of Law 15/2012, the Respondent asserts that the TVPEE is levied on the income obtained by the producers of electrical energy derived from the production and incorporation into the electrical system of electric power within the Spanish electricity system.[405]

448. The Respondent contends that the Claimant's arguments on this matter are contradictory and completely unfounded.[406] The Respondent submits that the arbitral tribunals in previous cases have verified the nature of the TVPEE as a direct tax on income. The Claimant cannot intend that the tax nature of the TVPEE is accepted for the purposes of some provisions of the ECT and that, at the same time, the tax nature of the TVPEE is rejected for purposes of others, at its convenience.

449. In response to the Claimant's argument that the TVPEE is levied on gross income (revenues) not on net income, the Respondent submits that "*[t]he fact that the TVPEE is levied on gross income does not prevent the TVPEE from being considered a tax on income*

[403] *Wirtgen* Award, para. 270 (**RL-0111) (CL-0180**).
[404] Cl. Rej., para. 118.
[405] Resp. Rej., para. 233.
[406] *Ibid*., paras. 222-240.

for the purposes of the ECT, given that the definition of tax on income contained in the ECT itself does not specifically state that it must be limited to a tax on net income".[407]

450. On the basis of the text of Article 21(7)(b), the Respondent contends that the ECT does not limit the concept of taxes on income to taxes on net income and that the ECT itself considers taxes on income both those levied on gross income and those levied on net income.[408]

451. The Respondent further asserts that the TVPEE is not an indirect tax and that Article 10(7) only applies to indirect taxes, citing the statement in the "Energy Charter Treaty. A Reader's Guide" published by Energy Charter Secretariat as follows[409]:

> *"According to Article 21 (2),(3), the principle of non-discrimination in transit and investment matters shall apply to taxation measures other than those on income and capital. This means that this principle remains, in general, applicable with regard to indirect taxes in these two areas."*[410]

452. Finally, referring to Article 21(3) (a) of the ECT, the Respondent argues that this article prohibits the application of Article 10(7) of the ECT so as to impose MFN treatment obligations as claimed by the Claimant.[411] The Respondent's view is that the BITs invoked by the Claimant are international agreements by which the Respondent is bound and the provisions of those BITs by which standards such as the FET would be extended to taxes are provisions relating to taxes.[412]

(3) The Tribunal's Analysis

453. Article 10(7) of the 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*

[407] *Ibid*., para. 237.
[408] *Ibid*., para. 238.
[409] Resp. C-Mem., para. 181; Resp. Rej., para. 239.
[410] The Energy Charter Treaty. A Readers Guide Energy Charter Secretariat, p.39. (**RL-0053**)
[411] Resp. Rej., para. 241.
[412] *Ibid*., para. 244.

> *management, maintenance, use, enjoyment or disposal, whichever is the most favourable."*

454. Article 21(3) of the ECT, in pertinent part, provides that:

> *"Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:*
>
> *(a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Integration Organization; "*

455. Article 21(7) of the ECT provides that for the purpose of Article 21, the term "*Taxation Measures*" includes "*any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound*".[413] Article 21(7)(b) provides that:

> *"There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital…"*

456. The application of Article 21(3) of the ECT hinges upon (i) whether the TVPEE is a tax "*other than those on income*" or is a tax on income, and (ii) whether Article 21(3)(a) of the ECT prohibits the application of Article 10(7) imposing MFN obligations.[414]

457. The Tribunal notes that neither Article 21(3) nor Article 21(7) of the ECT adds the word "*net*" to the word "*income*". They simply use the words "*taxation measure … other than those on income*" or "*taxes on income*". In defining the words "*tax on income*", Article 21(7)(b) provides that "*[t]here shall be regarded as taxes on income or on capital all taxes imposed on <u>total income</u>, on total capital or on <u>elements of income</u> or of capital…*" No further guidance is given in the ECT itself.

458. The general rule of interpretation of the treaties set forth in Article 31(1) of the VCLT provides that "*[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*"

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[413] ECT, Article 21(7)(a)(ii).

[414] Resp. Rej., paras. 241 through 245.

459. On a plain reading of the text of Article 21(3) and Article 21(7), the Tribunal has difficulty in accepting the Claimant's assertion that tax on income should be interpreted narrowly as "*tax on net income*".

460. According to Black's Law Dictionary, "*income*" is defined as "*[t]he money or other form of payment that one receives, usu. periodically, from employment, business, investments, royalties, gift, and the like*."[415] "*Net income*" is defined as "*[t]otal income from all sources minus deductions, exemptions, and other tax reductions*", while "*gross income*" is defined as "*total income from all sources before deductions, exemptions or other tax reductions*".[416]

461. In view of the definitions of "*income*", "*net*" and "*gross*" income as well as "*revenue*" by Black's Law Dictionary, the Tribunal considers that the phrase in Article 21(7) "*all taxes imposed on total income… or on elements of income*" does not limit the scope of "tax on income" to "*tax on net income*". The words "*total income*" could be interpreted to refer to something broader than "*net income*". Thus, the Tribunal is of the opinion that the TVPEE which is imposed on the revenue (total or gross income) of the electricity produced falls under the scope of a "*tax on income*" for the purpose of Article 21(3) of the ECT.

462. On this point, the Tribunal sides with the Respondent position that the fact that the TVPEE is levied on revenues, i.e., gross income rather than net income, does not prevent the TVPEE from being considered a tax on income for the purposes of the ECT.

463. The Tribunal does not find convincing the Claimant's argument that in order to interpret the meaning of the term under Article 21(7)(b) of the ECT, one must resort to Article 2.2 of the OECD Model Tax Convention.

464. In the Tribunal's view, this definition in the OECD Fact Book cited by the Claimant was made in the context of explaining the data on total tax revenue shown in that document. The exact wording in the document reads "*[t]axes on income and profits cover taxes levied on the net income or profits (gross income minus allowable tax reliefs) of individuals and enterprises*". The Tribunal has not found a clear basis in that document in which "*tax on*

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[415] Black's Law Dictionary, Tenth Edition, p. 880.
[416] *Ibid.*, p. 881.

income" is defined to mean only the tax on net income for the purpose of interpretation of the OECD Model Tax Convention. Furthermore, the definition under the OECD Model Tax Convention for the purpose of its own purpose could not be a determining factor in interpreting the text of the ECT whose purpose is different from the OECD Model Tax Convention.

D. CONCLUSION ON JURISDICTION

465. In conclusion, based upon the foregoing analysis, the Tribunal determines that the Tribunal lacks jurisdiction to hear disputes relating to the TVPEE, and denies the Claimant's arguments to the contrary. This determination is in line with other tribunals which addressed the same issue such as *Isolux, Novenergia, Antin, Masdar* as well as *Greentech, RREEF, 9REN, NextEra, Cube,* and *SolEs Badajoz*.

VI. LIABILITY

A. OVERVIEW OF THE DISPUTES

466. The Claimant submits that it has invested in the Solacor Plants with legitimate expectations of the application of the remunerative regime at the time of its investment under RD 661/2007, the July 2, 2010 Agreement and RD 1614/2010 (the Claimant refers those as "**Regulatory Framework 1**" or "**RF#1**") for the entire useful life of the Solacor Plants.[417]

467. According to the Claimant, under the RF#1, the Claimant was guaranteed an attractive feed-in tariff remuneration scheme for the entire life of the Solacor Plants. However, subsequent to the Claimant's investment, the Respondent drastically altered the regulatory regime governing the remuneration regime applicable to the Solacor Plants through a series of legislations adopted from 2012 through 2014 (the Claimant refers to Law 15/2012, RD-L 2/2013 and MO IET/221/2013 as "**Regulatory Framework 2**" or "**RF#2**" and refers to RD-L 9/2013, Law 24/2013 (EPA 2013), RD 413/2014, MO IET/1045/2014, MO IET/1168/2014 and MO IET/1882/2014 as "**Regulatory Framework 3**" or "**RF#3**"; RF#2 and RF#3 will collectively be referred to as the "**Disputed Measures**", as appropriate) and

[417] Cl. Mem., Sections 2.1.2. and 2.1.3, paras. 1169-1225; Cl. Opening, slide 24.

thereby frustrated the Claimant's legitimate expectations. The Claimant submits that the Disputed Measures, in particular RF#3, replaced the previous remuneration model by a new remuneration model which was based upon radically different parameters and applied retroactively.

468. The Claimant invokes protection under the ECT to which both Japan and the Kingdom of Spain are Contracting Parties. The Claimant claims that the Respondent breached its obligations under Article 10 of the ECT by implementing the Disputed Measures. Specifically, the Claimant submits that the Disputed Measures constitute: (a) a breach of the commitment to provide stable conditions and to grant the Claimant fair and equitable treatment at any time (Article 10(1)); (b) an infringement of the Claimant's right to full protection and security (Article 10(1)); (c) a breach of the obligation not to impair, through exorbitant or discriminatory measures, the Claimant's investment (Article 10(1)); (d) a breach of obligations with the Claimant and its investment covered by the umbrella clause (Article 10(1)); and (e) an infringement of the Claimant's right to benefit from the MFN treatment under Article 10(7). The Claimant submits that as a result, it has suffered substantial damages and is entitled to full reparation.

469. The Respondent denies both the facts and the grounds on which the Claimant bases its claims and contends that it has not violated any of its obligations under the ECT. The Respondent has at all times fulfilled its obligations under the ECT.[418] The Respondent considers that the Claimant has failed to prove its case.[419]

470. The Respondent submits that the Spanish system of support for renewable energies has always been based on the principle of a "*reasonable rate of return with reference to the cost of money on the capital market*" as an objective, and this principle, which was included in Law 54/1997, has remained in Law 24/2013 and the Disputed Measures. What was guaranteed was that the investments made in the renewable energy installations would obtain reasonable profitability throughout their existence. This does not imply the persistence of a given premium throughout the installation's lifetime. No specific

[418] Resp. C-Mem., para. 9.
[419] Tr. Day 6, 41:20-21.

commitment not to modify the remuneration regime has been given by the Respondent to the Claimant.

471. The Respondent claims that the Claimant was aware of the fact that the main objective of the Spanish electricity system is to ensure that all consumers have access to electricity under conditions of equality and quality, which implies that access to electricity is made at the lowest possible cost, also taking into account the protection of the environment.[420] The Respondent further claims that the Claimant also knew or had to know at the time of its investment that the Spanish Government might adopt changes to the remuneration regime aimed at ensuring the technical and economic sustainability of the Spanish electricity system and correcting situations of over-compensation.[421]

B. Applicable Law: The ECT and the Relevance of Spanish Domestic Law and EU Law

472. The first sentence of Article 42(1) of the ICSID Convention provides that:

> *"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties."*[422]

473. As the Claimant invokes protection under the ECT, the starting point for issues of the law to be applied is the ECT, which contains the rules of law chosen by the Parties. Article 26(6) of the ECT provides that:

> *"A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."*[423]

474. Accordingly, it follows that the issues in dispute in this arbitration are to be determined in accordance with the ECT and applicable rules and principles of international law. Article 26(6) of the ECT does not include any reference to rules of domestic law nor is there any mention of the law of the European Union.

[420] Resp. C-Mem., para. 15.
[421] *Ibid.*, para. 16.
[422] Article 42(1) of the ICSID Convention.
[423] Cl. Mem., para. 936 (footnotes omitted).

475. The Respondent contends that "*in the end this is a case primarily about Spanish law*"[424], and "*necessarily about EU law too*".[425] In support of its position on the relevance of EU law, the Respondent quotes the tribunal in *Electrabel v Hungary* which stated that "EU law has a multiple nature: on the one hand, it is an international legal regime; but on the other hand, once introduced in the national legal orders of EU Member states, it becomes also part of these national legal orders."[426] The Respondent asserts that EU law is applicable to any State Aid scheme within the EU as public order.[427]

476. Upon a question by the Tribunal on the first day of the Hearing, the Respondent agreed, however, that Article 26 of the ECT sets forth that only international law is applicable.[428]

477. The Respondent argues in its PHB that EU law is in fact international law directly applicable to the merits of this dispute, in accordance with Article 26 of the ECT and Articles 41 and 42 of the ICSID Rules applicable to this arbitration and therefore the standards invoked by the Claimant must be interpreted in a manner consistent with EU law.[429]

478. The Respondent contends that Spanish domestic law must be considered to weigh the existence and the scope of the alleged undertakings and obligations assumed by the Kingdom of Spain with the Claimant or its investment. The Respondent points out that the Claimant bases its legitimate expectations on its interpretation of the Spanish regulatory framework and that the obligations which the Claimant considers protected by the umbrella clause can only have arisen in accordance with Spanish law. Therefore, the Respondent asserts, an appropriate resolution to this arbitration requires detailed knowledge of Spanish law.[430] In support of its position, the Respondent cites observations of the tribunal in *Charanne v. Spain* which held that:

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[424] Tr. Day 1, 215:24-25.
[425] Tr. Day 1, 216:8-9.
[426] Resp. Opening, slide 15, quoting *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, paras. 4.117- 4.118 (**RL-0002**) ("***Electrabel* Decision**").
[427] Resp. Opening, slide 211.
[428] Tr. Day 1, 216:20–217:12.
[429] Resp. PHB para.75, referring to Resp. Rej., paras. 64-67 and 1460-1463.
[430] Resp. C-Mem., para. 1045.

> *"…the key issue is to know whether the regulatory framework existing at the time of the investment had the ability to give rise to a legitimate expectation, protected by international law, that it was not going to be modified or otherwise altered by provisions such as those enacted in 2010."*[431]

479. With respect to the role of the case law of the Supreme Court of Spain, the Respondent clarified at the Hearing that it was not invoking the case law of the Supreme Court as an issue of the merits that should be applied to this case, but arguing it as an essential fact that should shape the legitimate expectations of any investor.[432]

480. The Claimant contends that (i) in an international arbitration, domestic law is considered a fact; (ii) Spanish domestic law also includes the ECT; (iii) the Respondent's international responsibility towards the Claimant for breaches of the ECT shall be determined solely under international law; and (iv) the Tribunal is not bound by the analysis of the facts made by the Respondent's domestic courts.[433] The Claimant further submits that its claims do not have to be settled in the light of the interpretation of EU law with regard to EU Directives on Renewable Energies.[434]

481. The Tribunal agrees with the Claimant's submission that in an international arbitration, domestic law is considered a fact and that the Respondent's international responsibility towards the Claimant for breaches of the ECT shall be determined solely in accordance with the ECT and the applicable rules and principles of international law, these rules and principles being independent and separate from the Respondent's domestic law or the law of European Union. This Tribunal disagrees with the Respondent's proposition that EU law is in fact international law directly applicable to the merits of this dispute. As this arbitration case is between an investor of Japan, one Contracting Party to the ECT which is not a Member State of EU, and the Kingdom of Spain, another Contracting Party to the ECT, the Tribunal considers that EU law could not be viewed as international law for the purpose of Article 26(6) of the ECT.

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[431] *Charanne and Construction Investments v. Spain, SCC Case No. V 062/*2012, Final Award, January 21, 2016, paras. 494, 498 ("***Charanne*** **Award**"), cited by Resp. Opening, slide 211 (**RL-0049) (CL-0009**).
[432] Tr. Day 1, 122:19-24.
[433] Cl. Mem., para. 938.
[434] Cl. Opening, slide 198; Tr. Day 1, 89:11-16.

482. However, the Tribunal is of the view that Spanish domestic law including the judgements of the Spanish domestic courts could provide a context in connection with the assessment of the legitimate expectations claimed by the Claimant under Article 10(1) of the ECT.

483. With respect to the issue of TVPEE and the application of MFN provision to the TVPEE, the Claimant has advanced arguments in connection with the applicable law in the merits discussion. However, as the Tribunal has already determined that it lacked jurisdiction over the TVPEE matter, the Tribunal does not find it necessary to review this matter again in the context of the applicable law and the merits of the Claimant's claims.

C. PARTIES' POSITIONS

484. In their submissions on liability, the Parties take opposite views on the legal understanding of Article 10(1) of the ECT, the interpretation and scope of the Respondent's obligations thereunder, the existence and the scope of legitimate expectations as claimed by the Claimant, the assessment of the Disputed Measures in view of the Respondent's obligation under the ECT and their impact upon the Claimant and its investments.

485. While the Claimant states that there is no disagreement between the Parties on the method of interpretation or scope of the fair and equitable treatment (FET) standard in Article 10(1) of the ECT[435], it is apparent to the Tribunal that the Parties do not share the same understanding regarding the ECT's object and purpose that must guide the interpretation and scope of relevant provisions in the ECT and the obligations that it comprises.[436]

(1) The Claimant's position

(a) Date of investment

486. The Claimant submits that the earliest possible date for establishing the investment date for the purpose of determining the Claimant's legitimate expectation could be July 28, 2010 when its Board of Directors adopted a resolution approving the investment in the Solacor

[435] Cl. Reply, para. 85.
[436] Resp. Rej. para. 1491.

Project[437], but that August 6, 2010, when the Financial Closing took place, is a more accurate date of investment.[438]

487. Citing the tribunal in *Isolux*[439], the Claimant submits that the test determining the investment date is twofold: the date on which the investment is irreversible, and the date on which the financial risk is assumed.[440]

488. The Claimant claims that it withheld its decision to invest until the July 2, 2010 Agreement with the CSP sector was confirmed through various means including communication from Abengoa[441], the July 2, 2010 Press Release of the Ministry of Industry, Tourism and Commerce as well as the report from Lovells[442], its legal advisor in Spain and the Ministry's letter to NEXI[443].

489. According to the Claimant, its Board of Directors adopted the resolution on July 28, 2010 after receiving the news that the Spanish Government and the CSP sector had reached an agreement that provided stability and guarantee and assured that there would be no revision for the tariffs.[444] This Board resolution stated that the Financial Closing Date was expected to be in August 2010, and commercial operation expected to commence in March 2012.

490. The Claimant points out that the Financial Closing occurred on August 6, 2010 when a number of agreements necessary for the implementation of the Solacor Project were executed. The agreements entered into on August 6, 3010 included Shareholders Agreements[445], Loan Agreements with Lenders[446], EPC Contracts[447], and O&M

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[437] Minutes of the Board Meeting (**C-0346t**).
[438] Tr. Day 6, 8:4-8; Cl. PHB, para. 2; In its Opening (slide 60), the Claimant identified July 28, 2010 as the investment date.
[439] *Isolux* Award, paras. 782 and 783 (**CL-0151t**) (**RL-0092**).
[440] Tr. Day 6, 4:8-22; 5:3-4.
[441] Email from Mr. Seage to JGC, July 2, 2010 (**C-0217**).
[442] (**C-0573**)
[443] (**C-0261**)
[444] Tr. Day 1, 31:7-12.
[445] Shareholders Agreement signed by CSI, JGC and Solacor Electricidad Uno, S.A. on August 6, 2010 (**C-0557**); Shareholders Agreement signed by CSI, JGC and Solacor Electricidad Dos, S.A. on August 6, 2010 (**C-0558**).
[446] Senior Credit Facility Agreements between SMBC, HSBC, Mizuho and BNP on Solacor Electricidad Dos, S.A., on August 6, 2010 (**C-0559**); Senior Credit Facility Agreements between SMBC, HSBC, Mizuho and BNP on Solacor Electricidad Uno, S.A., on August 6, 2010 (**C-0560**).
[447] Construction Contract among Solacor Electricidad Uno, S.A., Carpio Solar Inversiones, S.A., JGC Corporation, Abener Energía S.A. y Teyma Gestión de Contratos de Construcción e Ingeniería, S.A., Unión Temporal de

Contracts[448]. The Shareholders Agreements contained the parties' obligation to make regular contribution to the SPV's equity in parallel to drawdowns of the loans from the Lenders. The Claimant submits that on this date the Claimant entered into irreversible commitments to the Solacor Project by executing those agreements. In particular, the Claimant brings to the attention of the Tribunal that the Loan Agreements included the draft regulation of what would later become RD 1614/2010 as Schedule 4.2.2 (g).[449] In the Claimant's view, these provisions show that the Lenders went ahead with financing because the Solacor Plants were pre-registered and the Lenders relied on the July 2, 2010 Agreement between the CSP industry and the Spanish Government.[450]

491. The Claimant contends that the approval of its Board of Directors on June 7, 2010[451] was for the acquisition of shares for a price of Euro 31,134 only, subject to the closing of the financial structure. In accordance with the approval of June 7, 2010, the Claimant entered into share purchase agreements on June 22, 2010, subject to a buy-back condition under which the Abengoa sellers agreed to buy back the shares to be acquired by JGC if "*Financial Close does not occur on or before 2nd August 2010*". These share purchase agreements did not entail the commitment to make an equity contribution of EUR 34 million. Accordingly, the Claimant argues that either of those two dates does not qualify as an investment date.

(b) Essential characteristics of the Spanish regulatory framework at the time of the Claimant's investment

492. The Claimant submits that the essential characteristics of the Spanish regulatory regime at the time of its investment in 2010 provided stability and its investment was attracted by this regime backed by Spain's promises of stability thereof upon final registration of the

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Empresas, Ley 18/1982, Solacor El Carpio II and Abengoa S.A., dated August 6, 2010 (**C-0601**); Construction Contract among Solacor Electricidad Dos, S.A., Carpio Solar Inversiones, S.A., JGC Corporation, Abener Energía S.A. y Teyma Gestión de Contratos de Construcción e Ingeniería, S.A., Unión Temporal de Empresas, Ley 18/1982, Solacor El Carpio II and Abengoa S.A., dated August 6, 2010 (**C-0602**).

[448] Operation and Maintenance Agreement for Solacor 1 signed between Abengoa Solar España, S.A. and Solacor Electricidad Uno, S.A. (**C-0603**); Operation and Maintenance Agreement for Solacor 2 signed between Abengoa Solar España, S.A. and Solacor Electricidad Dos, S.A. (**C-0604**).

[449] Cl. Opening, slide 83; Tr. Day 1, 37:9-15.

[450] Tr. Day 1, 37:21-24.

[451] (**C-0343**)

Solacor Plants in the RAIPRE. The Claimant claims that it had legitimate expectations in regard to the application of such regime for the entire useful life of the Solacor Plants.[452]

493. The Claimant submits that Article 30(4) of EPA 1997 mandated the Government to supplement the remuneration of renewable producers with a "*premium*" set out in the implementing regulations to promote the development of renewable energies to achieve the 12% Objective. The Claimant points out that the Respondent has defined the "*premium*" in successive Royal Decrees, including RD 661/2007.[453]

494. The Claimant submits that JGC invested in the Solacor Plants in the CSP sector in Spain on the basis of the economic conditions provided by the Special Regime of RF#1 based upon RD 661/2007 which established an attractive and stable feed-in remuneration scheme and the guarantees of stability offered by the Respondent.[454] The Claimant states that RD 661/2007 had the following three key elements applicable to renewable energy producers utilizing CSP technology: (i) right to feed-in tariff in kWh for electricity produced; (ii) guarantee that the feed-in tariff would apply during the entire production and lifetime of installations; and (iii) guarantee that the Government would not retroactively revise the feed-in tariff.[455] According to the Claimant, these were basic conditions of a feed-in system with a purpose to guarantee a stable remuneration to investors so that investors could be confident enough to invest and it could see an investment worthy of value.[456]

495. In further detail, the Claimant claims that RD 661/2007 established seven feed-in rights for CSP producers which were applicable to Solacor 1 and Solacor 2 as follows[457]:

(i) Right to choose on an annual basis, as best suited to the producer, between regulated tariff (FiT) and pool plus premium (FiP) options (Article 24(10));

(ii) Right to sell the full net amount of the electricity produced under both options (Ar ticle 17(b));

[452] Cl. Opening, slides 24-27; Tr. Day 1, 12:17-21.
[453] Cl. Mem., paras. 140-141.
[454] Cl. Mem., para. 91; Cl. PHB, para. 2.
[455] Transcript Day 1, 14:12-15:4; Cl. Opening, slide 29; Cl. Closing, slide 68.
[456] Cl. Mem., Section II; Tr. Day 6, 33:11-14.
[457] Cl. Mem., Section III. 6.2.

(iii) Right to use back-up fuel and obtain the feed-in remuneration for the electricity attributable to the use of back-up fuel, up to certain limits (Article 2(1)(b)(1));

(iv) Right to receive the feed-in remuneration scheme for an unlimited period of time, thus including the entire lifespan of the Plants (Article 44(3));

(v) Right to receive a feed-in remuneration scheme in which Tariffs, Premiums and Caps & Floors had to be annually updated in accordance with general CPI less 0.25 % until the end of 2012 and less 0.50 % onwards (Article 44(1));

(vi) Right to priority access to the transmission and distribution grid and energy dispatch priority (Article 17(e) and Annex XI(3)); and

(vii) Right to receive a reactive energy supplement for the maintenance of certain stipulated power factor values (which was established at 0.082954 Euro/kWh) (Article 29(1)).

496. The Claimant emphasized that RD 661/2007 established a clear and simple remuneration scheme, offering two options to investors to remunerate CSP production (FiT or FiP) for the entire useful life of the facility.[458] According to the Claimant, stability is an essential element for the feed-in system to work properly. The Claimant quotes Dr. Padilla's testimony at the Hearing that "*this type of regulatory scheme is only effective if the government commits ex ante not to behave opportunistically, changing its key parameters in order to reduce the level of support*."[459] The Claimant asserts that changes to FiT/FiP should only apply to new plants to reflect technology advances and drops in energy costs.[460]

497. The Claimant submits that the stability of the regulatory regime for investments in the renewable energy sector providing a stable feed-in tariff was the leitmotiv of Spain's acts at the time of the Claimant's investment.[461] The Claimant states that it has decided to invest

[458] Cl. PHB, para. 5.
[459] Cl. PHB, para. 7 citing Padilla testimony in Tr. Day 4 [Padilla] 101:19-23.
[460] *Id*.
[461] Cl. Opening, slide 29.

in Spain that promoted stability and a favourable regulatory framework. In support of this proposition, the Claimant cites the award of the *Antin v. Spain* tribunal which held that:

> *"In the present case, the preamble of the royal decrees enacted by the Spanish Government – specifically RD 661/2007 and RD 1614/2010 – reflect the Respondent's intention to provide for and guarantee the stability of the legal and economic regime applicable to RE projects. Previous and subsequent acts by State entities, including reports from the CNE, press releases from the Ministry and advertising material prepared together with InvestInSpain, all emphasise the stability of the regulatory regime set forth under RD 661/2007. The stability of the regulatory regime for investments in the RE sector was thus the leitmotiv of Spain's acts at the time of the Claimants' investment."*[462]

498. The Claimant states that RD 436/2004 included a clause exempting existing facilities from the review and revision of tariffs and premiums in its Article 40(3), which, it submits, was an obvious sign to private investors and the capital markets intended to generate investor confidence by increasing legal certainty.[463] The Claimant argues that Spain's intention to respect stability expectations was evidenced during the drafting process of RD 661/2007. The Claimant points out that the initial draft of RD 661/2007 did not contain any language limiting the quadrennial revisions to newly-completed facilities similar to Article 40(3) of RD 436/2004[464], but that, in view of CNE's critical comment emphasising the fundamental importance of minimizing regulatory instability,[465] the Government added the last sentence of Article 44(3) to the final version of RD 661/2007, to the effect that the quadrennial reviews of the economic terms would affect new facilities only.[466] The Claimant argues that this CNE Report was highlighted by the tribunals in the *Eiser*,[467] *Masdar*,[468] and *Antin*[469] awards.[470]

499. The Claimant submits that the feed-in tariff model of RD 661/2007 has three major improvements as compared to the previous regime.[471]

[462] *Antin* Award, para. 548, quoted in Cl. Opening slide 29 (**CL-0182**).
[463] Cl. Mem., para. 204.
[464] Cl. Reply, para. 228.
[465] CNE Report 3/2007 (**C-0044**).
[466] C. Reply, para. 229.
[467] *Eiser* Award, para. 109 (**CL-0149**).
[468] *Masdar* Award, para. 496 (**CL-0175**).
[469] *Antin* Award, para. 541 (**CL-0182**).
[470] Cl. Opening, slide 30.
[471] Cl. Opening, slides 33-37.

500. First, Article 36 of RD 661/2007 defined the FiT and the FiP in absolute amount per kWh for an unlimited time period, to be updated with CPI. For the regulated tariff (FiT), it guaranteed price for kWh for the entire production and for the entire plant's lifetime delinked from the average or reference electricity tariff ("**TMR**") set forth in RD 436/2004. The regulated tariff (FiT) value for year 2007 applicable to CSP plants (sub-group b.1.2), up to 25 years was set at 0.269375 Eur/kWh, and thereafter 0.215498 Eur/kWh. No time limit was set. With respect to the FiP applicable to CSP plants, reference premium up to 25 years was set at 0.254000 EUR/kWh; and from year 26, 0.203200 EUR/kWh with lower limit 0.254038 and upper limit 0.343976 EUR/kWh. No time limit was set either for the FiP.

501. The second major improvement was the cap and floor system for the FiP option that guaranteed the investor a minimum if market prices fell beyond a certain price and also guaranteed consumers a capped maximum if market prices rose beyond a certain price.

502. The third major improvement, in the Claimant's view, was the grandfathering provision in Article 44(3). The Claimant maintains that the Spanish Government took notice of the comment of CNE's Report 3/2007 on the importance of minimizing instability in that no retroactive changes should be introduced and decided to lay down a stabilization clause in Article 44(3) of RD 661/2007.[472] The Claimant submits that while Article 44(3) ensured that the Government had the power to adapt the feed-in tariffs of new installations to the technological learning curve through a revision during 2010 and every four years thereafter, it guaranteed existing CSP plants that the regulated tariff in the FiT option and the upper (cap) and lower (floor) limit values of the FiP option would not be revised during the entire lifetime of the plants.

503. The Claimant cites the *Novenergia* tribunal in support of its position.[473] After reviewing Law 54/1997, RD 436/2004 and RD 661/2007, the *Novenergia* tribunal agreed with the claimant, who had invested in PV plants, that the statements and assurances in those regulations were indeed aimed at incentivising companies to invest heavily in the Spanish

[472] *Ibid*., slide 35.
[473] *Ibid*., slide 36.

electricity sector and that the claimant made its investment in reliance on the terms provided in RD 661/2007. It further added that "[t]*he commitment from the Kingdom of Spain could not have been clearer*."[474]

504. The Claimant also cites the *Masdar* tribunal, which recognized this provision as a stabilization clause in the following words[475]:

> *"Particular reliance is placed on stabilisation clauses included in the general regulations, and in particular that which is found in Article 44(3) of RD661/2007."*[476]

505. The Claimant also states that the tribunal in *OperaFund* confirmed the findings in *Novenergia*[477] in the sense that Article 44(3) RD 661/2007:

> *"contained an express stability commitment that served its purpose of inducing investment in part by shielding investors in Claimants' position from legislative or regulatory changes (including the ones complained of in this matter). The Tribunal, thus, respects the legislative authority of the Respondent State by giving effect to each of the terms in Article 44(3) of RD 661/2007, including its assurance that "revisions [...] shall not affect facilities for which the functioning certificate had been granted[.]"*[478]

506. The Claimant asserts that in its concurrent official press release of May 25, 2007[479]the Respondent represented RD 661/2007 as a guarantee of stability which contained specific commitments on legal stability of the regulatory framework.[480] In support of its assertion, the Claimant quotes the following statements in this official press release of the Spanish Government:

> *"Future tariff revisions will not affect those installations already in operation. This guarantee provides legal certainty to generators, granting stability to the sector and encouraging its development."*
>
> *"The government assigns priority to profitability and stability in the new Royal Decree on renewable energy and cogeneration."*
>
> *"The new text, which replaces Royal Decree 436/2004, forms part of the energy policy commitment to promote the use in our country of clean, autochthonous and*

[474] *Novenergia* Award, para. 667 (**CL-0173**).
[475] Cl. Opening, slide 36; Tr. Day 1, 20:21-25.
[476] *Masdar* Award, para. 500 (**CL-0175**).
[477] Cl. New Cases para. 49.
[478] *OperaFund* Award, para. 485 (**CL-0211**); *Novenergia* Award, paras. 665-667 and 681 (**CL-0173**).
[479] (C-0075t)
[480] Tr. Day 1, 23:3-4; Cl. Opening, slides 44 and 45.

efficient sources of energy. The government's commitment to this energy technologies has been the reason why in the new regulation stability in time is sought allowing business owners to plan in the medium and long term, as well as a sufficient and reasonable return which, like the stability, makes the investment and engagement in this activity attractive."

507. The Claimant further claims that this official press release spoke about an increase in the remuneration for CSP projects[481] in the following words:

> *"In the case of technologies requiring a boost because of their limited development, such as biomass, biogas and thermosolar, the return is increased to 8% in the option for ceding to distributors, and between 7% and 11% for those participating in the market."*
>
> *"Under the option for sale to distributor, there is an increase in the remuneration for wind, biomass, biogas and thermosolar …"*
>
> *"Thus, increases in the regulated tariff compared with that envisaged in Royal Decree 436/2004 are … 17% for thermosolar installations…"*

508. The Claimant submits that RD 661/2007 was a great call on investors and the press release coming from the Government provided specific assurances for investors.[482] The Claimant states that the investors and associations welcomed and praised RD 661/2007, and the CSP installed capacity grew substantially after the enactment of RD 661/2007, from 61 MW in 2008 to 1950 MW in 2012.[483] In this regard, the Claimant stated in its opening statement on the first day of the Hearing that it was totally wrong for the Respondent to state that this Royal Decree was detrimental and was affecting existing investors.[484]

509. The Claimant submits that the prevailing view among ECT tribunals such as *Eiser*,[485] *Novenergia*,[486] *Masdar*,[487] and *Antin*[488] is that RD 661/2007 offered a favorable framework for renewable investors to encourage their investment in the CSP sector.[489] For instance, the *Antin* tribunal found that "*through the compensation system offered in RD 661/2007,*

[481] Cl. Opening, slide 47; Tr. Day 1 23:8-12.
[482] Tr. Day 1, 24:3-5; Cl. Opening, slide 48.
[483] Cl. Opening, slide 39, citing Compass Lexecon First Expert Report, Sec. 4.2.2. (**CER-0001**).
[484] Tr. Day 1, 22:18-20.
[485] *Eiser award*, para. 365(**CL-0149**).
[486] *Novenergia award*, paras. 665, 667, 688 and 679 (**CL-0173**).
[487] *Masdar award*, para. 496(i) (**CL-0175**).
[488] *Antin award*, para. 540 (**CL-0182**).
[489] Cl. Opening, slide 42.

Spain sought to encourage further investments in its RE sector to meet the targeted growth in certain technologies."[490]

510. The Claimant points out that the Spanish Government put in place a marketing campaign to attract investments into the renewable sector in Spain, including promotional pamphlets of IDAE[491], *Invest in Spain*'s roadshows[492] as well as a speech by the Spanish Secretary of State for Energy, Dr. Uribe, at the US-Spain Business Sustainability Forum in 2009. The Claimant quotes Mr. Uribe stating that "*Feed-in-tariff mechanisms have provided a reliable and stable regulatory environment*."[493]

511. The Claimant emphasizes that the representatives of the Respondent (people working in *Invest in Spain* and IDAE)[494] who met with JGC representatives conveyed the same messages. The Claimant specifically refers to the JGC's meeting in June 2009 with Ms Manuela Garcia of *Invest in Spain* who, after the meeting, sent Mr. Sibuya of JGC a file explaining the Spanish legal framework governing CSP installations in Japanese.[495] The Claimant stresses that the official press release of May 25, 2007 was expressly quoted in the presentation by Ms Manuela García to the Claimant which reads that "[a]*ny revision in the feed-in-tariff thereafter will not apply to the plants already in operation. This is the commitment to the stability and development of this sector which is to be a legal backup for generators*."[496]

512. The Claimant's understanding of the subsequent development in the legal framework for CSP installations through its due diligence, was that RD-L 6/2009 made access to RD 661/2007 stricter by requiring pre-registration in the newly set-up Remuneration Pre-

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[490] *Antin award*, para. 540 (**CL-0182**).
[491] IDAE, The Sun can be yours, 2005 (**C-0072**); IDAE, The Sun can be yours, 2007 (**C-0073**); Cl. Opening, slide 50; Tr. Day 1, 24:16-17. Mr. Endo of JGC stated that IDAE was an administrative agency dependent on the Spanish Government focused on improving energy efficiency, renewable energies and other low-carbon technologies. See CWS-ME1, footnote 6.
[492] *Invest in Spain* Roadshow, Opportunities in Renewable Energy in Spain, November 15, 2007 (**C-0090**); (**C-0582**) cited in the Claimant's Opening slides 51 and 52. Mr. Endo of JGC stated that *Invest in Spain* was an administrative unit of the Spanish Government in charge of promoting foreign investment in Spain. See CWS-ME1, footnote 5.
[493] Speech in Los Angeles on October 26, 2009, cited in Cl. Opening, slide 53 (**C-0482**); Cl. Mem., para. 1158..
[494] Tr. Day 1, 24:6-12.
[495] *Invest-in Spain*, presentation to JGD, June 18, 2009 (**C-0092**, in Japanese).
[496] (**C-0093**), cited in Cl. Opening, slide 55; Cl. Mem. Para. 1077(i).

Assignment Register prior to registration with RAIPRE, but the successful pre-registration would guarantee access to the benefits of RD 661/2007, subject to compliance with specific deadlines and conditions.[497] In the Claimant's view, the purpose of RD-L 6/2009 was to accelerate investment during 2009 by providing further guarantees of stability and legal certainty to investors, particularly project developers who at the time of RD-L 6/2009 met the conditions to obtain registration in RAIPRE.[498] In this connection, the Claimant asserts that the additional requirement of registration in the Remuneration Pre-Assignment Register was essential in that under Article 4(2) of RD-L 6/2009, CSP plants that were pre-registered and finally registered within a 36 month window would have the right to receive the feed-in tariff of RD 661/2007.[499]

513. The Claimant claims that in the Resolution of the Council of Ministers of November 13, 2009[500], the Government wilfully assumed responsibility for the sustainability of the tariff deficit.[501] The Claimant asserts that based on an analysis on the mid-term integration of renewable generation for the period 2009-2014, the Council of Ministers decided to absorb the over-capacity situation beyond the 200 MW limit set by RD 661/2007 by deferring the entrance of operation on a staged basis.[502] The Claimant argues that this Resolution was an additional confirmation of the Respondent's commitment to the feed-in regime set forth under RD 661/2007, since it confirmed that that feed-in regime would remain applicable to pre-registered installations.[503] In the Claimant's view, in November 2009, the Government of Spain was fully aware of, and decided to accept, the consequences of over-capacity by putting priority on reaching the objectives of renewable energy production and attracting investment.[504]

514. The Claimant also points out that the official press release issued by the Council of Ministers on the same day[505] affirmed Spain's aim to become the world's undisputable

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[497] Cl. Mem., paras. 314 – 326; Cl. Opening, slide 66.
[498] Cl. Mem., para. 315.
[499] CL. PHB., para. 10.
[500] Resolution of the Spanish Council of Ministers, November 13, 2009 (**C-0134**) (**R-0098**).
[501] Cl. Opening, slide 67.
[502] Cl. Mem., paras. 327-338.
[503] Cl. Mem., para. 328.
[504] Tr. Day 1, 28:18-29:2.
[505] Official Press Release of the Council of Ministers of November 13, 2009 (**C-0138t**).

leader in CSP technology[506] and underlined the Respondent's expectation that this Resolution would provide project developers with the "*necessary certainty*" to plan their investment.[507] The Claimant states that the Respondent's decision to honor the expectations of projects already registered in the Remuneration Pre-Assignment Register was a positive (and relevant) signal for JGC.[508]

515. The Claimant states that both Solacor 1 and Solacor 2 were successfully pre-registered with the Remuneration Pre-Assignment Register as phase 2 facilities on December 11, 2009, with a 36 months window for completion.[509] The Claimant points out that in their respective pre-registration documents, it was explicitly stated that the facilities were "*granted the economic regime regulated in Royal Decree 661/2007, May 25*."[510] The Claimant emphasizes that the documents the Solacor Plants received from the Ministry for the confirmation of pre-registration were titled as "*resolution*" from the General Directorate for Energy Policy and Mining[511] which, the Claimant submits, is a specific commitment.[512] The Claimant refers to the explanation of Lovells in its memorandum of July 2009 which stated that "[t]*he Plants shall be entitled to receive the feed-in tariff of RD 661/2007 provided that they are effectively registered in the Pre-Assignation Registry after the end of the 30 days term established in RD-Law 6/2009*."[513] The Claimant submits that consequently Solacor 1 and Solacor 2 were guaranteed the application of the feed-in remuneration scheme established in RD 661/2007, provided that they were finally registered in RAIPRE and started the sale of energy before January 1, 2013.[514] The Claimant states that Solacor 1 was finally registered in RAIPRE on January 19, 2012 and started the sale of energy on January 22, 2012, and that Solacor 2 was registered in RAIPRE on February 21, 2012 and started the sale of energy on February 21, 2012.[515]

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[506] Cl. Opening, slide 68.
[507] Cl. Mem., para. 340.
[508] *Ibid.*, para. 547.
[509] *Ibid.*, paras. 344-346.
[510] Registration of Solacor 1 in Pre-assignment Register, December 11, 2009 (**C-0141**); Registration of Solacor 2 in Pre-assignment Register, December 11, 2009 (**C-0142**).
[511] Tr. Day 1, 30:2-8
[512] Tr. Day 1, 31:4
[513] Cl. Opening slide 64, citing Legal Due Diligence Report issued by Lovells on July 15, 2009, p.18 (**C-0566**).
[514] Cl. Mem., para 347.
[515] *Ibid.*, para. 348.

516. The Claimant asserts that JGC only considered seriously investing in the Solacor Plants after their pre-registration was confirmed.[516] According to the Claimant, soon after the Solacor Plants were registered with the Pre-Assignment Register, the Lenders reached an agreement to constitute a banking syndicate to finance the construction of the Solacor Plants and NEXI started an internal due diligence process for the issuance of its OULI policies.[517]

517. In the meantime, according to the Claimant, JGC and Abengoa Solar were busy finalizing the EPC Contracts and the O&M Contracts for the construction of the Solacor Plants and began drafting a share purchase agreement, whereby JGC would acquire 26% stakes in the Solacor SPVs.[518]

518. The Claimant states that in May 2010, it learned the news that the Spanish Government and Protermosolar were negotiating potential regulatory changes to the regulatory framework applicable to CSP plants.[519] JGC did wait and see what would come out of the negotiations, how the situation would pan out.[520]

519. In the Claimant's view, what took place between the Ministry and the CSP industry sector on July 2, 2010 was an "*agreement*" under which the whole CSP sector (and wind sector) accepted certain economic sacrifices to contribute to mitigate the tariff deficit.[521] According to the Claimant, the CSP sector agreed to the following sacrifices: (i) the FiT option only for the first year of operation even for existing plants (plus 15% of natural gas); (ii) the limit in the equivalent number of hours of operation entitled to FiT/FiP; and (iii) delay in the entry into operation for certain plants including Solacor 1 and Solacor 2.[522] The Claimant states that the CSP sector's agreement outlined above was included in the July 2, 2010 Press Release of the Ministry.[523]

[516] Cl. Opening, slide 72.
[517] See Cl. Mem., paras. 548 -558.
[518] Cl. Mem., para. 559.
[519] *Ibid*., para. 560.
[520] Tr. Day 6, 29:16-21.
[521] See Cl. Mem., Sections 9.2 – 9.5.
[522] Cl. Opening, slides 107, 110-115.
[523] July 2, 2010 Press Release (**C-0040t**).

520. In compensation for this (*quid pro quo*), the Claimant claims, the Respondent (i) agreed to extend the protections existing in Article 44(3) of RD 661/2007 in Article 4 of RD 1614/2010 and (ii) delivered Acceptance Letters to CSP plants including the Solacor Plants which confirmed the application of the remuneration regime of RD 661/2007 to their entire useful life, i.e., a message of legal security, assuring the stability of the regulatory framework for the CSP sector the future.[524]

521. In this regard, the Claimant points out that the July 2, 2010 Press Release included the statement of the Spanish Government guaranteeing stability of the regulatory framework for the CSP sector. The Claimant emphasizes that legal stability was one essential element of the July 2, 2010 Agreement.[525] The statement quoted by the Claimant in the July 2, 2010 Press Release reads as follows:

> *"The agreements include short-term measures that will reduce the impact of these technologies on the price of electricity, as well as long-term measures which will provide these technologies with stability and certainty for their future development."*[526]

522. The Claimant points out that the July 2, 2010 official press release referred to the outcome of the negotiations the Ministry held with Protermosolar and AEE with the noun '*acuerdo*' or the verb '*acordar*' (Spanish word for 'agreement' and 'to agree'), or the noun '*pacto*' (Spanish word for 'pact').[527] The Claimant considers the July 2, 2010 Agreement equivalent to a global regulatory pact, and thus binding.[528] Referring to Dr. Crespo's testimony at the Hearing that "[t]*here is an agreement between two parties, and I understand that any agreement of that kind is binding*"[529] and that "*all that was negotiated and agreed was reflected in December in Royal Decree 1614*",[530] the Claimant asserts that it is a binding agreement.[531] The Claimant points out that the Respondent's authorities and representatives confirmed the existence of agreements in various occasions.[532]

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[524] Cl. PHB, para. 40; See also Cl. Opening, slides 107-108 and Tr. Day 1, 34:25-35:9.
[525] Cl. Mem., para. 394.
[526] Cl. Opening, slide 112, quoting (C-0040t) p.1.
[527] Cl, Mem., para. 384.
[528] Cl. PHB. Section 3.1
[529] Tr. Day 2 [Crespo] 146:25-147:2.
[530] *Ibid.*, 147:5-7.
[531] See Cl. Mem., Section 9.6.
[532] *Id.*

523. Maintaining that JGC withheld its decision to invest until the July 2, 2010 Agreement with the CSP sector was confirmed, the Claimant stresses that this Agreement was an essential feature of the Claimant's legitimate expectations.[533] According to the Claimant, at that moment when the sector was building the plants and had to get finance in order to get money for the construction of the plants, it was necessary for the sector to receive a message of stability. The Claimant states that Solacor 1 and Solacor 2 were in that situation.[534] It claims that JGC and Abengoa Solar (as co-sponsors), the Lenders and NEXI were reassured by the July 2, 2010 Agreement that the remuneration regime of RD 661/2007 would be applicable during the entire lifetime of the Solacor Project.[535]

524. The Claimant points out that the contents of the July 2, 2010 Press Release of the Ministry was confirmed in parallel by the press release on the same day (July 2, 2010) issued by Protermosolar representing the CSP industry.[536]

525. The Claimant further points out that the email from the Ministry to Dr. Crespo dated July 8, 2010 referred to the document attached thereto as "*Agreement with the Solar Thermal Sector*".[537] The Claimant emphasizes that the attached document, on official paper with the coat of arms of the Kingdom of Spain and the logo of Protermosolar, used the term "*agreement*" a number of times and included the contents of what was agreed between the Ministry and the CSP sector. The Claimant points out that in this document, the Respondent decided to raise the limit of use of gas during the first year of operation up to 15%. Further, this agreement made it explicit that Article 44(3) of RD 661/2007 would be amended so that any future revisions of the "*premiums*" would not affect existing facilities either..[538]

526. The Claimant claims that the Respondent gave the message of stability not only through unilateral instruments like the July 2, 2010 Press Release, but also in legal instruments like

[533] Cl. PHB, para 40.
[534] Tr. Day 1, 52:16-21.
[535] Cl. PHB, para. 40.
[536] Tr. Day 1, 54:3-6, referring to Press release issued by Protermosolar on July 2, 2010 (**C-0222/C-0222t**).
[537] (**C-0219t**)
[538] (**C-0219t**) para. 3 of the Agreement with the Thermosolar Sector; Tr. Day 1, 58:17-21.

RD 1614/2010 and the bilateral relationships with each CSP plant through, what the Claimant terms, the "*declaratory contracts*".[539]

527. The Claimant states that the first full draft royal decree with all the provisions covered by the July 2, 2010 Agreement was revealed by the Respondent on June 30, 2010. The Claimant states that on the same day the Respondent issued a "*comfort letter*" to NEXI.[540] The Claimant argues[541] that specific commitments or assurances came from this letter of the General Directorate for Energy Policy and Mining to the Chairman of the Board of NEXI confirming that the Ministry was "*initiating today the procedure for the approval of the revised regulation for Concentrated Solar Power technology in Spain. The new Royal Decree includes the results of the meetings maintained with the sector for the last weeks.*"[542]

528. The Claimant submits that the July 2, 2010 Agreement was converted into two specific legal instruments. The first was RD 1614/2010 issued by the Respondent to cover almost all legal commitments under the July 2, 2010 Agreement. The second was the exchange of an offering letter issued by a CSP plant and an acceptance letter, in response thereto issued by the Ministry regarding the delay of the operation of the plant (which the Claimant refers as "*declaratory contract*").[543] The Claimant asserts that in both instruments, the Respondent reaffirmed the grandfathering of the remuneration regime from which Solacor 1 and Solacor 2 were entitled to benefit, upon completion and registration in RAIPRE, against subsequent changes.[544]

529. The Claimant points out that the Respondent stated in its own words that the new regulations of RD 1614/2010 were agreed with the wind and CSP sectors in July 2010.[545] Explaining the background of RD 1614/2010, the Council of Ministers Reference dated December 3, 2010 stated that the new regulations "*which were agreed with both sectors [the wind and CSP technologies] last July*", involved

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[539] Tr. Day 1, 52:22-53:2; 34:10-17.
[540] Tr Day 1, 61:1-11.
[541] Tr. Day 1, 36:1-13 referring to (**C-0258**); Cl. Opening, slide 81.
[542] (**C-0261**)
[543] Tr. Day 1, 46:13-18.
[544] Tr. Day 1 46:18-24.
[545] Tr. Day 1 61:20-23, referring to (C-0277) Council of Ministers Reference dated December 3, 2010.

> *"reinforcement of the visibility and stability of the regulation of these technologies in the future, and guarantees the present premiums and tariffs of Royal Decrees 661/2007 as of 2013 for installations in operation and for those included on the pre-register."*[546]

530. The Claimant maintains that RD 1614/2010 incorporated the July 2, 2010 Agreement as follows[547]:

   (i) Compulsory first year of operation under FiT option (+15% natural gas) (Article 3);

   (ii) Limit to the number of equivalent hours of operation entitled to FiT/FiP, also guaranteed against subsequent regulatory changes (Article 2); and

   (iii) Grandfathering including the premium: no subsequent regulatory changes would affect the tariff, premium and cap & floor, extending Article 44(3) of RD 661/2007 to the Premium (Article 4).

531. The Claimant claims that it is necessary to read Article 44(3) of RD 661/2007 and Article 4 of RD 1614/2010 together to understand that, according to the Spanish legislation, no subsequent regulatory changes would affect the tariff, premium and cap and floor.[548]

532. The Claimant asserts that Article 4 of RD 1614/2010 is a stabilization clause of the remuneration regime under RD 661/2007 for the Solacor Project, citing the tribunal in *Masdar v. Spain* which observed that "*Article 4 of RD1614/2010 of 7 December 2010 also included a* "*stabilisation commitment: in terms similar to those of Article 44.3*."[549]

533. The Claimant contends that, contrary to the Respondent's argument that RD-L 14/2010, adopted in 16 days after RD 1614/2010, is the acid test showing that there was no such agreement as the alleged July 2, 2010 Agreement (see para. 693 *infra*), it was an unequivocal reference to the agreement with the CSP and Wind subsectors, claiming that the Respondent expressly acknowledged that the CSP and Wind subsectors had made contributions to cuts in the regulated costs of the electricity system, contrary to the PV

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[546] Press Release issued by the Council of Ministers on December 3, 2010, p.3 (**C-0277t**).
[547] Cl. Opening, slide 137.
[548] Tr. Day 1, 63:11-18.
[549] Cl. Opening, slide 138, citing *Masdar* Award, para. 502 (**CL-0175**); Cl. PHB, para. 56.

subsector. The Claimant points out that RD-L 14/2010 contained major changes to the regulatory framework applicable to the PV subsector, not applicable to the CSP or Wind subsectors.[550]

534. The Claimant submits that one of the contents of the July 2, 2010 Agreement which was not incorporated in RD 1614/2010 was the industry's agreement of the delay in the entry into operation of the plants. This agreement was implemented through the exchange of an offering letter signed by a CSP plant and a letter accepting such an offer executed by the Ministry of Energy. In the case of the Solacor Plants, the offering letters were executed by each Solacor Plant on December 1, 2010 ("**Offering Letters**"), and the acceptance letters were sent to each of them by the Ministry of Energy on March 1, 2011 ("**Acceptance Letters**").[551]

535. The Claimant states that the Offering Letters contained the waiver of the right of the entry into operation and a request for a resolution of the Ministry communicating the economic conditions applicable to the operational life of the offering plant. In response, the Claimant asserts, the Acceptance Letters included the acceptance of the waiver in the Offering Letters and the communication of the economic conditions applicable to the operational life of the specific plant, subject only to have the annual updates foreseen in RD 661/2007.

536. Pointing out that the Acceptance Letters sent to each Solacor Plant on March 1, 2011 included statements reproducing the economic regime applicable to each of the Solacor Plants according to Articles 2, 3 and 4 of RD 1614/2010, the Claimant submits that the Offering Letters sent by each of the Solacor Plants and the Acceptance Letters sent by the Respondent constituted a specific assurance to each of the Solacor Plants and as such created legitimate expectations in JGC.[552]

537. The Claimant claims that the Offering Letters of Solacor 1 and Solacor 2 and the Ministry of Energy's Acceptance Letters should be viewed as "*declaratory contracts*" and reaffirmed the grandfathering of RF#1 for Solacor 1 and Solacor 2. The Claimant claims

[550] Cl. Mem., paras. 432-438.
[551] Offering Letters sent by Solacor Plants (**C-0294**) (**C-0296**); Acceptance Letters issued to Solacor Plants. (**C-0295**) (**C-0297**).
[552] Cl. PHB, para. 57.

that these declaratory contracts were also the bases of the Claimant's legitimate expectations concerning the application of the Special Regime under the RD 661/2007 and RD 1614/2010 for the entire useful life of Solacor 1 and Solacor 2.[553] The Claimant further asserts that the July 2, 2010 Agreement and the exchange of Offering and Acceptance Letters create binding obligations under Spanish law.[554]

538. The Claimant disagrees with Professor Vaquer's opinion that the Acceptance Letter provided the information in response to a request for information in the Offering Letter. Pointing out the text in the Offering Letter "*request for a Resolution communicating the remuneration conditions for the operational life of the facility*"[555], the Claimant contends that the Solacor Plants were not requesting information, but were trying to get confirmation of a right from the administration.[556]

539. In support of its position, the Claimant cites the *Masdar* award which regarded the Acceptance Letters as the basis of its finding of Spain's breach of ECT's FET. In the words of the *Masdar* tribunal,

> *"It would be difficult to conceive of a more specific commitment than a Resolution issued by Spain addressed specifically to each of the Operating Companies, confirming that each of the Plants qualified under the RD661/2007 economic regime for their "operational lifetime".*[557]

540. In response to the Respondent's criticism of the *Masdar* tribunal[558], the Claimant contends that the Respondent was responsible for drafting both Offering and Acceptance Letters and that the Acceptance Letters specifically answered the Solacor Plants' requests in the Offering Letters to be communicated the remuneration conditions applicable to their "*operational lifetime*." Thus, in the Claimant's view, a literal and contextual interpretation of the Offering Letters and Acceptance Letters cannot lead to a conclusion different from the Claimant's.[559]

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[553] See Cl. Opening, slides 140-151; Cl. Mem., Section 9.8.
[554] Cl. PHB, para 59.
[555] For Solacor 1 (**C-0294**); for Solacor 2 (**C-0296**).
[556] Tr. Day 6, 22:18-24; 23:9-11.
[557] Cl. PHB, para. 58, citing *Masdar* Award, para.520 (**CL-0175**).
[558] Tr. Day 1, 228:17-229:3;
[559] Cl. Closing, slide 48; Cl. PHB, para. 58.

(c) Timely registration of the Solacor Plants in RAIPRE

541. The Claimant submits that as the Solacor 1 and Solacor 2 Plants were successfully registered in RAIPRE within the prescribed timeframe, the former on January 19, 2012 and the latter on February 21, 2012[560], they were entitled to the benefits of the Special Regime of the RD 661/2007 feed-in model as modified by RD 1614/2010.

542. The Claimant quotes the testimony of Mr. Soler Babot who highlighted the importance of registration in RAIPRE at the Hearing by stating that it was:

> *"the assurance that we could benefit from the economic regime of Royal Decree 661. That was very important for any investor. It was very important for the banks, for the lenders, for NEXI as an insurer; for everybody."*[561]

543. The Claimant asserts that registration in RAIPRE was *conditio sine qua non* for the CSP plants to benefit from the RD 661/2007 regime in accordance with Article 17 of that RD. As such it was not a mere administrative registration, but a specific commitment granting rights to the investors. [562] In its support, the Claimant cites the tribunal in *Masdar v. Spain* which observed the legal consequence of the registration in RAIPRE as follows[563]:

> *"Specifically, the State undertook that it would offer to investors the possibility to continue to enjoy the existing benefits, provided that within a certain window of time, they did everything necessary to enable them to register in the RAIPRE. This was a very specific unilateral offer from the State, which an investor would be deemed to have accepted, once it had fulfilled the substantial condition of construction of the plant and the formal condition of registration within the prescribed "window".*[564]

544. In support of its rejection of the Respondent's contention that the registration in RAIPRE is simply an administrative requirement to sell energy without any further legal consequences, the Claimant also cites the tribunal in *Antin v. Spain* which stated that the tribunal was "*not persuaded that registration in the RAIPRE is simply an administrative requirement to sell energy without any further legal consequences.*"[565]

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[560] Certificate of Final Registration in the RAIPRE of Solacor 1 (**C-0088**); Certificate of Final Registration in the RAIPRE of Solacor 2 (**C-0089**).
[561] Cl. PHB, para. 9 quoting Mr. Soler Babot's testimony in Tr. Day 3, 25:13-17.
[562] Tr. Day 1, 43:9-12
[563] Cl. Opening, slide 97.
[564] *Masdar award*, para. 512 (**CL-0175**).
[565] Cl. Opening, slide 98, citing *Antin award*, para. 552 (**CL-0182**); Cl. PHB, para. 9.

(d) The Claimant's legitimate expectations

545. The Claimant maintains that JGC's investments in the Solacor Plants were attracted by the remuneration regime under RD 661/2007 and Spain's promises and specific assurances of stability thereof as elaborated in detail earlier. The Claimant legitimately believed Spain's commitments and assurances of stability of such remuneration regime.[566]

546. The Claimant submits that it has carried out a detailed due diligence to confirm the stability and guarantees of RF#1. The Claimant claims that the level of the due diligence it conducted satisfies any legal standard.[567] The due diligence showed that no previous decision by the Spanish Supreme Court could warn JGC that the full abrogation of RF#1 would be legal in Spanish law.[568] The Claimant asserts that when the Claimant took the investment decision in July 2010, there was no doubt that if the Spanish Government ever adopted a change in the regulatory regime or contravened the specific commitments in RD 661/2007 or the specific agreement of July 2, 2010, it would be compensated.[569]

547. Specifically, the Claimant claims that before making the investment, it conducted an exhaustive due diligence to assess the viability of the projects from all points of view, including seeking the opinion of its Spanish legal counsel on the regulatory framework and meeting with Spanish authorities who provided information about the regulatory framework and the requirements for the projects to benefit from RD 661/2007.[570] In addition to Claimant's own due diligence, the Lenders also conducted their due diligence and gave green light to commit to finance the construction of the Solacor Plants. Furthermore, referring to the letter written by Mr. Hernandez Garcia, General Director for Energy Policy & Mining of the Ministry of Industry, Tourism and Commerce to the Chairman of NEXI dated on July 30, 2010,[571] the Claimant claims that NEXI gave its *Naidaku* approval to provide its OULI guarantee after receiving assurances from Spanish

[566] Tr. Day 1, 25: 5-8; Cl. Mem., para. 527.
[567] Cl. Opening, slide 85; Tr. Day 1, 38:3-5.
[568] Cl. PHB., paras. 15 and 30-32.
[569] Tr. Day 1, 38:9-16.
[570] See Cl. Reply, paras. 314-329; Cl. PHB., paras. 33-34.
[571] (**C-0261**)

authorities.[572] In its support, the Claimant refers to the testimony of Mr. Endo at the Hearing who stated that:

> "*...NEXI interpreted this letter as a government-to-government assurance. And so with this letter it decided at that point to enter into the specific procedure of granting the insurance.*"[573]

548. The Claimant claims that the assessment provided by the advisors of JGC and other participants in the transaction including the Lenders underlined that as long as the Solacor Plants were able to get registered in RAIPRE before January 1, 2013, the Solacor Plants would have a right to benefit from the feed-in regime set forth in RD 661/2007 for the entire lifetime of its facilities.[574] It further claims that none of the due diligence sources consulted by JGC, Abengoa, NEXI or the Lenders identified or forecasted any red flag of a sweeping legislative reform such as the Disputed Measures that Spain passed a few years later. Therefore, the Claimant submits that it could legitimately believe in both the specific assurances the Respondent gave to it and the regulatory framework.[575]

549. Consequently, the Claimant argues that it could legitimately conclude that the Solacor Project's risks would only involve the substantial development and operational risks, including those related to potential cost overruns or engineering-related risks in general, but the regulatory risk would be low.[576]

550. Contrary to the Respondent's argument, the Claimant submits that the Clifford Chance Report rendered for the Lenders in August 2009[577] supports its right to be compensated and must be read in light of all accumulated assurances from the Spanish Government.[578] The Claimant claims that there is nothing in the Clifford Chance Report that could question its

[572] Cl. Opening, slide 62.
[573] Tr. Day 2, [Endo] 41:15-21.
[574] Cl. Reply, para. 328.
[575] *Ibid*., para. 329.
[576] Cl. PHB, para. 32, referring to Mr. Miyamoto's witness statement (CWS-TM), para. 27 and Mr. Miyamoto's testimony at the Hearing; Tr. Day 2, [Miyamoto] 69:4-12 and 84:3-5.
[577] Clifford Chance Report, August 24, 2009 (**C-0574**).
[578] Cl. Opening, slide 86; Tr. Day 1, p. 39:1-6.

impeccable due diligence.[579] Specifically, the Claimant quotes the following passages from the conclusion section of the Clifford Chance Report:[580]

> "*1. It is possible for a reglementary disposition to modify the economic regime established in RD 661/2007 affecting solar thermal plants included in its scope.*
>
> *2. However, in order for said disposition to be valid, it must respect the following:*
>
> *a) It cannot retroactively affect the payment of tariffs or premiums corresponding to energy that has already been sold by the owners of a special regime production facility.*
>
> *b) It cannot infringe the principles of legal certainty and legitimate expectations, taking into account of the following:*
>
> *- The importance of the modifications introduced.*
>
> *- The predictability of modifications.*
>
> *- The existence of exterior signs by the Administration creating the belief that a reglementary change will not take place.*
>
> *- The existence of sufficient transitory measures or compensatory measures.*
>
> *c) It has to ensure that the special regime electric energy installations receive reasonable rates of return with regard to the investment costs incurred as established in Law 54/1997.*" [Emphasis added by the Claimant]

551. Contrary to the Respondent's reading of the Clifford Chance Report to the effect that Clifford Chance advised the Lenders and JGC about the fact that RD 661/2007 could be modified, affecting already existing CSP plants,[581] the Claimant submits that the report established a number of criteria that any change to RD 661/2007 should comply with, like non-retroactivity of dispositions restricting individual rights and the protection of the legal certainty and legitimate expectations, bearing in mind (**i**) the importance of the modification introduced; (**ii**) the predictability of the modification; (**iii**) the existence of exterior signs by the Administration creating the belief that a regulatory change would not take place; and (**iv**) the existence of sufficient transitory measures or compensatory measures.[582]

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[579] Tr. Day 6, 32:7-9.
[580] Cl. Opening, slides 86-87 referring to Clifford Chance Report, August 24, 2009, pp. 26, 28-29 (**C-0574**).
[581] See Tr. Day 2, 29:24-30:2 [the Respondent's question to Mr. Endo in cross-examination].
[582] Cl. Opening, slide 87, referring to Clifford Chance Report, August 24, 2009 (**C-0574**).

552. The Claimant specifically refers to the paragraph in the Clifford Chance Report which referred to the existence of exterior signs by the Administration creating the belief mentioned above[583]. The paragraph reads as follows:

> "*In the case at hand, said belief could be found on the fact that the Spanish Government, by means of the provisions contained in articles 36 and 44.3 of RD 661/2007, has established a series of tariffs, premiums and supplements to be received during the whole useful life of solar thermal plants for the sale of the electricity they generate. Additionally, notwithstanding the provision of future reviews of said tariffs, article 44.3 of RD 661/2007 expressly states that the reviews of the regulated tariff and the upper and lower limits on the aggregate of the reference market price and the reference premium will not affect those installations that have entered into service prior to January 1 of the second year after the year during which the review has taken place.*"

553. The Claimant asserts that the Clifford Chance Report expressly concluded that any regulatory changes to RD 661/2007 had to respect the principles of legal certainty and legitimate expectations to be valid.[584]

554. The Claimant contends that it never understood from the Clifford Chance Report that the Spanish Government would carry out a system overhaul.[585] In its support, the Claimant refers to Mr. Endo's testimony at the Hearing in response to the Respondent's counsel asking him whether JGC was aware of the fact that, in addition to the revisions included in Article 44 of RD 661/2007, the Government could modify RD 661/2007. Mr. Endo answered as follows:

> "*I have no understanding that there is a complete overhaul of the system itself. But at the same time, as stated in this conclusion, I thought that there is at any time a possibility of adjustment within the reasonable scope. But that adjustment within the reasonable scope is a completely different matter to a complete system overhaul.*"[586]

555. The Claimant further quotes[587] the following testimony of Mr. Endo referring to the conclusion of the Clifford Chance Report:

[583] Cl. Opening, slide 88, quoting from Clifford Chance Report, August 24, 2009, p.26 (**C-0574**); Tr. Day 1, 40:13-41:10.
[584] Tr. Day 6, 31:23-25; Cl. PHB, para. 37.
[585] Cl. Closing, slide 66.
[586] Tr, Day 2, [Endo] 29:6-12.
[587] Cl. PHB, para. 65.

> "*I believe that the agreement between the industry association and the minister, reached in July 2010, was done in line with the procedure mentioned in this conclusion. And following that procedure, a minor change was made. That was my understanding.*"[588]

556. The Claimant points out that in addition to Lenders, NEXI also became comfortable with the stability of the regulatory framework through its extensive due diligence and after receipt of the letter from the Spanish Government's representative and accordingly provided its OULI guarantee.[589]

557. In response to the Respondent's argument that some of the documents the Claimant relied on in forming legitimate expectations post-dated its investment date, the Claimant contends that although they post-dated the investment date, their main contents were announced at, and formed part of, the July 2, 2010 Agreement, which pre-dated its investment date. Moreover, JGC continued deepening its investment in the Solacor Project by disbursing its EUR 34 million equity investment pursuant to the capital increases of the Solacor SPVs from September 2010 until March 2012 as required by the Senior Loans drawdowns and the Shareholders' Agreements well after RD 1614/2010 and the Acceptance Letters.[590]

558. The Claimant argues that the Spanish Supreme Court decisions on which the Respondent relies are irrelevant to assess the Claimant's legitimate expectations.[591] In the Claimant's view, as the investor's legitimate expectations must be assessed at the time of its investment, the Supreme Court judgments rendered after August 6, 2010 (date of JGC's investment) could not have informed the Claimant's expectations created under RD 661/2007, confirmed under the July 2, 2010 Agreement and reinforced with *ad hoc* representations (including the comfort letter to NEXI).[592]

559. The Claimant states that each and every judgement of the Supreme Court on renewable energy before the investment date (which in total were seven cases)[593] do not support Spain's contention that JGC should have been aware that the Government could make

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[588] Tr. Day 2, [Endo] 30:21-25.
[589] Cl. Opening, slide 89-90; Tr. Day 1, 42:3-43:2.
[590] Cl. PHB, para. 130.
[591] Cl. PHB, para. 60.
[592] Cl. PHB, para 61.
[593] Tr. Day 6, 20:23–21:3.

sweeping changes to RF#1 such as the Disputed Measures.[594] The Claimant asserts that the judgements issued in 2005-2007[595] did not deal with RD 661/2007, but with different regulations not applicable to this case and that two Supreme Court judgements rendered in 2009[596] dealt with RD 661/2007, but are irrelevant to assess JGC's legitimate expectations.[597] The Claimant elaborates that the December 3, 2009 judgment (R-0123) rejected a challenge to the validity of RD 661/2007 that a PV company had brought against RD 661/2007 on the grounds that PV installations were not included in its transitory provisions. The judgment dismissed the challenge holding that the remuneration provided by RD 436/2004 was in essence the same as the one laid down in RD 661/2007 for PV facilities.[598] The December 9, 2009 judgment (R-0002) dismissed a challenge brought by an owner of cogeneration facilities because the claimant had failed to prove that it would have invested under RD 436/2004.[599]

560. Citing Mr. Montoya's testimony at the Hearing,[600] the Claimant further contends that neither Mr. Montoya nor the Spanish agencies explained any Supreme Court case decision to potential investors attracted by the Spanish regulatory framework.[601]

561. With respect to the Spanish proceedings brought by the Solacor SPVs against MO IET/1045/2014, the Claimant explains that the Solacor SPVs were not seeking compensation in this Spanish administrative court proceedings. The relief was limited to challenge the legality or the validity of a ministerial order against Royal Decree 413/2014 and EPA 2013. The decision of the Supreme Court was that the ministerial order was not illegal because it complied with the requirements of the Electricity Act.[602]

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[594] Cl. PHB, para. 62.
[595] Judgment of the Third Chamber of the Supreme Court, December 15, 2005 (**R-0119**); Judgment of the Third Chamber of the Supreme Court, October 25, 2006, RCA 12/2005, reference El Derecho EDJ 2006/282164 (**R-0120**); Judgment of the Supreme Court, March 20,2007. 11/2005 EDJ 2007/18059 (**R-0121**); and Judgment of the Supreme Court, October 9, 2007 13/2006 EDJ 2007/175313 (**R-0122**).
[596] Judgment of the Supreme Court, December 3, 2009. Appeal 151/2007 EDJ 2009/307349 (**R-0123**) and Judgment of the Third Chamber of the Supreme Court, December 9, 2009, appeal 152/2007, reference El Derecho EDJ 2009/307357 (**R-0002**).
[597] See Cl. Closing, slide 39; Tr. Day 6, 21:8-25.
[598] Tr. Day 6, 21:8-22:4; Cl. PHB, para. 62; Cl. Closing, slide 39.
[599] Tr. Day 6, 22:5-9; Cl. PHB, para. 62; Cl. Closing, slide 39.
[600] Tr. Day 3, [Montoya] 50:10-13.
[601] Cl. PHB, para. 62(iii).
[602] Tr. Day 6, 20:2-16; Cl. Closing, slide 37.

(e) Disputed Measures:

562. The Claimant submits that the Respondent breached its specific assurances of stability when it replaced the Special Regime of RD 661/2007 (as amended by RD 1614/2010) with a fundamentally different regulatory framework, i.e., the Disputed Measures.[603] As stated earlier, the Claimant claims that the Disputed Measures changed the essential characteristics of the remuneration scheme relied upon by it at the time of its investment and thus constituted a breach of Article 10(1) of the ECT.[604] The Claimant calls the change introduced by the Disputed Measures a "*paradigm change*".[605]

(i) Law 15/2012 and RD-L 2/2013 (RF#2)

563. The Claimant submits that Law 15/2012 abrogated the right to use natural gas as a backup fuel, which was one of the essential characteristics of the original regime under RD 661/2007 and one of the essential characteristics in the July 2, 2010 Agreement.[606] The Claimant argues that RF#1 incentivized electricity production with natural gas in a consistent manner, referring to Article 2(1)(b)(b)(1) of RD 2818/1998, Article 2(1)(b)(b)(1) of RD 436/2004, Articles 2(1)(b)(1), 17(b) and 36 of RD 661/2007.[607] Moreover, the Claimant asserts that this element derived from the Government's representation under point 1 of the July 2, 2010 Agreement with the Thermosolar Sector (the one-year suspension of the FiP option with an increase to 15% of natural gas production instead of the 12% limit per RD 661/2007).[608] The Claimant states that the use of gas up to 15% rather 12% was defined as *quid pro quo* for the one year suspension by the *Masdar* tribunal.[609] The Claimant contends that a reduction of gas allowance was not foreseeable.[610] The Claimant claims that if Spain had applied *ex ante* a remuneration scheme that did not provide incentives for the use of natural gas, JGC would have avoided

[603] Cl. PHB, Section II.C.
[604] The Claimant focused on the obligation to provide stability and the FET and to the protection of legitimate expectations during its opening statement at the Hearing. The Claimant explained that it was not waiving other causes of action claimed in the written submissions. Tr. Day 1, 69:1-14; Cl. Opening, slides 156-166.
[605] Tr. Day 1, 68:23.
[606] Tr. Day 1, 69:18-70:1.
[607] Cl. PHB, para. 90.
[608] Cl. PHB, para. 91 referring to the email from Mr. Antonio Hernández García to Dr. Luis Crespo of July 8, 2010 (**C-0219t**).
[609] *Id.*, referring to *Masdar* Award, para. 120 (**CL-0175**).
[610] *Id.*

investing in gas-burning equipment or investing in the Solacor Project at all.[611] Referring to the Note on the legal and economic impact of the bill of Law 15/2012 submitted to the Respondent's Parliament on September 20, 2012,[612] the Claimant asserts that the economic impact of the non-use of backup fuel would entail a reduction of 12% in the total remuneration.[613]

564. The Claimant also states that RD-L 2/2013 in effect eliminated the premium (FiP) option, one of the essential characteristics of the original regime in RF#1, and substituted CPI by IPD-IP in the annual adjustment of tariffs, premiums and the upper and lower limits. The Claimant submits that the FiP option was an essential driver for all CSP investors including JGC and that the right to choose between the FiP and FiT options shaped JGC's expectations. In accordance with the July 2, 2010 Agreement, Article 3 of RD 1614/2010 and the Offering and Acceptance Letters, the Claimant expected that in the first quarter of 2013, after the first year of operation under the FiT option, the Solacor Plants could then switch to the FiP option, as foreseen in RD 661/2007 and RD 1614/2010.[614] The Claimant refers to the testimony of Mr. Miyamoto at the Hearing who stated that "*in making decisions on this investment as a factor to calculate, we used feed-in premium*"[615] and "*Solacor entities, namely JGC and Abengoa, also used FIP*."[616] The Claimant argues that both Abengoa and the Claimant as co-owners of the Solacor Plants thought that pool plus premium was the best option under RD 661/2007 for the production of energy since 2009.[617] The Claimant contends that the abrogation of the FiP option was not foreseeable at all.[618] Accordingly the elimination of a mixed FiP/FiT regime breached JGC's expectations, particularly under point 1 of the Respondent's agreement with the Thermosolar Sector.[619]

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[611] Cl. PHB, para. 89.
[612] (**C-0375t**)
[613] See Cl. Mem, paras 630-646. This measure was subject to a specific development by the Respondent in a subsequent ministerial order. First Final Provision, Law 15/2012 (**C-0372/C-0372t**).
[614] *Ibid.*, para. 93.
[615] Tr. Day 2, [Miyamoto] 82:6-8.
[616] *Ibid.*, [Miyamoto] 82:16.
[617] Cl. Mem, para 674.
[618] Cl. PHB, para. 94.
[619] *Ibid.*, para. 97, referring to (**C-0219**).

565. The Claimant disagrees with the Respondent's argument that there have been several changes over time from one royal decree to the following to affirm the validity and foreseeability of the abrogation of CPI as the updating index. The Claimant submits that the Acceptance Letters sent by the Ministry of Energy to Solacor SPVs [620] clearly guaranteed the Solacor Plants' right of annual updates of the values of Article 36 of RD 661/2007 according to CPI. The Claimant points out that the Respondent duly updated the values of tariffs, premiums and caps and floors by ministerial orders between 2007 and 2012 in accordance with Article 44(1) and First Additional Provision of RD 661/2007.[621] The Claimant claims that the replacement of CPI with IPD-IP to deliberately reduce the remuneration under RD 661/2007 entailed a serious decrease in the updating rate, and thus was a clear repeal of the original regimes' method of updates of the tariff, premiums and caps and floors.[622] The Claimant submits that the elimination of annual updates under CPI is, consequently, a breach of JGC's expectations under RF#1.[623]

566. The Claimant claims that due to RF#2, it had already suffered huge damages.[624] In the Claimant's view, RF#2 was phased out by a new normative context, which was basically a change of system, RF#3.[625]

(ii) RD-L 9/2013, Law 24/2013, RD 413/2014 and implementing Ministerial Orders including MO IET/1045/2014 (RF#3)

567. The Claimant submits that in July 2013, the Respondent enacted RD-L 9/2013, which repealed RD 661/2007 as well as any other conflicting laws and regulations and introduced a new model that was based on entirely different regulatory premises, but yet "*under construction*". Law 24/2013 followed in December, 2013. In June 2014, the Respondent approved RD 413/2014[626] and MO IET/1045/2014[627] which defined economic parameters of its new regime, specifically designed to cut the remuneration of existing renewable

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[620] (**C-0295**) and (**C-0297**)
[621] Cl. Mem. paras. 271-273.
[622] Cl. Mem, para. 679.
[623] Cl. PHB., para. 44.
[624] Cl. Mem, para. 685.
[625] Tr. Day 6, 27:14-16; Cl. PHB, paras. 151 and 170.
[626] RD 413/2014, June 6, 2014 (**C-0388**).
[627] Ministerial Order IET/1045/2014, of June 16, 2014 (**C-0383t**).

installations. In October 2014, the Respondent approved MO IET/1882/2014[628] to set out the new conditions for the use of natural gas by CSP plants.[629]

568. The Claimant considers that it is a total change of the system. In the Claimant's view, this unprecedented new model, based on the concept of standard installations, is not a feed-in system anymore, and no longer guarantees a stable remuneration. The Claimant points out that CNE in its Report 18/2013[630] stated that there was no comparable remuneration system in the EU.[631] It drastically reduced the returns of the Solacor Plants.[632] The Claimant submits that the new remuneration model has eliminated all essential characteristics of the remuneration model that was in effect at the time of the Claimant's investment.[633]

569. The Claimant asserts that while RD 661/2007 remunerated actual production by applying a price expressed in €/MWh to a CSP installation's production of electricity, the new remuneration system remunerates installed capacity by reference to "*Installations-Type*" or "*IT*".[634] Pointing out that Article 36 of RD 661/2007 or any other provisions of RD 661/2007 did not have any reference to "*standard installation*" or "*installation type (IT)*", the Claimant states that the standard facility installation type is a novel regulatory concept around which the new system revolves.[635] In this regard, the Claimant contends that there is no parallelism between the 2005-2010 Plan's 'case type' and the 'installation type' concept set out in RD 413/2014 and MO IET/1045/2014.[636] The Claimant further contends that because the remuneration is established by reference to one hypothetical installation type (IT), the remuneration does not correspond with the actual CAPEX of the Solacor Plants. The Claimant submits that EUR 4.576 million per MW, the investment costs attributed to all IT-00604 plants (to which category the Solacor Plants belong), is

[628] Ministerial Order IET/1882/2014, of October 14, 2014 (**C-0376**).
[629] Cl. PHB, para. 67.
[630] Report 18/2013 on the new RD on renewable energy production, issued by the CNE on September 4, 2013, p. 5 (**C-0408t**).
[631] Cl. PHB., para. 69.
[632] Tr. Day 6, 34:21-35:1.
[633] See Cl. Opening, slide 180, offering detailed comparison of the remuneration system under RD 661/2007 as modified by RD 1614/2010 and the new model introduced by the Disputed Measures; Cl. PHB, para. 68.
[634] Cl. PHB, para. 70.
[635] *Ibid*., para. 70-71.
[636] *Ibid*., para. 75.

"*substantially below the actual average investment costs of all these plants, the IT-00604*".[637]

570. The Claimant further criticizes the new system in that it sets a maximum target return and introduces a novel concept of "*regulatory useful life*", all these with retrospective effect.[638] The Claimant argues that RF#1 neither guaranteed any rate of return or established any maximum rate of returns capping the remuneration of renewable installations (there were just FiP and FiT options), but the new remuneration model establishes caps to ensure that an existing CSP installation will not exceed what the Respondent considers a maximum rate of return in 2014. Once the installation reaches this "*target*" rate of return, it is no longer entitled to any incentive and it must sell its production at the market price. Moreover, Article 19 of RD 413/2014 entitles the Respondent to discretionally change the remuneration rate of existing CSP plants at the end of each regulatory period (i.e., six years with adjustments every three years). In the first regulatory period, the Respondent has used the 10-year Spanish bond plus a 300-basis-point spread as proxy for establishing an *ex post* rate of return (7.398%). The Claimant asserts that the economic rationale for establishing this remunerative approach as well as the methodology for updating the spread in the future is not clear. Thus, in the Claimant's view, the new regulatory regime creates regulatory uncertainty.[639]

571. The Claimant submits that the most unfair element of the new system is that the Government is imposing an arbitrary 7.4% (7.398%) pre-tax return on existing profits, which is clearly lower than the 7% to 11% post-tax returns that the Government promised while Royal Decree 661 was in place.[640] In this regard, the Claimant submits that a fair return is what the Government said was fair in its regulations at the time of the investment.[641] In this regard, the Claimant maintains that the expected returns JGC

[637] *Ibid.*, para. 76, quoting to the testimony of Mr. Garcia, Tr. Day 4 [García] 206:8-10.
[638] *Ibid.*, para. 70.
[639] *Ibid.*, paras. 78-79.
[640] Tr. Day 6, 36:2-7.
[641] *Ibid.*, 36:15-16.

expected to receive were "*the expected returns based on RD 661 that we expected at the time of making the decisions to invest in this project.*"[642]

572. The Claimant also asserts that the application of the new remuneration system to existing CSP installations is retroactive. The Claimant points out that in September 2013, the CNE raised serious concerns about the "*great uncertainties*" created to existing projects by the new standard installation system.[643] The Claimant states that the replacement of a remuneration system based on production with a new one based on investment costs brought extremely unfair consequences to the Claimant's investment.[644] The Claimant explains the problem of the new remuneration system in the following words:

> "*If you build an installation with an investment base higher than the investment base of your assigned standard installation that the government has calculated ex-post, you have been basically fooled by the regulator, because the incentive will not be enough to recover your initial capital expense and earn a fair return.*"[645]

573. The Claimant contends that while one of the key defences of the Respondent is to try to portray that the new remuneration model introduced by the Disputed Measures is the same model as the previous one, this is wrong.[646] The Claimant submits that the differences between the original regime and the new regime under the Disputed Measures are as follows:

(i) Under the Special Regime of RD 661/2007 as modified by RD 1614/2014, fixed single value applied to the entire production and applied during the entire installations' lifetime beyond 25 years. It is a performance-based incentive in that the more you produce, the more you earn. No cap is applicable on the remuneration amount. Thus, the clarity of the rules of remuneration helped the investors to plan the investment.[647] There would not be a retroactive change of remuneration to existing plants (grandfathering clause). Use of LNG as back-up fuel up to 15%/12%

[642] Cl. PHB, para. 85, quoting Mr. Miyamoto's testimony, Tr. Day 2, 80:4-6.
[643] Report 18/2013 on the new RD on renewable energy production, issued by the CNE on September 4, 2013 (**C-0408t**).
[644] Cl. PHB, para. 86.
[645] Tr. Day 6, 35:11-17.
[646] Tr. Day 1, 77:8-16.
[647] Cl. Mem., paras. 257-262.

was allowed to enhance generation efficiency. Annual adjustment to remuneration was made with general CPI. CSP plants had a right to select FiT or FiP.

(ii) Under the new model defined by MO 1045/2014 in detail, the investor no longer receives a fixed price for kilowatts produced. Under the new model, the Government assigns a standard installation code to each operating installation. Remuneration is composed of two elements: return on investment and return on operation. Main term is a capacity payment incentive and is not remunerating production. The remuneration is capped at 7.398% pre-tax of return on investment of "*standard installation*" and the cap would be set by the Respondent based on a "*dynamic reasonable rate of return*". The remuneration is limited by the regulatory useful life of 25 years. Remuneration parameters determining the specific remuneration are set by the Government at its discretion using hypothetical conditions of "*standard plants*". The discretion of the Government in setting remuneration parameters means regulatory risk for existing investments. Thus, under this new model, incentives are diminished in value and not predictable.[648] Use of LNG back-up is allowed only for minimum necessity (almost zero). Adjustment of remuneration may happen, but no clear index is set. The producers do not have option on remuneration scheme (FiT or FiP).

574. The Claimant denies the Respondent's arguments (see para. 711 *infra*)[649] that documents contemporary to the Claimant's investment reveal JGC's understanding and expectation of a probable change in the regulatory framework applicable to the Solacor Project.[650] The Claimant contends that none of the documents cited by the Respondent demonstrate that JGC was aware of Spain's intention to completely replace the remuneration regime in an unreasonable, arbitrary, disproportionate and non-transparent manner.[651]

575. The Claimant explains that the clauses referring to a change in law in the Loan Agreements and EPC Contracts are standard clauses and could not be used as an indication that the

[648] Cl. Opening, slides 179-180.
[649] Resp. Opening, slides 123-130.
[650] Cl. PHB, para. 109.
[651] Cl. Reply Section V.2.2.3.4, paras. 360-392.

Claimant foresaw the possibility of such change in law. They are without prejudice to any claim by an investor against the host State under domestic or international law as a consequence of the said change in law.[652]

576. With respect to the Respondent's argument that NEXI was aware that the remuneration regime for the Solacor Plants could change (see para. 712 *infra*), the Claimant contends that the fact NEXI issued the OULI is the living proof that it had not identified any probable change to RF#1.[653]

577. The Claimant brings to the attention of the Tribunal the fact that BCG and RB were requested to provide assistance in case of future arbitration proceedings against the Respondent after the approval of MO IET/1045/2014.[654]

(f) The Claimant's rebuttal to the Respondent's tariff deficit and reasonable rate of return arguments

578. The Claimant contends that the defences that the Respondent submits in this arbitration are exactly the same defences based on the tariff deficit and the reasonable rate of return arguments which it has already tried in other cases and have failed. Specifically, the Clamant notes that in previous cases such as *Antin, Masdar* and *Eiser* tribunals have rejected these lines of the Respondent's defence.[655]

579. As the Claimant understands it, the Respondent's defence in principle is that an investor is to receive a reasonable rate of return that the Government determines and could change in the future in accordance with the cost of money on capital markets. This defence is built upon the legal tenet of hierarchy of rules in that a royal decree has a lower rank than a law such as EPA 1997 or EPA 2013, and therefore the Government could amend royal decrees by laws with a higher rank. The Claimant asserts that the principle of hierarchy invoked by Spain could not replace the test whether or not a new regulatory regime has changed essential characteristics of the original remuneration regime in breach of its international obligation under the ECT. The Claimant asserts that if the Government were to be able to

[652] Cl. PHB, para. 102.
[653] *Ibid.*, para. 103.
[654] *Ibid.*, para. 106, referring to IDAE's Technical Terms & Conditions (**C-0645**).
[655] Tr. Day 1, 71:17-23.

change the rules of the game, and to provide different contents of rates of return in different years after the investment has been made, investors would never choose to make an investment. The Claimant asserts that investors need to know beforehand the rules that will determine the remuneration.[656] It further submits that the Government can choose to set the model it chooses such as a model including a revision every certain years of time. However, the Claimant contends, once the Government has decided to put in place a model based on remuneration based on production, and investors have made the investment, what is against the ECT is to accept a proposition that would allow the Government to change essential characteristics of the original regime under which the investors have made their investment.[657]

580. The Claimant labels as "dynamic return fallacy"[658] the Respondent's argument that the remuneration model derived from Law 54/1997 "guaranteed its dynamism through the principle of regulatory hierarchy" and "[t]he way in which dynamism was expressed was via regulatory modification and that these regulatory reforms allow the regulations to be adapted to the changing economic and social circumstances without affecting the basic rules contained in the Law."[659]

581. Citing *Eiser v. Spain* award[660], the Claimant points out that according to the Ministry of Industry, Energy and Tourism, RD 661/2007 was structured to provide substantially higher after-tax returns than that of the new model to successful CSP investors.[661]

582. The Claimant argues that the Spanish Government found reasonable to reach rates of return of up to 11% after tax under RD 661/2007.[662] It cites a press release of the Ministry of Industry, issued on November 28, 2006, which included a statement that "*in the case of technologies requiring a boost because of their limited development such as biomass, biogas and solar thermal, the return is increase to 8% for the regulated tariff option and*

[656] Tr. Day 1, 78:20–79:1.
[657] Tr. Day 1, 79: 7-15
[658] Cl. Opening, slide 168.
[659] Resp. Rej, para. 1259.
[660] *Eiser* Award, para. 392 (**CL-0149**).
[661] Cl. Opening, slide 170; Tr. Day 1, 79:16-20.
[662] Tr. Day 1, 81:3-7; Cl. Opening, slide 171.

between 7% and 11% when participating in the market."[663] The Claimant points to another document of the Ministry titled as "*Project Memorandum of Royal Decree*"[664], which stated that *"the proposed regulated tariff value under RD 661/2007 for CSP sector provides a return (IRR in current currency, with own resources after taxes and at 25 years) of 8%*" and "*for the market option, a premium that ensures a project IRR of 9.5% for the type case at 25 years with a minimum of 7.6% and a maximum of 11%.*"

583. In contrast, Spain's new regulatory regime deemed the reasonable rate of return to be a pre-tax return of 7.398% on the hypothetical asset value of a hypothetical "*efficient*" plant, and this equates to 5.2% after tax on the hypothetical asset base for the investor in the *Eiser* case according to the *Eiser* tribunal.[665] The Claimant submits that the IRR of the Solacor Plants after the Disputed Measures renders 4.3% after tax.[666] The Claimant asserts that this change in the concept of reasonability is significant and thus it is not acceptable that after the investment and after the investor accepted the proposition from the Government in 2007, the Government decided that "*today it's not reasonable to accept what they themselves deemed reasonable in 2007.*"[667] The Claimant points out that no argument was advanced by the Respondent proposing that RD 661/2007 goes against the EPA 1997.[668]

584. According to the revised Spanish model, adopted in and after 2013, the Claimant argues, the amount of remuneration would be left to arbitrary decisions by Spain, and the special payment would be limited, contrary to Spain's commitments, thus the new model is arbitrary. In support of its argument, the Claimant cites the following words of the *Antin* tribunal:

> "*Based on the evidence on the record of this arbitration, the Tribunal concludes that the methodology for determining the "reasonable rate of return" under the New Regime is not based on any identifiable criteria. On the contrary, what Spain*

[663] Official Press Release of the Ministry of Industry, Tourism and Commerce of November 28, 2006, "*The Ministry of Industry assigns priority to profitability and stability in the new regime for assistance for renewable energy and cogeneration*" (**C-0074/C-0074t**).
[664] Project Memorandum on Royal Decree by Regulating the Activity of Energy Production in Special Regime and of certain Facilities of Assimilable Technologies, of Ordinary Regime, the General Directorate of Energy Policies and Mining, March 21, 2007 (**C-0662/0662t**).
[665] Cl. Opening, slide 170 referring to *Eiser* Award, para. 392 (**CL-0149**); Tr. Day 1, 80:1-6.
[666] Tr. Day 1, 81:9-11.
[667] *Ibid.,* 81:11-19.
[668] *Ibid.*, 81:20-25.

> *labels a "reasonable rate of return" seemingly depends on governmental discretion."*[669]

585. The Claimant states that the best evidence of a paradigm change is the economic impact of the Disputed Measures. It claims that passing from a performance-based model to a capacity investment model has very detrimental consequences and damages for the investors.[670]

586. On the basis of the impact of the new model on the cash flows and the equity value, the Claimant refutes the Respondent's claim that the new model retains the same structure as the original regime.[671] Relying on Compass Lexecon's report, the Claimant contends that the new model has reduced the incentives to CSP plants, and as a result the Disputed Measures have caused 37% cash flow drop and 43% revenue drop over the lifetime of the Solacor Plants and 70-73% drop in equity value of the Solacor Plants.[672] The Claimant also claims that the Disputed Measures have caused a 43% revenue drop over the lifetime of the Solacor Plants.[673]

587. Another argument of the Claimant against the Respondent's defence relates to the concept of standard installation types in the new model. The Claimant argues that the reference to a "*type case*" in the 2005-2010 Plan, whose purpose was to estimate the funding that Spain needed to achieve renewable growth objective, has nothing to do with the concept of "*installation type*" under the new model.[674]

588. With respect to the Respondent's defence related to the macroeconomic issues, i.e. the need to address the structural problem of tariff deficit threatening the financial stability of the Spanish electricity system, the Claimant contends that there is no correlation between the tariff deficit and CSP installations or at least the CSP sector was not creating any tariff deficit.[675] The Claimant does not agree that the incentives to CSP installations were the underlying cause of the tariff deficit. The Claimant points out that the tariff deficit existed

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[669] Cl. Opening, slide 172, citing *Antin* Award, para. 568 (**CL-0182**).
[670] Tr. Day 1, 85:14-20.
[671] Resp. Rej., para. 1280.
[672] Cl. Opening, slides 175-176.
[673] *Ibid.*, slide 186, citing (**CER-0002**) Compass Lexecon's Valuation Model (**CLEX-199**), from Tab FCFF&FCFE.
[674] Tr. Day 1, 84:24-85:10; Cl. Opening, slide 183; See also Cl. Reply, paras. 145-149.
[675] Tr. Day 1 87:4-12; Cl. Opening, slide, 191.

as early as in 2005, well before 2007, when there was just an 11-MW CSP plant in operation in Spain.[676]

589. In this regard, the Claimant contends that in spite of the tariff deficit, the Respondent kept promoting the construction and commissioning of CSP installations to become the world's leader in this technology.[677] The Claimant refers to the testimony of Mr. Caravantes who stated at the Hearing that "*in 2013 in the entire world there were probably around 3,000 megawatts of CSP installed capacity, 2,400 of which were in Spain*".[678] The Claimant argues that Spain is accountable for the tariff deficit because it refused to set up tariffs that would reflect the cost of electricity and, at the same time, largely increased the installed capacity of renewables in Spain.[679]

590. The tariff deficit could not, in the Claimants' view, justify the Disputed Measures, as it was a consequence of Spain's decision to expand capacity of production of renewables and to attract new investments by offering additional incentives. The Claimant points out that the Fifth transitory provision of RD-L 6/2009 provided that if pre-registered projects exceed wind and CSP targets, the Government could restrict access to RD 661/2007. However, instead of limiting access to RD 661/2007, the Government through the resolution of November 13, 2009 accepted pre-registered projects beyond the target set by RD 661/2007 and established the order of priority. The Claimant submits that Spain decided to give priority to attract investment and exceed its capacity targets for CSP and establish new targets knowing the existence of the tariff deficit and knowing that electricity demand had been falling since 2007.[680] In this regard, the Claimant quotes the following words from the Report by Secretary of State for Energy of November 12, 2009 as the reasons behind such decision-making:

> "*… renewable energy provides several beneficial effects that justify public backing. A non-exhaustive list of said benefits includes sustainability of sources, reduction in harmful emissions, technological changes … less energy dependency and*

[676] Cl. PHB, para. 114.
[677] *Ibid*., para. 115.
[678] Tr. Day 3 [Caravantes] 108:2-5.
[679] Cl. PHB, para. 116.
[680] Tr. Day 1, 87:13-20; Cl. Opening, slide 193.

> *additional social benefits deriving from a lower trade balance deficit, increased employment and rural development.*"
>
> "*… because the benefits indicated above, which far exceed the costs and therefore justify a regulatory framework to support the use of renewable energy…*" [681]

591. With respect to the Respondent's defence of the Disputed Measures based on the argument of avoidance of "*over-remuneration*", the Claimant contends that JGC's investment has not obtained any windfall profit or over-remuneration at the expense of Spanish consumers. It states that the Solacor Plants meant to keep the efficiency gain allowed under RD 661/2007. The Claimant states that the Solacor Plants came into operation in 2012, and thus had barely received any remuneration when cuts were implemented.[682] The Claimant further contends that in the case of CSP technology and specifically the Solacor Project, there was not any over-remuneration. The Solacor Plants were never allowed to benefit from the FiP option, and they enjoyed the FiT option for less than one year when the Disputed Measures went into effect.[683]

592. The Claimant submits that if Spain wanted to rely on its economic hardships to preclude the wrongfulness of its actions, it should have made a straightforward state of necessity defence under the ILC Draft Articles on State Responsibility. But as Spain knows that the threshold to meet a state of necessity defence is very high, it instead argues that the Disputed Measures have been proportional.[684] In the Claimant's view, the Respondent has the burden of proving this claim, and it has clearly failed to do so. The Respondent has provided no evidence demonstrating that the tariff deficit made it impossible to comply with Article 10(1) of ECT. The Claimant argues that the Respondent could have adopted other alternative measures such as electricity price increase for residential and industrial customers and indirect tax increase.[685] Relying on Dr. Padilla's view, the Claimant maintained in its closing submission at the final day of the Hearing that there were

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[681] Cl. Opening, slide 193, citing Report on the Economic Impact of the Entry into Operation of Electric Power Production Facilities Using Renewable Sources of Energy, p.6 (**C-0136t**).
[682] Cl. Opening, slide 194.
[683] *Id.*; Cl. PHB, para 112(iv).
[684] Tr. Day 6, 37:15-24.
[685] Tr. Day 1, 88:23-25.

alternative measures that would have enabled Spain to address the tariff deficit and at the same time comply with Article 10(1) of ECT with very limited distortion.[686]

593. The Claimant submits that the Respondent passed the Disputed Measures to tackle the tariff deficit. However, the Disputed Measures were not the least restrictive measure available to Spain to achieve its objective,[687] and it did so in a manner that disregarded the tremendous damage inflicted on the Claimant.[688]

594. Finally, the Claimant argues that Spain's reference to the concept of state aid under European law could not justify its breach of Article 10(1) of the ECT. The Claimant rebuts this defence on two grounds. First, the Claimant submits that this Tribunal is not asked to rule on the existence of state aid under EU law. Secondly, the Claimant states that in a case between a Japanese investor and the Kingdom of Spain under the ECT, EU law is a domestic law, not international law, and as such is simply a fact. Accordingly, the only question would be to establish whether or not at the time of investment there was any duty for the investor, or the investor to have expected that EU law would limit its right under the Spanish regulatory framework. The Claimant further submits that its investment was not based on the expectation generated by EU law. The Claimant maintains that the answer to this question is negative because at the time of the Claimant's investment in 2010, neither the Respondent nor the European Commission considered that the support scheme in the RD 661/2007 regime constituted state aid.[689] Thus, the Respondent believed that the FiT/FiP system were not "*aid*" and did not have to notify it to the European Commission.[690] In reliance upon the position taken by the tribunal in *Micula v. Romania*, the Claimant asserts that at the time of investment in 2010, it was entitled to believe that the Kingdom of Spain was in compliance with EU law.[691]

595. The Claimant contends that the EC's State Aid Decision of 2017 cited by the Respondent is irrelevant to the determination of the Respondent's liability in this arbitration. The EC's

[686] Tr. Day 6, 37:25-38:8.
[687] Cl. Mem., paras 439-444; Cl. PHB, para. 136.
[688] Cl. Mem., paras 445-446; Cl. PHB, paras. 133, 137-138.
[689] Tr. Day 1, 89:17–90:15.
[690] Cl. Closing, slide 33.
[691] Cl. Opening, slide 202, citing *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, December 11, 2013, para. 706 (**CL-103**) ("***Micula* Award**"); Tr. Day 1, 90;22-91:7.

State Aid Decision merely stated that the remuneration for the standard facilities under the RF#3 did not violate state aid because it did not give excessive remuneration that would raise state aid concerns. In turn, as the EC's State Aid Decision addressed neither the proportionality nor the reasonableness of remuneration regime of RD 661/2007, it addressed neither the effects of the Disputed Measures on JGC's specific investment nor whether there was any overcompensation or incompatible state aid to the Solacor Plants under RF#1 if it had stayed in place all the way through from the initial operation of the Solacor Plants until the end of their useful lifetime.[692] As a result, the Claimant asserts, the EC Decision's analysis of proportionality of the aid under RF#3 did not mean that the returns under RF#1 would be incompatible with EU state aid law.[693]

596. With respect to the Respondent's argument that the assessment of Abengoa and Atlantica Yield's presentations and prospectus support the Respondent's case,[694] the Claimant disagrees and points to the evidence of Mr. Zuluaga as follows[695]:

(i) Mr. Zuluaga clarified in his witness statement the context of these statements by saying that Abengoa was not stating that the new remuneration regime was positive but that, once RD-L 9/2013 abrogated RD 661/2007, the subsequent pieces of legislation to be approved by the Respondent would not be worse. At the time of those presentations, the details of the new remuneration system were not known.

(ii) Mr. Zuluaga testified at the Hearing that "what is clear is that this new regulatory framework is different from the prior one"[696] and "the remuneration is lower when we compare both regulatory frameworks."[697]

597. With respect to the Respondent's argument concerning the statement made in the Management report for the financial year 2016[698], the Claimant refers to Mr Zuluaga's testimony in the Hearing `indicating that such statement meant that "*the company can fulfil*

[692] Cl. PHB, para. 139.
[693] Cl. Closing, slide 34; Cl. PHB, para. 141.
[694] Resp. Opening, slides 171-173.
[695] Cl. PBH, para. 137, referring to Mr. Zuluaga's witness statement (CWS-AZ), paras. 12, 14, 17-19, 22 and 25.
[696] Tr. Day 2, [Zuluaga] 102:11-13.
[697] *Ibid.*, 102:19-21.
[698] Resp. Opening, slide 173.

their obligations, and that's the meaning of that sentence. But this is not a judgment about the profitability of the investment or anything related to the profitability of the investment".[699]

(g) The Claimant's position on the standard of protection and the Respondent's breaches of obligations under the ECT

598. The Claimant submits that the Respondent's actions and omissions constitute at the same time breaches of various standards of protection of Article 10(1) of the ECT and entail the Respondent's international responsibility and obligation to repair damages caused to the Claimant.[700]

(i) Stability obligation in Article 10(1) of the ECT

599. The Claimant submits that the fundamental objectives of the ECT are to require the Contracting States to maintain a stable and transparent legal and regulatory framework for energy sector investments, and to provide substantive protections (which include, but are not limited to, fair and equitable treatment) and the procedural mechanism of investor-State dispute settlement, with a view to reducing political and regulatory risks and thus facilitating investments in the energy sector.[701]

600. The Claimant further submits that the provision of a stable legal and business environment is of particular importance in the energy sector where, as in the present case, a substantial amount of capital is typically committed at the outset of a project in order to generate a long-term return. This need for equitable, stable and effective legal regimes to promote investments in the energy sector, and the role of the ECT in this regard, have also been repeatedly recognised by multinational organisations and fora.[702]

601. The Claimant stated in its closing submission on the final day of the Hearing as follows:

> "*Article 10(1) includes the FET standard as applied by ECT tribunals and other international tribunals today. And more importantly, it includes an express*

[699] Cl. PHB, para. 137, referring to Mr. Zuluaga's testimony, Tr. Day 2, [Zuluaga] 105:23-25.
[700] The Claimant in its Memorial focused more on the umbrella clause argument. However, it's focus shifted to the stability obligation and the FET standard in its opening and closing statements at the Hearing and the PHB.
[701] Cl. Reply, para. 80.
[702] *Id*.

> *obligation on the part of the state to provide legal stability, which makes the state's duty to protect stability obligations particularly strong. The state has a sovereign right to regulate. But the ECT imposes very clear limits on actions that generate distrust on the investor because these actions are bad for the investment climate, which is precisely what the ECT is trying to protect.*"[703]

602. Specifically, the Claimant considers that the first sentence of Article 10(1) of ECT imposes a duty on the Kingdom of Spain to provide fundamental stability to the essential characteristics of the legal regime on which the investor relied to carry out its long-term investment.[704] The Claimant asserts that such guarantee of stability does not depend on the existence of any specific commitments provided expressly to the investor.[705] In support of its position, the Claimant cites the tribunal in *Antin v. Spain* which observed that:

> "*the language of Article 10(1) of the ECT is not merely a suggestion or a recommendation for the Contracting Parties (...) The modal verb 'shall' expresses an instruction, command or obligation and therefore compliance with the ECT requires that each Contracting State shall not only encourage but also create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.*"[706]

603. The Claimant emphasizes that the investors in the renewable energy sector have a strong interest in the stability of the regulatory scheme, including, any incentive schemes for renewable energy, and protection from unwarranted government policy changes that could amount to expropriation or a denial of fair and equitable treatment.[707] It is precisely because of the particularities of energy investments that the ECT offers a higher or more robust level of protection than most BITs.[708]

(ii) The FET standard in Article 10(1) of the ECT

604. The Claimant submits that the FET standard embodied in the second sentence of Article 10(1) of the ECT is an absolute standard. It is autonomous and different from and beyond the minimum standard of treatment of the customary international law. The Claimant states that the FET has been consistently interpreted as more protective than the minimum

[703] Tr. Day 6, 24:14-24.
[704] Tr. Day 1, 71:1-6.
[705] Cl. PHB, para. 123.
[706] *Antin* Award, para. 525 (**CL-0182**).
[707] Cl. Mem., para. 1157.
[708] Cl. Rep, paras. 80-83: Cl. Closing, slide 44.

standard of treatment under customary international law.[709] In support of its position, the Claimant cites decisions of previous arbitration cases dealing with claims brought under the ECT including *Plama v. Bulgaria*, *Liman Caspian Oil v. Kazakhstan*, as well as Professor Schreuer and other scholarly opinions.[710]

605. The Claimant contends that the Respondent's position on the object and purpose of the ECT that the "*national treatment*" protection is "*the maximum aspiration of the ECT*"[711] is misguided.[712] The Claimant asserts that this position is contrary to the express provisions of Article 10(1) of the ECT and that Spain's additional obligation to afford "*national treatment*" in Article 10(7) ECT, which is presently not at issue in this arbitration, does not detract from, or override, the other substantive obligations the Respondent expressly undertook under the ECT.[713]

606. The Claimant presents that the link between the FET and long-term stability has been suggested by commentators to serve as the basis for affording the legitimate expectations of investors operating in the energy field comparatively greater protection against changes to regulatory regimes.[714] According to the Claimant, a particularly important element of the FET standard in the ECT is the protection against State conduct that undermines the stability and predictability of the legal and economic framework upon which an investor reasonably relied in making its investment.[715] The Claimant submits that the tribunals dealing with the Spanish CSP cases confirmed that Article 10 of ECT includes an obligation to provide fundamental stability of the economic and legal regime in place at the date of the investment and that the FET protects against changes in the essential

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[709] Cl. PHB, para. 124.
[710] Cl. Mem., para 1134 and footnote 1190, citing *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, para. 163 (**CL-0017**) ("***Plama* Award**") and *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, June 22, 2010, para. 263 (**Cl-0074**) ("***Liman* Award**") and articles of Professor Schreuer, K. Yannaca-Small and Salacuse.
[711] Resp. Rej., para. 1469; Resp. C-Mem., para. 1017.
[712] Cl. Reply, para. 75.
[713] Cl. Reply, para. 76; Cl. Closing, slide.44.
[714] Cl. Mem., para 1134.
[715] Cl. Reply, para 87.

characteristics of the regulatory regime relied upon by investors at the time of investment.[716]

607. In support of its position the Claimant refers to the view expressed by the tribunal in *Eiser v. Spain* stating that:

> "*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 investment. This does not mean that regulatory regimes cannot evolve. Surely they can. […] 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.*"[717]

608. In addition, referring to the award in *Micula v. Romania* followed by the tribunal in *Novenergia v. Spain*, the Claimant points out that the tribunals did not accept the argument that a paradigm change would be lawful when the legal regime had always been unstable; the tribunal upheld that there is a duty on the State to respect essential regulatory conditions used to induce investments, even in the absence of a specific commitment.[718] The Claimant goes on to point out that the *Micula* tribunal did not accept Romania's attempt to justify the change of the regulatory model arguing that the legal framework had always been unstable. The Claimant views the Respondent's argument that the regulatory framework has been dynamic similar to Romania's failed argument.[719]

609. The Claimant submits that the FET standard protects against "a radical or fundamental change to legislation" citing the tribunal in *Novenergia v. Spain* which observed that the FET standard "protect[s] investors from a radical or fundamental change to legislation or other relevant assurances by a state that do not adequately consider the interests of existing investments already made on the basis of such legislation."[720]

[716] Tr. Day 1, 71:1-6.
[717] Cl. Opening, slide 160, citing *Eiser* Award, para. 382 (**CL-0149**).
[718] Tr. Day 1,73:20-74:4.
[719] Tr. Day 1, 74:15-18.
[720] Cl. Opening, slide 163, citing *Novenergia* Award, para. 654 (**CL-0173**); Tr. Day, 1 74:24-75:3.

(iii) Legitimate expectations

610. The Claimant asserts that Spain's key obligation under Article 10(1) is its duty to protect JGC's stability expectations. It cites the tribunal in *Antin v. Spain* holding that[721]:

> *"This does not mean that the legal framework cannot evolve or that a State Party to the ECT is precluded from exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest. It rather means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered –i.e., stripped of its key features –as applied to existing investments in ways that affect the investors who invested in reliance on those regimes."*

611. The Claimant submits that when a State attracts investments promising basic regulatory conditions, it acquires a duty to maintain those conditions central to the investment decision.[722] In seeking guidance from previous cases, the Claimant cites *Total v. Argentina* which held that "*a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations* ..."[723] Relying on the *Total* tribunal's view that "[e]*xpectations based on such principles are reasonable and hence legitimate, even in the absence of specific promises by the government*",[724] the Claimant submits that even if there is no specific commitment from the government in the eyes of the tribunal, the tribunal should also find that there is a breach of Article 10 ECT, a breach of the FET standard, a breach of these obligations to provide stability, to provide fundamental stability in the essential characteristics of the legal regime.[725]

612. The Claimant submits that an investor is entitled to expect that the regulatory framework will remain stable and consistent and, hence, legitimate expectations may also be breached by infringing the implicit requirement for stability and consistency. A clear example of behaviour contrary to stability and consistency is what has been termed as "*roller-coaster*" changes in the law (i.e., consecutive changes in the law that occur within a relatively short

[721] Cl. Closing, slide 43, citing *Antin* Award, para. 532 (**CL-0182**).
[722] Tr. Day 1, 72:19-25; Tr. Day 6, .23:23-24:3
[723] Tr. Day 1, 73:3-6, referring to *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, December 27, 2010, para. 122 (**CL-0109**) ("***Total* Decision**").
[724] *Ibid.*, 73:8-10, citing *Total* Decision, para. 333.
[725] *Ibid.*, 73:11-19.

period of time) because "[s]*tability cannot exist in a situation where the law kept changing continuously and endlessly*."[726]

613. The Claimant states that there is consensus within the international legal community that the most important function of the FET standard is the protection of the investor's reasonable and legitimate expectations.[727]

614. In support of its statement, the Claimant relies upon *Electrabel v. Hungary*, where the tribunal acknowledged that under the ECT the FET comprises an obligation

> *"to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment."*[728]

615. The Claimant considers that stability is a part of the FET obligation under Article 10(1) of the ECT. The Claimant states that since regulatory stability is always a decisive factor for foreign investors when deciding whether or not to make an investment in a particular country, especially in the long-term, denying the FET's role in terms of stability and consistency would be incompatible with the spirit of international investment treaties such as the ECT. It continues that the idea that regulatory stability is a legitimate expectation upon which investors may rely makes particular sense in the context of the ECT, the reason being the explicit text of the first sentence of Article 10(1) of the ECT.[729]

616. The Claimant submits that the clarity of the terms used to make the commitment, assurance or promise is the decisive factor in determining the legitimacy of an expectation which should also have been relied upon by the investor. Relying upon *Micula v. Romania*, the Claimant asserts that it is not necessary for the entire investment to have been solely based on such an expectation, but the legitimate expectation should have been a determining

[726] Cl. Mem., para. 1167, quoting *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Tikaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, para. 254 (**CL-0002**) ("***PSEG* Award**").
[727] *Ibid*., para. 1146, quoting the *Electrabel* Decision, para. 7.75 (**CL-0098**).
[728] *Ibid*., para. 1140, quoting *Electrabel,* Decision, para. 7.74 (**CL-0098**).
[729] *Ibid* ., para. 1159.

factor in an investor's decision to invest, or in the manner or magnitude of its investments.[730]

617. The Claimant also submits that the previous decisions held that the legitimate expectations could be based on specific commitments, but also (as pointed out in the *Masdar* award) the totality of the Spanish legislative regime; commitments made outside of the general legislation could also be taken into account.[731]

618. In this regard, the Claimant cites the tribunal in *SolEs v. Spain* which recalled that investors' legitimate expectations could not only arise from specific commitments, but also "*from provisions of law and regulations* and from statements made by or on behalf of the State for the purpose of inducing investment by class of investors."[732]

619. The Claimant also cites the tribunal in *Cube Infrastructure* which affirmed that it was not necessary that a specific commitment be made to each individual claimant in order for a legitimate expectation to arise as follows:[733]

> *"At least in the case of a highly-regulated industry, and provided that the representations are sufficiently clear and unequivocal, it is enough that a regulatory regime be established with the overt aim of attracting investments by holding out to potential investors the prospect that the investments will be subject to a set of specific regulatory principles that will, as a matter of deliberate policy, be maintained in force for a finite length of time. Such regimes are plainly intended to create expectations upon which investors will rely; and to the extent that those expectations are objectively reasonable, they give rise to legitimate expectations when investments are in fact made in reliance upon them."*[734] [Emphasis added by the Claimant]

620. The Claimant further submits that the tribunal in *Suez v. Argentina* has given strong importance to the protection of legitimate expectations under the FET in international investment law, in particular the investor's reliance upon the representations made by the host State in its legislation.[735] The Claimant quotes the following from *Suez v. Argentina*:

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[730] *Ibid.*, para. 1163, citing *Micula* Award, para. 672 (**CL-0103**).
[731] Tr. Day 1, 71:7-16; See Cl. Opening, slide 157, item 2 (*Masdar* column, referring to para. 511).
[732] Cl. New Cases, para. 47, citing *SolEs* Award, para. 313 (**CL-0209**), referring to *Antin* Award, para. 538 (**CL-0182**).
[733] Cl. New Cases, para. 48.
[734] *Cube* Decision, para. 388 (**CL-0203**).
[735] Cl. Mem., para. 1147.

> *"In examining the various cases that have justifiably considered the legitimate expectations of investors and the extent to which the host government has frustrated them, this Tribunal finds that an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result.*
>
> *Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not accorded protected investments fair and equitable treatment."*[736]

621. The Claimant submits that legitimate expectations are created when a State's conduct is such that an investor may reasonably rely on that conduct as being consistent. It further submits that commitments, promises or assurances attributable to competent organs or representatives of the host State may create legitimate expectations on the investor, irrespective of whether they were explicit or implicit, or whether they were issued generally or specifically. In particular, legitimate expectations may stem from the provisions included in a State's domestic legislation dealing with the regulatory framework applicable to a particular economic sector, be it renewable energy or oil and gas. The Claimant quotes *LG&E v. Argentina* tribunal holding that:

> *"Argentina made these specific obligations to foreign investors, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees."*[737] [Emphasis added by the Claimant]

622. The Claimant submits that legitimate expectations may be linked to what is generally termed as '*regulatory stability*', i.e., the existence and maintenance of a stable and consistent regulatory framework. In this regard, the Claimant cites *Duke Energy v. Ecuador* tribunal which held that:

> *"The stability of the legal and business environment is directly linked to the investor's justified expectations. (...) To be protected, the investors' expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into*

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[736] *Ibid*., para. 1147, quoting *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, para. 207 (**CL-0088**) ("***Suez* Decision**").

[737] *Ibid*., para. 1148, quoting *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, October 3, 2006, para. 175 ("***LG&E* Decision**") (**CL-0058**).

> *account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State."*[738]

623. The Claimant quotes Professor Schreuer as follows:

> *"Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host State will be protected. The legitimate expectations of the investor will rest primarily on the legal order of the host state as it stood at the time when the investor acquired the investment (...) An arbitrary reversal of such undertakings will constitute a violation of FET. While the host State is entitled to determine its legal and economic order, the investor has a legitimate expectation in the system's stability to facilitate rational planning and decision making."*[739]

624. The Claimant submits that the requirement of the existence of '*specific commitments*' applies only to the sub-standard of legitimate expectations of the FET standard. The duty to provide stability in the first sentence of Art. 10(1) ECT applies even though in the instant case there were no specific commitments of legal stability of RF#1 (*quod non*).[740]

625. The Claimant submits that investors are legitimately entitled to believe that the regulatory framework will remain stable and consistent over time, particularly when investing in a state like Spain with "*political, socioeconomic, cultural and historical conditions*" of seriousness and reliability as an investment-friendly State.[741] In this regard, the Claimant quotes the tribunal in *Charanne v. Spain* stating that:

> *"The Tribunal agrees with other tribunals which have concluded, based on the principle of good faith in customary international law, that a State cannot encourage an investor to make an investment (thus giving rise to legitimate expectations) and then disregard the commitments arising out of those expectations."*[742]

626. The Claimant submits that such legitimate expectations may be breached as a result of any subsequent conduct of the host State that contradicts them and that a change to the regulatory framework is an example of conduct of such kind.[743]

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[738] *Ibid*., para 1153, quoting *Duke* Award, para. 340 (**CL-0108**).
[739] C. Schreuer, "*Fair and Equitable Treatment*" in A. K. Hoffmann (Ed.), Protection of Foreign Investments, p. 126 (**CL-0090**), quoted in Cl. Mem., para 1154.
[740] Cl. PHB, para. 125.
[741] C. Mem., para. 1155.
[742] *Charanne* Award, para. 486 (**CL-0009/CL-0009t**), quoted by the Claimant in Cl. Mem., para. 1155.
[743] Cl. Mem., para 1165.

627. The Claimant further submits that the form, content, clarity and specificity of the commitment, promise or assurance, determines the degree to which such a limitation applies, being the limitation absolute if specific commitments, promises or assurances have been made by the host State. Specific commitments are not just those addressed to a particular investor or group of investors, but also those which are "*specific regarding their object and purpose*." The Claimant continues that for the purposes of the analysis of legitimate expectations, it is to note that contractual arrangements entered into by the respondent State are relevant.[744]

(iv) Application of the stability obligations and the FET in Article 10(1) of the ECT

628. Asserting that the Respondent's key obligation under Article 10(1) is its duty to protect JGC's stability expectations,[745] the Claimant claims that it has demonstrated that it had the legitimate expectation under the first sentence of Article 10(1) of the ECT that Spain would not alter the essential characteristics of the remuneration regime relied upon by the Claimant at the time of its investment. In the Claimant's view, the abrogation of the RD 661/2007 feed-in system and its substitution by the radically different new remuneration regime is out of discussion. As a result, Spain is in breach of the first sentence of Art. 10(1) ECT.[746]

629. In addition, the Claimant submits that the Respondent provided the Claimant with specific stability commitments in the form of Article 44(3) RD 661/2007, the July 2, 2010 Agreement, the Comfort Letter to NEXI, Articles 2 to 4 of RD 1614/2010 and the Acceptance Letters. Consequently, Spain is also in breach of the FET standard of the second sentence of Art. 10(1) ECT.

630. The Claimant claims that, given the extent of the Disputed Measures as they have impacted the Claimant's investments, the Respondent has breached its obligations under Article 10(1) of the ECT to accord at all times fair and equitable treatment to the Claimant through

[744] *Ibid*., para. 1166.
[745] Tr. Day 6, 23:20-22.
[746] Cl. PHB, para. 126.

the Disputed Measures taken between 2012 and 2014, which in its view, amounted to a "*paradigm change*" of the original legal regime.

631. The Claimant asserts that each of the measures taken by the Respondent under RF#2 and RF# 3 is in itself contrary to the ECT because they blatantly abrogate the right the Claimant is entitled to under RF#1, and thus the Tribunal does not need to assess those regulatory measures in aggregate, but individually in order to declare them as breaches of the ECT. However, if the Disputed Measures are taken altogether as a whole, it could be considered as an aggravation of the breaches of all ECT standard invoked by the Claimant.[747]

632. The Claimant states that the breaches of Article 10(1) of the ECT committed by the Respondent have lasted since the enactment of each piece of legislation of RF#2 and RF#3 and remain not in conformity with the Respondent's international obligations under the ECT.[748]

633. In support of its claim that the Disputed Measures are in breach of Spain's obligation under Article 10(1) of the ECT, the Claimant cites the conclusion reached by the tribunal in *Antin v. Spain* which reads as follows:

> *"In this case, it is undisputed that through RDL 9/2013 and Law 24/2013, Spain (a) replaced the FIT system by a remuneration system that allowed certain RE installations to obtain a special payment installation by reference to a standard and (b) withdrew the right of priority of grid access and priority of dispatch for RE installations. Moreover, RDL 9/2013, Law 24/2013 and Ministerial Order IET/1045/2014 dismantled all the regime and therefore all the features of the regime provided for under RD 661/2007.*
>
> *... it would necessarily conclude that Spain breached its obligations under Article 10(1) of the ECT by eliminating those features through RDL 9/2013 and Law 24/2013."*[749] [reference to footnote omitted]

634. The Claimant states that the tribunals in the *Eiser*, and *Masdar* cases also found that Spain breached 10(1) of the ECT because the Disputed Measures breached this particular duty.

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[747] Cl. Mem., para. 952.
[748] *Ibid*., para. 953.
[749] Cl. Opening, slide 174 [sic], *Antin* Award, para. 560 (**CL-0182**).

These decisions are the essential precedents because they are based on the same facts in this case, and because they share a consistent reasoning revolving around this duty.[750]

635. The Claimant argues that the cases of *Charanne* and *Isolux*, which did not find Spain to have breached its obligation under Article 10(1), stand in isolation. According to the Claimant, while *Charanne* is distinguished in that the disputed measures concerned were limited to the 2010 measures involving the PV technology sector, *Isolux* related to the same Disputed Measures under review in this arbitration proceeding, but involved PV technology with different facts. The investor in the *Isolux* case invested in October 2012.[751]

636. The Claimant asserts that the Respondent's analysis of the proportionality of the Disputed Measures is flawed and ignores their impact on the Solacor Project.[752] In the Claimant's perspective, while the Respondent suggests that the test of balancing only requires to check the existence of a rational policy and the reasonableness of the act in relation to that policy relying on *AES Summit* and *Electrabel,*[753] The Claimant argues that the proposed test is problematic because it obviates the interests and protection of the aggrieved party and that that is the reason why investment tribunals follow a more balanced approach, like the one proposed in *Occidental v. Ecuador*[754] which required consideration of whether the effects of the measure were disproportionate or excessive in relation to the interests involved, i.e., whether the benefit of realising the State's aim exceeded the harm to the relevant rights of investors.

637. The Claimant contends that the effect of the Disputed Measures on the Solacor Project is so harmful that they cannot be considered proportionate.[755]

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[750] Tr. Day 6, 24:4-9.
[751] Tr Day 1, 75:19-76:3.
[752] Cl. PHB., Section V.C.
[753] Resp. Closing, slide 81, quoting *AES Summit Generation Limited and AES-Tisza Eromu Kft v. Hungary*, ICSID No. ARB/07/22, Award, September 23, 2010, paras. 10.3.7 and 10.3.9 (**RL-0039**) ("***AES Summit* Award**"); and *Electrabel S.A. v. Hungary*, ICSID Case No. Arb/07/19, Award, November 25, 2015 (**RL-0048**) ("***Electrabel* Award**"), para. 179.
[754] Cl. PHB, para. 134, citing *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11, Award, October 5, 2012 (**CL-0153**) ("***Occidental* Award**"*)*, paras. 416, 428-436 and 450; See also Cl. Reply, para. 420.
[755] Cl. PHB., para. 137.

(v) Transparency

638. The Claimant also claims that the Respondent breached the standard of transparency in the process of the consultation and the approval of the Disputed Measures. The Claimant asserts that the Respondent was not transparent in the preparation of the MO IET/1045/2014 which defined the economic parameters. The Claimant argues that Spain did not provide the investors with the calculations and it did not use the expert reports that the Government had committed to BCG or Roland Berger.[756] The Claimant points out that the Council of State Report on the draft parameters noted that the interested parties never had access to the technical calculations supporting the Standard Installations.[757]

(vi) Most Constant Protection and Security (MCPS) and MFN treatment

639. The Claimant submits that the repeal of RF#1 by the Respondent through its successive passing of RF#2 and RF# 3 constitutes a breach of the Respondent's obligation to provide the Claimant with the most constant protection and security (MCPS), as required by the ECT and MFN treatment.[758]

640. The Claimant argues that the MCPS is equivalent to "*full protection and security*" commonly used in international investment treaties, and that several arbitral tribunals, which have considered the meaning of the full protection and security standard, have concluded that this standard obliges the host State not only to secure the physical protection of the investor, but also to provide a secure legal investment environment.[759] Accordingly, the Claimant asserts that host States bound by MCPS (like the Respondent under Article 10(1) of the ECT) are also under an obligation to create and maintain a legal framework that grants security to the investor. In case the State does not comply with it, there is a breach of the ECT.[760]

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[756] Cl. Opening, slide 207; Tr. Day 1, 91:15-21.
[757] Cl. Opening, slide 208, referring to Council of State, Opinion on the draft Order, June 12, 2014 (**C-0590t**).
[758] Cl. Mem., paras. 1320 and 1331; See Cl. Mem., Section XI.
[759] *Ibid*., paras. 1323-1324.
[760] *Ibid*., para. 1326.

641. The Claimant claims that the roller-coaster of legislative changes and the retroactive application of the implementing regulations of the Respondent show that the Respondent has blatantly disregarded the obligation imposed by MCPS and MFN treatment, which requires the Respondent to grant a secure and stable investment environment to investors of another ECT/BIT Contracting State or from third States pursuant to MFN treatment.[761]

(vii) Non-Impairment

642. The Claimant submits that the Respondent has impaired the Claimant's investment with unreasonable and discriminatory measures (i.e., the Disputed Measures) in breach of the Respondent's obligation of non-impairment of the Claimant's investment of Article 10(1) of the ECT.[762]

643. Referring to the phrase in the third sentence of Article 10(1) of the ECT ("no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal"), the Claimant argues that a particular conduct of the host State does not need to be both 'unreasonable' and 'discriminatory' in order to be held as a breach of the ECT. On the contrary, the presence of either of those elements is enough for a breach of the non-impairment standard to take place.[763]

644. The Claimant argues that the non-impairment requirement may be breached by the host State as a result of measures which are considered "*unreasonable*" from either an objective or a subjective viewpoint. On this basis, the unilateral withdrawal of assurances given in good faith to investors to induce them to invest is unreasonable by definition.[764] The Claimant further asserts that the passing of "*discriminatory*" measures may also give rise to a violation of the non-impairment standard.[765]

[761] *Ibid*., para. 1341.
[762] Cl. Mem., paras. 1344; See Cl. Mem., Section XII.
[763] *Ibid*., para. 1347.
[764] *Ibid*., para. 1349.
[765] *Ibid*., para. 1350.

645. The Claimant submits that the Respondent did impair the Claimant's investment by taking Disputed Measures which are unreasonable and discriminatory measures.[766]

(viii) Umbrella clause

646. The Claimant asserts that the Respondent entered into the "*Declaratory Contracts*" under which it committed not to change the regulatory framework applicable to Solacor 1 and Solacor 2. The Claimant submits that the repeal of RF#1 by the Respondent through its successive passing of RF#2 and RF#3 constitutes, first of all, a breach of the Respondent's obligations it entered into with the Claimant as investor as well as the Claimant's investment.[767] Therefore, that repeal constitutes a breach of the Respondent's obligations under Article 10(1) *in fine* of the ECT which 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."*

(ix) Alternative claim under the "Reasonable Rate of Return" theory

647. The Claimant submits that in the event that the Tribunal were to find that all that was guaranteed was a reasonable return as argued by the Respondent, Spain would still be liable for breach of the ECT by introducing changes inconsistent with the reasonable return implicit in the feed-in values originally offered.[768] It argues that the outcome of the regulatory changes passed by the Respondent between 2013 and 2014 did not respect the estimated rate of return that the Respondent allegedly guaranteed for the Solacor Plants and, consequently, the Respondent would have anyway breached the same Article 10(1) ECT standards of protection: FET, MCPS, Non-Impairment and Umbrella Clause.[769] The Claimant claims that under the reasonable rate of return theory, the Respondent would have guaranteed to the Claimant a "reasonable return" of at least 9.5% after taxes (12.7% pre-tax).[770]

[766] *Ibid*., paras. 1353-1382.
[767] Cl. Mem., Section IX.
[768] Cl. Reply, Section VI; Cl. PHB., para. 174.
[769] Cl. Reply, para. 644.
[770] *Ibid*., paras. 649-654; Cl. PHB, para. 175.

(2) The Respondent's position

648. In its opening statement on the first day of the Hearing, the Respondent presented as reality check three figures intended to give the Tribunal a perfect picture of this case.[771] According to the Respondent, the Kingdom of Spain with the Disputed Measures in place is going to devote more than EUR 150 billion to the promotion of renewables, out of which EUR 32.4 billion is earmarked for the promotion and fostering of CSP plants.[772] The Respondent states that with the Disputed Measures in place, 82% of the income of the Claimant's CSP plants comes from public subsidies paid by Spanish consumers, and just 17% comes from the market.[773] According to the Respondent, EUR 1.25 billion would be paid in subsidies to the Claimant's CSP plants during the whole useful life and that figure is more than triple of the investment cost of the Claimant's plants made back in 2010 to 2012.[774] In the Respondent's view, these figures show that the Claimant is asking for further subsidies to be paid by the Spanish consumers.[775]

649. The Respondent's main arguments could be summarized as follows[776]:

(i) While the Claimant attempts to isolate CSP plants from the Spanish electricity system, CSP plants are just a part of the Spanish electricity system.[777] The Spanish regulatory framework on renewable energy has always guaranteed the obtaining of a reasonable rate of return on investment costs according to the cost of money in capital markets in the framework of a sustainable electricity system. Since 1997, Spain has always exercised its sovereign power to regulate in order to ensure the sustainability of the Spanish electricity system and the obtaining of a reasonable rate of return by the renewable projects, adjusting regulatory framework to the reality of the economy.

[771] Tr. Day 1, 116:23-118:5; Resp. Opening, slides 4-5.
[772] Resp. Opening, slide 4
[773] *Ibid.*, slide 5.
[774] *Id.*
[775] Tr. Day 1, 118:3-5.
[776] Resp. Opening, slide 174.
[777] Tr. Day 1, 118:17-22.

(ii) The Claimant knew and should have known that the Kingdom of Spain could and would exercise its sovereign power to regulate in order to guarantee such legitimate public policy purpose.

(iii) Contrary to the Claimant's arguments, there were no stabilization commitments on the part of the Respondent as argued by the Claimant.

(iv) The Disputed Measures, taken with the purpose of resolving the problem of the tariff deficit, are based on the same basic conditions of the prior regulation and maintain the essential elements of the remuneration regime of the CSP plants at the time of the Claimant's investment.

650. In this regard, the Respondent maintains that the Claimant's claim goes against: (i) legislative, arbitral and jurisprudential rulings and precedents; (ii) the knowledge of the sector, the market players and the analysts and (iii) the reality and assessment of the Disputed Measures by the market.[778] In sum, the Respondent has not breached any obligations under the ECT, and the Claimant failed to prove its case.

(a) Principles and objectives of the Spanish electricity system and the hierarchy of rules

651. The Respondent maintains that it has consistently proven its case that the Disputed Measures are the foreseeable result of the performance of the Spanish electricity system in accordance with its principles and objectives.[779]

652. The Respondent explains that the Spanish electricity system is an economic, legal and technical system. The economic viability of the Spanish electricity system rests on its financial self-sufficiency which relies on the principle that the costs of the Spanish electricity system should be paid for with their income, without access to external source of funding. Under this system, the cost of different agents (generators, transporters, distributors and marketing companies) and operators of the market are paid by the same income, i.e., the electricity bill paid by the Spanish consumers.[780] The Respondent submits

[778] Resp. Opening, slide 174.
[779] Resp. PHB, para. 26.
[780] Resp. Opening, slide 8; Tr. Day 1, 119:12-14; Resp. Closing, slide 8.

that this principle was included in Law 54/1997 and remained in Law 24/2013.[781] The Respondent further submits that the economic sustainability of the Spanish electricity system depends on the balance between its revenues and costs.[782] A rational understanding of the Spanish electricity system as an economic structure leads to the conclusion that any situation of imbalance between its revenues and costs, i.e., the tariff deficit, has to be corrected within the Spanish electricity system itself by adjusting its revenues and costs. The Respondent submits that the rational understanding of this Spanish electricity system as an economic structure should lead any prudent investor to the conclusion that if the tariff deficit arises such imbalance has to be resolved within the system, adjusting the costs and the income.[783] In the Respondent's view, the link between subsidies to renewables as cost of the Spanish electricity system and the principle of financial sustainability of the Spanish electricity system has been set in multiple regulatory instruments including RD 661/2007.[784]

653. The Respondent submits that based on the principle of the hierarchy of rules (the hierarchy in the order of the Constitution, laws and royal decree laws as well as Supreme Court jurisprudence (as case law) and then royal decrees), all the mandates contained in a regulation are subordinated to the provision of a law, and no article of a regulation may prevent the introduction of regulatory changes aimed at complying with the provisions of a law. Such hierarchy of rules applies to the Spanish electricity system as it is also a legal system[785]. In this respect, the Respondent submits that royal decrees just develop the principles and rights included in a law with the rank of an Act, and cannot contain a mandate contrary to the principles and rights included in the Spanish Electricity Sector Act.[786] In this regard, the Respondent argues that as any prudent investor would know that, in accordance with the basic principle of hierarchy of norms and the democratic principles embedded in the Spanish Constitution, "*no Government democratically elected can be*

[781] Resp. Opening, slide 9.
[782] Tr. Day 1, 120:17-21.
[783] Tr. Day 1, 120:22-121:3.
[784] Resp. Opening, slide 10.
[785] *Ibid.*, slide 11; See Resp. C-Mem., paras. 202-206.
[786] Tr. Day 1., 122:3-11.

prevented from amending a regulation adopted by a previous Government no longer in power".[787]

654. The Respondent submits that Article 30(4) of Law 54/1997 did not establish a concrete mechanism that needs to be followed to determine a reasonable rate of return. Said article only enabled the Government to perform the actions established by the legislation.[788] The Respondent asserts that in the face of a possible change in the mechanism of subsidies for renewables, the only limit set by Law 54/1997 was that, in all cases, the new implemented model continued to guarantee a "*reasonable rate of return*" to investments.[789]

655. The Respondent states that the Spanish Supreme Court is the ultimate interpreter of the Spanish legal system, and it is the legal body able to deal with appeals against the regulations (royal decrees) issued by the Government. Therefore, it asserts, no diligent investor could ignore the interpretation of the jurisprudence of the Supreme Court on the Special Regime for the renewable energy sector.[790] In this connection, the Respondent asserts that the Supreme Court, in its ruling of December 15, 2005 on the direct challenge against RD 436/2004 denied fixing the remuneration system.[791] The Respondent further asserts that the Supreme Court in its ruling rendered on October 25, 2006[792] on the regulatory changes made to RD 436/2004, expressly denied investors the right to receive a fixed tariff, and held that they only have the right to reasonable profitability. The Respondent quotes this Ruling which held that:

> *"the owners of electricity production installation under a special regime <u>do not have an "immutable right" that the economic system under which they receive premiums remains unchanged</u>. This regime is designed to encourage the use of renewable energies by means of an incentive mechanism which, like all other of its type, has no guarantee that it will remained (sic!) unchanged in the future."*[793]
> [Emphasis added by the Respondent]

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[787] Resp. PHB, para. 28 i).
[788] Resp. C-Mem., para. 304.
[789] *Ibid*., para. 306.
[790] *Ibid*., para. 308.
[791] Resp. C-Mem., para. 312, citing the Supreme Court Judgment of December 15, 2005 (**R-0119**).
[792] Judgment of the Third Chamber of the Supreme Court on October 25, 2006, RCA 12/2005, reference El Derecho EDJ 2006/282164. Legal Basis Three (**R-0120**).
[793] Resp. C-Mem., para. 313, quoting (**R-0120**).

656. The Respondent claims that this exact problem was explained in the Clifford Chance Report reviewed by the Claimant before its investment.[794]

657. The Respondent states that the Spanish Supreme Court, in three rulings rendered in December 2009, reiterated that in no case the right given to economic agents in the electrical sector included the right to the immutability of the economic regime. The Respondent asserts that according to the Supreme Court, the only limitations to the regulatory power of the State are twofold: 1) that the change does not cover returns already received and 2) that the principle of reasonable rate of return is not violated.[795]

658. With respect to the principle of legitimate expectations, the Respondent cites the ruling of the Spanish Supreme Court which stated that:

> *"the principle of legitimate expectations does not guarantee the perpetuation of the current situation, which can be modified within the discretionary powers of both institutions and public authorities to impose new regulations on assessing general interest needs."* [796] [Emphasis added by the Respondent]

659. The Respondent asserts that the Supreme Court issued from April 12, 2012 until November of the same year, a long series of decisions reiterating its jurisprudence on the limits and scope of the concept of reasonable profitability in cases brought by investors challenging RD 1565/2010 and RD-L 14/2010 which modified RD 661/2007.[797]

660. The Respondent argues that the importance of the jurisprudence of the Spanish Supreme Court has been expressly recognized by the *Charanne v. Spain* award which stated that:

> *"508. Although these decisions by the Spanish courts are not binding on this Arbitration Tribunal, they are factually relevant to verify that the investor was unable, at the time of the disputed investment, to have the reasonable expectation that in the absence of a specific commitment the regulation was not going to be modified during the lifespan of the plants".* [798]

[794] Tr. Day 1, 123:6-19; Resp. Opening, slide 12; See Resp. C-Mem., paras. 304-306.
[795] Resp. C-Mem., para. 318.
[796] *Ibid*., para. 321, quoting Judgement of the Third Chamber of the Supreme Court of December 3, 2009, claim. 151/07, "*El Derecho*" reference EDJ 2009/307349 (**R-0123EN**).
[797] Resp. C-Mem., paras. 324-326.
[798] *Ibid*., para. 330, quoting *Charanne* Award, para. 508 (**RL-0049**).

(b) EU Legal Order and State Aid

661. Another argument presented by the Respondent is an argument based on the EU legal order. The Respondent claims that the origin of the promotion of the renewables in Spain is the EU legal order. According to the Respondent[799], the Spanish supportive schemes were approved in order to implement the European Union Directive 2001/77/EC of the European Parliament and of the Council of September 27, 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market[800] and the Directive 2009/28/EC of the Parliament and of the Council of April 23, 2009 on the promotion of the use of energy from renewable sources.[801] The Respondent asserts that these supportive schemes, as state aid, do constitute a public order matter for Spain and therefore they are essential for the resolution of the present disputes.[802]

662. The Respondent submits that the Clifford Chance Report of 2009 gave to the Claimant a very accurate picture of the regulatory framework in which it was investing that included a reference to EU law.[803]

663. Citing the EC Decision on the State Aid SA.40348 (2015/NN) rendered on November 11, 2017[804], the Respondent asserts that the Commission Decision confirmed that (i) the subsidies given to the renewables by the Respondent are state aid within the meaning of Article 107(1) TFEU; (ii) the supportive scheme under the Disputed Measures complies with the rule of proportionality and the purpose of ensuring that the plants may reach a "*level playing field*", by means of recovering the CAPEX and OPEX and obtaining a reasonable rate of return; (iii) the duration limited to the "*legal lifetime*" is assumed correct; (iv) the transparency of the regime under the Disputed Measures and the commitment to review and assess periodically the support regime as a way of guaranteeing its proportionality were welcomed; and (v) all the payments received through the useful

[799] Resp. PHB, para. 31; Resp. Opening, slide 13.
[800] Directive 2001/77/EC of the European Parliament and the Council of September 27, 2001 (**RL-0015**).
[801] Directive 2009/28/EC of the European Parliament and the Council of April 23, 2009 (**RL-0017**).
[802] Tr. Day 1, 125:9-16; Resp. Opening, slide 14.
[803] Resp. PHB, para. 33.
[804] Decision of the European Commission regarding the Support for Electricity generation from renewable sources, cogeneration and waste (State Aid S.A. 40348 (2015/NN)) (**RL-0091**).

lifetime of the installations have to be considered.[805] The Respondent further asserts that the foregoing Commission decision of November 11, 2017 held that as a general comment, "*there is no right to State aid*",[806] and "*in the very specific situation of the present case, where a Member State grants State aid to investors, without respecting the notification and stand-still obligation of Article 108(3) TFEU, legitimate expectation with regard to those State aid payments are excluded.*"[807]

664. The Respondent emphasizes that the proper analysis of the EU regulation, as an essential fact that should shape the legitimate expectations of any investor perceiving State Aid out of a supportive scheme from a Member State, must lead to the conclusion that the Claimant could not have the legitimate expectation to receive *sine die* a specific level of State Aid as it now claims.[808]

(c) The Respondent's position on specific factual issues

(i) Date of investment

665. The Respondent asserts that June 22, 2010 on which the Claimant signed the Sale and Purchase Agreement of Shares[809] should be regarded as the date of the Claimant's investment for the purpose of determining the Claimant's legitimate expectations. In the Respondent's view, the signing of the Sale and Purchase Agreement of Shares is the date on which JGC actually carried out its investment. Accordingly, the Respondent disagrees with the Claimant' position that the alleged July 2, 2010 Agreement (and RD 1614/2010) should be included in the regulatory framework relied on by the Claimant at the time of its investment.[810]

666. The Respondent contends that the Claimant's insistence on the exit clause (buy-back condition if Financial Closing does not occur on or before August 2, 2010) in the Sale and

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[805] Resp. Opening, slides 18-24.
[806] (**RL-0091**), para. 155.
[807] *Ibid*., para. 158.
[808] Resp. PHB, para. 38.
[809] (C-0344)
[810] Resp. Rej., para. 864; Resp. Opening, slide 102.

Purchase Agreement undeniably confirms the Respondent's view that why the Claimant would need an exit clause if the investment had not been entered in the first place.[811]

(ii) Regulatory framework at the time of the Claimant's investment

667. The Respondent states that the regulatory framework on the remuneration regime for renewable energy traces back to Law 54/1997 and includes several successive laws and regulations that amended or superseded one another affecting existing installations, including RD-Laws adopted for urgency reasons. Further, the Respondent insists that the successive renewable energy plans should be considered as well, as a part of the regulatory framework.[812] From this perspective, in the Respondent's view, the regulatory framework at the time of the Claimant's investment is comprised of the following[813]:

(i) Law 54/1997: essential principles of reasonable rate of return and sustainability of the Spanish electricity system.

(ii) 2000-2010 Energy Plan and 2005-2010 Energy Plan (to be collectively referred to Renewable Energy Plans): methodology based on standard facilities.

(iii) RD 2818/1998, RD 436/2004, RD 661/2007 and RD 1578/2008: successive economic regimes applicable to the renewable plants within the limits of Law 54/1997 and always applicable to existing facilities. The Respondent claims that no provision of these RDs has ever prevented their modification or replacement.

(iv) RD-L 7/2006 and RD-L 6/2009: adoption of urgent measures to guarantee the basic principles of reasonable profitability.

(v) Interpretation by the Supreme Court case-law in 2005, 2006, 2007 and 2009 which addressed the precise definition of what the renewable producers could and could not expect.

[811] Resp. PHB., para. 21.
[812] *Ibid.*, para. 46
[813] Resp. Opening, slide 218; See Resp. C-Mem., Section IV.E.

668. The Respondent argues that it has never granted a right to obtain a specific level of premium or regulated tariff during the whole useful life of the plants in Article 30 of EPA 1997 which provided for the rights and obligations of the generators under the Special Regime.[814]

669. The Respondent submits that from an economic point of view, remuneration of renewable energy consists mainly of subsidies that are a cost of the Spanish electricity system. The implementation of the renewable energy required planning by the regulator, who should accommodate the costs of the development of the renewable energy to the forecast of revenues of the Spanish electricity system. This planning has resulted through the successive Renewable Energy Plans which, the Respondent argues, the Claimant has avoided making any reference to.[815]

670. The Respondent submits that the concept of "*reasonable rate of return*" is the cornerstone of the remuneration regime for renewable energy producers.[816] The Respondent further submits that the objective of the reasonable rate of return is "*so as to achieve reasonable profitability rates with reference to the cost of money on capital markets*" as provided for in Article 30(4) of Law 54/1997. In the Respondent's view, within this ambit of the "*reasonable rate of return*", with reference to the cost of money on capital markets, the Respondent has a discretion to make revisions to the remuneration regime applicable to the renewable energy producers embodied at the royal decree level through further revisions to royal decrees or the higher level of legislation such as laws or royal decree laws.

671. From this viewpoint, the Respondent maintains that the concept of a reasonable rate of return is not a static concept, but a dynamic concept,[817] citing decisions of the Spanish Supreme Court rendered from 2005 until 2016[818] in support of its position. In particular, the Respondent quotes the Judgment of the Supreme Court rendered on December 3, 2009 which held in regard to Article 40(3) of RD 436/2004 that the mandatory content of EPA

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[814] Tr. Day 1, 130:1-18.
[815] Resp. Opening, slide 27; Tr. Day 1, 132:1-3.
[816] Resp. Opening, slide 28; Resp. PHB, para 39; Resp. C-Mem., Section IV.C.
[817] Resp. C-Mem., paras. 297-300.
[818] Resp. Opening, slide 30, referring to Judgement of the Supreme Court, October 25, 2006 (**R-0120**); Judgment of the Supreme Court, December 3, 2009 (**R-0123**); and Judgement of the Supreme Court, December 4, 2012 (**R-0126**).

1997 regarding the electricity sector "*does not suggest the standstill or freezing of the remuneration regime for owners of electrical energy installations under a special regime or any recognition of the right of producers under a special regime to the immutability of said regime*."[819]

672. The Respondent describes the details of how the reasonable return was estimated in the course of legislating RD 661/2007 as follows:

(i) Twenty-fifth Additional Provision of Law 54/1997 mandated the Government to promote renewable energies in order to achieve the objective established by the EU of 20% by 2020 and maintained the commitment to 12% of the total energy demand by 2010. These objectives have been taken into account when setting the premiums for these types of installations.

(ii) The Respondent argues that the 2005-2010 Plan[820] already included the definition of the installation types[821] and defined those standard installations according to the same parameters in terms of capacity, CAPEX, OPEX, equivalent operating hours, sales service life and reactive power that are used in the 2014 ministerial order to define the standard installations.[822] The Respondent claims that this is the methodology that has always been used by Spain and that this was well known by the associations of the renewables prior to the Claimant's investment.[823]

In this regard, the Respondent argues that the standard facilities of the Disputed Measures, far from constituting an overhaul of the system and a radical change without precedents, are just an improvement of the same methodology responsive to the evolution experienced by the Sector.[824]

[819] Resp. Opening, slide 33, citing (**R-0123**).
[820] (R-0101)
[821] Tr. Day 1, 136:3-5; Resp. Opening, slide 37.
[822] Tr. Day 1, 136: 9-16.
[823] Tr. Day 1, 138:1-9; Resp. Opening, slide 39.
[824] Resp. PHB, para. 42

(iii) With respect to thermosolar technology, the Regulatory Impact Report on RD 661/2007[825] stated that the proposed regulated tariff value provided an 8% return (IRR in local currency, with own capital) after tax and after 25 years, and that for the market option, a bonus was proposed that ensures an IRR per project of 9.5% for the standard case after 25 years, with a 7.6% minimum and 11% maximum in the limits of the band.[826]

673. The Respondent's argument is built upon the proposition that all royal decrees approved by the Kingdom of Spain since 1997 have always maintained the two same essential principles: the principle of reasonable rate of return and the priority of dispatch.[827]

674. The Respondent states that RD 661/2007 was approved to establish a remuneration regime in substitution of RD 436/2004 which, according to the Respondent, was creating an over-compensation for wind farms.[828] The Respondent states that RD 661/2007 did not imply an increase in the rate of return for renewable energy producers. The Respondent argues that accordingly RD 661/2007 was not well received by renewable energy producers, since they involved a cut to their remuneration regime.[829] However, the Respondent also states that regarding solar thermal technology, RD 661/2007 increased the tariff for these facilities, not to incentivise its implementation, but to compensate the possible auxiliary consumption levels of those plants, which were between 10 and 20 %.[830]

675. The Respondent argues that RD 661/2007 included measures to guarantee economic sustainability.[831] Accordingly, RD 661/2007 changed the remuneration regime to the existing Special Regime within the limits of Article 30(4) of Law 54/1997. The measures taken included disassociation of subsidies from the TMR and updating them according to

[825] Report on Draft Royal Decree Regulating the Activity of Electricity Production under the Special Regime and Certain Installations Using Similar Technologies under the Ordinary Regime (**R-0065**).
[826] Resp. Opening, slide 38, citing (**R-0065**) p.17.
[827] Tr. Day 1, 139:2-8.
[828] Tr. Day 1, 140:10-12; Resp. Opening, slide 43; Resp. C-Mem., para. 1147.
[829] Resp. C-Mem., para. 442.
[830] Resp. C-Mem., para. 444, referring the Regulatory Impact Report (**R-0065**).
[831] See Resp. C-Mem., paras. 436-444.

CPI. It also introduced cap and floor limits for the FiP option in order to avoid the over-remuneration in an unforeseen increase in pool prices.

676. The Respondent asserts that the premiums and tariffs of RD 661/2007 were the means by which to achieve a reasonable rate of return according to the method known by all investors, contrary to the Claimant's argument that RD 661/2007 was a commitment to pay the regulated tariffs and premiums throughout the useful life of the facilities.[832] Specifically, the Respondent maintains that the tariffs set out in RD 661/2007 were linked to the macro-economic, technical and methodological bases outlined in the 2005-2010 Energy Plan, and that it was set in order to provide typical facilities with a profitability of around 7%, with their own resources (before financing) and after taxes.[833]

677. The Respondent stresses that there is no stabilisation commitment in RD 661/2007 and that Article 44(3) of RD 661/2007 is not a "*stabilization commitment*."[834] The Respondent asserts that its argument is based on the literal interpretation of Article 44(3) of RD 661/2007, the principle of regulatory hierarchy, legislative precedents and the Spanish Supreme Court jurisprudence, contemporary interpretations and arbitral precedents.[835]

678. The Respondent explains that Article 44(3) of RD 661/2007 established that in the year 2010 the Government could review the remuneration scheme of RD 661/2007, taking into account the objectives of the Renewable Energy Plan. Thus, Article 44(3) referred to the specific kind of revision related to the Renewable Energy Plans. After limiting the scope of the revision, the Respondent argues, it clearly stated that those specific revisions, not any kind of revision, could not affect existing installations. The Respondent submits that the revisions adopted by the Disputed Measures were not that kind of specific revision envisioned by Article 44(3). The Respondent explains that these revisions were made due to the fact that there was a sustainability problem in the Spanish electricity sector and

[832] Resp. C-Mem., paras. 449-450.
[833] *Ibid*., paras. 452-453.
[834] Resp. Opening, slide 51; Tr. Day 1, 144:4-7.
[835] Resp. C-Mem., paras. 464-488.

renewable energy generators were obtaining an overcompensation.[836] It was a revision due to a failure in the economic supportive scheme to the renewables.[837]

679. In this regard, the Respondent points out that the Clifford Chance Report included a statement that "the effects of a possible modification of the economic regime established in RD 661/2007 on solar thermal plants included in its scope would be additional to those modifications introduced by the reviews set out above."[838]

680. Based upon the literal interpretation of Article 44(3) of RD 661/2007, the Respondent argues that the scope of grandfathering was limited to the revisions provided in this section, i.e., the revisions which necessarily must be performed "*in 2010*" and every "*four years*" thereafter in relation to the implementation objectives of the Renewable Energy Plans. Specifically, the Respondent points out that Article 44(3) did not refer to (i) the update of the CPI; (ii) the possibility of introducing tax or other measures that would directly or indirectly impact the return of the plants; (iii) the years of useful life of the plants; (iv) the burning of gas; or (v) the operating hours benefitting from the subsidies. Nor did it mention (i) the reactive power supplements or any other supplements; or (ii) the obligation that all the energy produced be subsidized.[839]

681. The Respondent contends that the Claimant's case is quite tricky in this regard, because they rely on the Article 44(3) to conclude that it gave them a stabilisation commitment not only on the tariff, which was the only element referred to in Article 44(3), but on all the elements of the supportive scheme. It points out that none of the other elements such as the back-up gas, useful life, the equivalent operating hours and the tax were referred to in Article 44(3) of RD 661/2007. The Respondent stresses that it is clear that this article is not a stabilisation commitment.[840]

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[836] Tr. Day 1, 242:12-15.
[837] *Ibid*., 242:19-21.
[838] Resp. PHB, para. 49.
[839] Resp. Opening, slide 53; Tr. Day 1, 144:14-22.
[840] Tr. Day 1, 243:4-13.

682. The Respondent submits that the evolution of the regulatory framework and the successive amendments affecting existing plants prove unequivocally that there was no stabilization commitment and that any investor would be aware of the absence of petrification clauses.[841]

683. The Respondent argues that the wording of Article 40(3) of RD 436/2004 is similar to that of Article 44(3) of RD 661/2007. The Respondent cites the Spanish Supreme Court judgements[842] holding that Article 40(3) of RD 436/2004 did not impede RD 661/2007.

684. The Respondent submits that none of the arbitral awards rendered so far regarding the Disputed Measures of Spain including *Charanne, Isolux*, *Novenergia*, *Eiser* and *Antin* considered Article 44(3) of RD 661/2007 nor Article 4 of RD 1614/2010 as a stabilisation commitment.[843] The Respondent cites *Charanne* tribunal holding that:

> *"In this case, the Claimants could not have the legitimate expectation that the regulatory framework laid down by RD 661/2007 and RD 1578/2008 would remain unchanged during the entire lifespan of their plants. Accepting such an expectation would, in fact, amount to freezing the regulatory framework applicable to eligible plants, even though the circumstances may change…"*[844] [Emphasis added by the Respondent]

685. The Respondent also argues that the industrial sector was aware of the fact that Article 44(3) of RD 661/2007 was not a stabilisation commitment, pointing out the explanation of Association of Renewable Energy Generators (APPA) to the sector that any rational investor, when planning facilities of this type, must consider the risk that such remuneration could be lowered.[845]

686. The Respondent submits that RD-L 6/2009 is not a commitment to maintain unchanged the supportive scheme. To the contrary, through RD-L 6/2009 the Government sent clear messages to the whole sector that the Government was worried about the tariff deficit and that it was going to adopt all the necessary measures to ensure the sustainability of the system and that those measures to control the tariff deficit would impact on the

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[841] Resp. PHB, p. 48.
[842] (**R-0120**) and (**R-0123**).
[843] Tr. Day 1, 145:22-146:4; Resp. PHB, para. 49.
[844] Resp. Opening, slide 57, quoting *Charanne* Award, para. 503 (**RL-0049**).
[845] Tr. Day 1, 146:5-13, referring to (**R-0295**) dated March 2007 commenting on the draft of RD 661/2007 in Resp. Opening, slide 59.

remuneration to the renewables. Another message, the Respondent asserts, was that this Royal Decree law empowered the Government to delay or suspend the entry into operation of plants that were already registered.[846]

687. The Respondent denies the Claimant's argument that the Council of Ministers' Resolution of November 13, 2009[847] was a new commitment because the Government was willing to absorb more installed capacity in the CSP sector.[848] The Respondent contends that this Resolution decided the staggering of the commissioning of CSP plants into four stages and that it meant that Solacor 1 and Solacor 2, which were classified in stage 2, were not allowed to sell energy prior to January 2011.

(iii)Nature of RAIPRE

688. The Respondent explains that the registration of the Solacor Plants with both Pre-Assignment Register and RAIPRE has always responded to the sole purpose of controlling and monitoring the energy supplied to the grid by all the generators.[849] Citing the tribunal in *Charanne v. Spain*,[850] the Respondent contends that the registration in RAIPRE was simply an administrative requirement to be able to sell energy and did not imply that the facilities registered had an acquired right to a particular remuneration.[851] The Respondent asserts that this registration does not generate any right to maintain a specific and unchangeable remunerative regime.[852] Similar consideration could be made about the registration with Pre-Assignment Register.[853]

(iv) Alleged July 2, 2010 Agreement and RD 1614/2010

689. As stated earlier (see para. 665 *supra*), the Respondent argues that the Claimant invested on June 22, 2010, and thus the alleged July 2, 2010 Agreement could not have shaped its

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[846] Tr. Day 1, 146:22–148:14; Tr. Day 6, 54:17-24; See Resp. C-Mem., paras. 489-495.
[847] Ruling of November 19, 2009, from the Secretary of State of Energy, by which the Ruling of the Council of Ministers of November 13, 2009 was published (**R-0098**).
[848] Tr. Day 1, 149:4-14; See Resp. C-Mem., paras. 507-520.
[849] Resp. PHB, para. 54.
[850] *Charanne* Award, para. 510 (**RL-0049EN**).
[851] Resp. Opening, slide 66.
[852] Resp. PHB, para. 55.
[853] *Ibid.*, para. 56.

expectations.[854] The Respondent adds that for the purposes of the Claimant's legitimate expectations, it makes no difference whether June 22 or July 28, 2010 (as claimed by the Claimant) is taken as the investment date as the alleged July 2, 2010 Agreement is no more than a public consultation in the process of approval of a Royal Decree, which in no way constitutes a bilateral commitment by the Government.[855]

690. The Respondent disagrees with the Claimant's argument that RD 1614/2010 put into law the agreement between the Respondent and the CSP industry association (Protermosolar) reached on July 2, 2010.[856] The Respondent contends that the so-called "*July 2 2010 Agreement*" could not be in the nature of a binding "*Agreement*" as claimed by the Claimant.[857] The Respondent submits that the July 2, 2010 Agreement simply reflects the consensus between the Ministry of Industry and the representative associations of the wind and solar thermal sectors along the essential lines of the draft regulation which ultimately became RD 1614/2010.[858] The Respondent claims that it has extensively proven beyond any reasonable doubt that RD 1614/2010, far from being the result of a give and take negotiation between the wind and CSP sector and the Spanish Government, was approved following a procedure of public consultations with the sector, for the sole purpose of guaranteeing the sustainability of the Spanish electricity system, which supports the cost of the subsidies to renewable energies.[859]

691. The Respondent contends that RD 1614/2010 did not contain any commitment or pact between the Government of Spain and the wind and CSP sectors, but, on the contrary, constitute unilateral actions dictated by the regulator in the exercise of their powers.[860] The Respondent states that accordingly RD 1614/2010 is not an agreement with the CSP sector either.[861] In the Respondent view, the fact that in the drafting of RD 1614/2010 the opinion of the solar thermal sectors was sought and even if support or acceptance of the reform was achieved by the operators of the sector does not alter (i) either its legal nature *erga omnes*,

[854] Resp. Opening, slide 223.
[855] Resp. Rej., para. 865.
[856] Cl. Mem., para 19.
[857] Resp. Opening, slides 70-72.
[858] Resp. C-Mem., para. 602.
[859] Resp. Opening, slide 69; Resp. PHB, para. 57.
[860] Resp. C-Mem., para. 626.
[861] Tr. Day 1., 154:20.

(ii) its content, (iii) or the possibility of being repealed by further measures aimed at achieving the sustainability of the Spanish electricity system, if macroeconomic circumstances so require.[862]

692. The Respondent specifically argues that Article 4 of RD 1614/2010 did not include a stabilization commitment.[863] The Respondent maintains that Article 4 merely limited itself to extending the provisions of the second paragraph of Article 44(3) of RD 661/2007 to plants that, by the application of RD-L 6/2009, could be excluded from it.[864] In this regard, the Respondent points out that the proposal of Protermosolar to include the State's pecuniary liability clause in RD 1614/2010 in case of an amendment to the economic regime was rejected by the Government.[865]

693. The Respondent considers this RD-L 14/2010 as the acid test showing that there was no agreement and that the Government was able to approve a change. The Respondent points out that the Government changed the remuneration of the CSP sector by imposing an additional toll on the CSP sector just 16 days after RD 1614/2010.[866]

694. The Respondent submits that through speeches of the Energy Secretary General, from the Ministry, from the preambles of the regulation, the Government declared that it was always empowered to adopt the necessary measures to adjust the regulation, within the limit of the reasonable rate of return.[867]

695. The Respondent further submits that those explanations and understanding of the regulatory framework explained above were shared as well by the industry sector, the operating firms, and the law firms before or contemporaneously to the Claimant's investment.[868] The Respondent argues that that should be an essential element in assessing the expectations of the Claimant in this case.[869]

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[862] Resp. C-Mem., para 601.
[863] Tr. Day 1, 153:8-9.
[864] Resp. C-Mem., para. 632.
[865] Tr. Day 1, 153:10-19; Resp. Opening, slide 74.
[866] Tr. Day 1, 154:25-155:8.
[867] Tr. Day 1, 156:10-22.
[868] Tr. Day 1, 156:23-157:3; Resp. Opening, slides 85-99; Tr. Day 1, 158:22-24.
[869] Tr. Day 1, 160, L4-5.

(v) In response to the Claimant's argument on "declaratory contract"

696. The Respondent contends that the specific communications in the letters of March 2011 that the Claimant refers to as "*acceptance letters*"[870] did not commit a specific economic regime for the whole useful life of the facilities, but they were merely informative of the current regime in force at that time.[871] It also points out that the "*merely administrative communications*" were dated after the Claimant's investment which could, therefore, in no way be the basis for the Claimant's alleged expectations.[872]

697. The Respondent criticises that the award in *Masdar v. Spain* cited by the Claimant in support of its position made a gross mistake. The Respondent points out that the *Masdar* tribunal mistakenly quotes a phrase from the Offering Letters from the SPVs, while the Acceptance Letters did not include such quoted phrases.[873]

(vi)In response to the Claimant's arguments on legitimate expectations

698. As noted earlier (see para. 689 *supra*), the Respondent claims that the legitimate expectation of the Claimant should be determined at the time of the Claimant's investment, which, in the Respondent's view was June 22, 2010, when the Claimant purchased shares in the Solacor SPVs.[874] The Respondent contends that accordingly the alleged July 2, 2010 Agreement is a post-dated fact to the Claimant investment and, as such, could not have shaped its expectations.[875]

699. The Respondent denies the existence of the legitimate expectations of the Claimant because the facts do not support them. Specifically, the Respondent contends that[876]:

(i) subsidies to renewable technologies are State Aid under EU law. As there is no right to State Aid under EU law, subsidies cannot be unlimited or disproportionate;

[870] Acceptance letter from the Director-General for Energy Policy and Mining to Solacor Electricidad Uno of March 1, 2011 (**C-0295**) and Acceptance letter from the Director-General for Energy Policy and Mining to Solacor Electricidad Dos of March 1, 2011 (**C-0297**).
[871] Tr. Day 1, 228:9-16.
[872] Resp. PHB, para. 60; Tr. Day 1, 229:4:8.
[873] Tr. Day 1, 228:17-229:3.
[874] Tr. Day 1, 160:13-161:10; Resp. Opening, slides 101 and 102.
[875] Resp. Opening, slide 223.
[876] *Ibid.*, slide 221.

(ii) precisely because of the power of the State to regulate, unless there is a specific stability commitment, no investor can have the expectation that a regulatory framework will not be modified.[877] The Claimant invested in a complex regulatory framework, presided by the principle of hierarchy, in which there have never been stabilization commitments;

(iii) the leitmotiv of the regulatory changes affecting existing installations from 2006 to 2010 has always been to guarantee economic sustainability and to avoid over-compensation above a reasonable return;

(iv) all those regulatory changes have been vindicated by several decisions of the Spanish Supreme Court issued since 2005;

(v) the limit to any regulatory change has always been the principle of "*reasonable return*" set out by Article 30(4) of Law 54/1997; and

(vi) the Respondent has always followed the same methodology based on parameters of standard facilities to calculate the subsidies to renewables without financial cost being born.

700. The Respondent contends that based upon the Respondent's understanding of more than 100 cases rendered all along 2005, 2006, 2007, 2009, 2011 and 2012 as well as other relevant declarations made by laws or senior managers of the relevant Ministry, objectively, legitimate expectations of the Claimant could not be warranted.[878] The Respondent emphasizes that the best proof of the central nature of the judgments of the Supreme Court for the resolution of this arbitration can be found in the due diligence carried out by Clifford Chance at the time of the Claimant's investment. The Respondent submits that the study of this case-law led to the conclusion that the measures in dispute were foreseeable and in accordance with the essential elements of the remuneration scheme for renewables at the time of the Claimant's investment.[879]

[877] Tr. Day 1, 219:12-16.
[878] Resp. Opening, slide 80.
[879] Resp. PHB, para. 53.

701. The Respondent contends that the Claimant's due diligence was short of what it should have done. The Respondent further contends that the due diligence of the Claimant prior to its investment shows that the real expectations of the Claimant at the time of the investment were the same as the Kingdom of Spain is explaining in this proceeding.[880]

702. The Respondent argues that the Claimant excessively relied on Abengoa as evidenced by the documents presented by the Claimant[881] including (i) explanations about the distinction between regulated tariff and premium option in April 2009,[882] (ii) Mr. Soler's explanations to JGC on RD-L 6/2009 and retroactivity in May 2009;[883] and Mr. Soler's emails regarding the Government agreement with CSP sector in July 2010.[884] The Respondent argues that it is not admissible for the Claimant to rely on any inaccurate or simply wrong representation or description of the regulatory framework made by Abengoa and its employees like Mr. Soler and Mr. Seage, who are not qualified as legal experts or advisors of the Claimant, under such circumstances.[885]

703. The Respondent further contends that the reports of the due diligence presented by advisors and consultants to the Claimant support the Respondent's case rather than the Claimant's.

704. Specifically, the Respondent argues that Lovells' memorandum on the Official Commissioning Certificate and Right to the Feed-in tariff issued in December 2009[886] and Lovells' Due Diligence Reports issued on July 15, 2009[887] and April 19, 2010[888] do not support the Claimant's claim. The Respondent argues that Lovells under no circumstances told JGC that once the plants were registered, they would be subject to RD 661/2007 throughout their operational life, nor that the "*supposed agreement of July 2010*", would be binding for the Government of Spain in such a way that it would be deprived of its

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[880] Tr. Day 1, 161:23–162:3.
[881] Resp. Opening, slide 103.
[882] (**C-0385**)
[883] (**C-0129**), (**C-0537**), (**C-0538**) and (**C-0551**).
[884] (**C-0215**) and (**C-0234**).
[885] Resp. PHB, para. 66.
[886] (**C-0568**)
[887] (**C-0566**)
[888] (**C-0567**)

regulatory power.[889] The Respondent contends that the scope of those reports was limited and did not include a comprehensive analysis of the regulatory framework.[890]

705. The Respondent further submits that Garrigues' reports were limited to the analysis of the main administrative and environmental aspects related to the permits, licenses and authorisations in relation to the construction of the Solacor Plants[891] or their corporate organization, the main agreements and real estate matters[892], and as such they did not analyse the applicable regulatory framework.[893]

706. The Respondent also points out the Pöyry reports issued in November 2009[894] and February 2010[895] stated that RD-L 6/2009 was aimed primarily at tackling the tariff deficit which was one of the major problems haunting the Spanish electricity system. In particular, the Respondent states that the second Pöyry report included a response to Solacor's questions asking for an explanation on the tariff deficit in relation to the increase of CSP projects. The Respondent considers that Pöyry's answer was quite aligned with the explanation of the Respondent as it showed a clear relationship between the tariff deficit and the evolution of renewables.[896] Thus, the Respondent asserts that the Claimant should have foreseen that the premiums might be reduced in the interest of solving the unsustainability of the Spanish electricity system.

707. The Respondent states that the Altermia's technical due diligence report[897] showed that in 2010 Altermia considered the investment costs and the operation and maintenance costs of Solacor 1 and Solacor 2 to be excessive in comparison to other similar investments.[898]

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[889] Resp. Rej., para. 878.
[890] Resp. Opening, slides 103-105; Tr. Day 1, 163:2-22; for detailed arguments, see Resp. Rej., paras. 880-889.
[891] (**C-0634**) and (**C-0635**).
[892] (**C-0632**) and (**C-0633**).
[893] Resp. Opening, slides 106-107; Tr. Day 1, 163:3-10; See Resp. Rej., paras. 890-898.
[894] (**C-0623**)
[895] (**C-0624**)
[896] Resp. Opening, slides 108-109; Tr. Day 1, 164:11-165: See Resp. Rej., paras. 899-909.
[897] (**C-0625**)
[898] Tr. Day 1, 165:9-21, referring to Resp. Opening, slide 110; See Resp. Rej., paras. 910-917.

708. With respect to the insurance consulting report of AON, the Respondent refers to the warning in the due diligence reports of AON[899] on compliance risk which reads that:

> *"this environment is dynamic and therefore it is possible that the regulatory framework will change and that Solacor Electricidad Dos, S.A. will have to make unforeseen investments so as to be able to continue its activity."*[900]

709. The Respondent puts particular emphasis on the due diligence report issued by Clifford Chance for the Lenders on August 24, 2009.[901] The Respondent asserts that this report "*far from supporting Claimant's case, supports each and every pillar of*" its case and shows that the expectations of the Claimant at the time of the investment were consistent with the Respondent's case.[902]

(1) First of all, the Respondent points out that the Clifford Chance Report included as applicable regulatory framework EU regulation and 2005-2010 Energy Plan in addition to EPA 1997, RD 661/2007 and RD-L 6/2009.[903]

(2) Second, none of the seven vested rights claimed by the Claimant[904] was defined as such by Clifford Chance in its report.[905] With respect to the right to burn back-up fuel, the Respondent states that Clifford Chance explained that it was not a right, but a technical measure.[906]

(3) Third, the Respondent asserts that Clifford Chance emphasised the relevance of the principle of reasonable rate of return in reliance upon the 2006 rulings of the Supreme Court of Spain.[907]

(4) Fourth, the Respondent states that Clifford Chance clearly established the distinction between the revisions envisaged in RD 661/2007 and any other revision that the

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[899] (**C-0631**)
[900] Resp. Rej., para. 921, quoting Chapter 2, Section 1.1.2. of (C-0631), p. 11; Resp. Opening, slide 111.
[901] (**C-0574**)
[902] Tr. Day 1, 116:13-22; Tr. Day 1, 165:22-166:2; Resp. Opening, paras. 112-120; see also Resp. Rej., paras. 927-943.
[903] Tr. Day 1, 166:3-18, referring to Resp. Opening, slide 112; Resp. Rej., paras. 929-930.
[904] Cl. Reply, para. 595.
[905] Tr. Day 1, 166:19-167:8, citing Resp. Opening, slide 113; Resp. Rej., paras. 931-935.
[906] Resp. Rej. Para. 932; Tr. Day 1, 167:18-21, citing Resp. Opening, slide 115.
[907] Resp. Rej., paras. 941-942.

Government could approve and that for the purpose of explaining those additional modifications of RD 661/2007, Clifford Chance referred to the rulings of the Supreme Court rendered in 2005 to 2007, although the Claimant argues that these rulings are not applicable to this case.[908]

(5) Fifth, the Respondent points out that Clifford Chance used the word "*retroactivity*" in the sense that if the measures did not affect the payment already made, they could not be considered as retroactive, differently from that used by the Claimant.[909]

(6) Finally, the Respondent points out that the Clifford Chance Report indicated that any prudent investor could predict further changes in the following words:

> *"With regard to the predictability of a new rule reducing the current tariffs and premiums received by solar thermal plants in operation, it would seem this is quite a real possibility, taking into account especially the short period of time between the entry into force of RD 436 and that of RD 661/2007."*[910]

(7) The Respondent further points out that the Supreme Court of Spain in 2016[911] applied those same criteria and concluded that the Disputed Measures were predictable and were consistent with the principle of the reasonable rate of return.[912]

710. The Respondent contends that the Claimant's reliance on the "*campaign*" of some of the Spanish agencies were not warranted.[913] The Respondent argues that there was no such "*campaign*."[914] It also claims that mere power point presentations of CNE employees were not addressed to particular investors. Furthermore, the Claimant did not see any of these documents prior to investment.[915] The Respondent argues that at the time that the presentations were issued, *Invest in Spain* was a private law entity, with functional and financial autonomy, the only connection with the State being that it was financed with public capital. *Invest in Spain* has not carried out functions involving public prerogatives

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[908] Tr. Day 1, 167:22-168:14, citing Resp. Opening, slides 116-117; Resp. Rej. paras 936-941.
[909] Tr. Day 1, 168:19-169:10.
[910] Resp. Opening, slide 119 quoting (**C-0574**); Tr. Day 1, 169:11-20; Resp. Rej., para. 9.
[911] Judgement No. 1964/2016, rendered in July 2016 by the Supreme Court, Contentious-Administrative Division Court Three (**R-0192**).
[912] Tr. Day 1, 169:25–170:11.
[913] Resp. Rej., para. 759.
[914] *Ibid.*, para. 758.
[915] Resp. Opening, slide 223; Resp. Rej., para. 752.

now or previously.[916] It also argues that CNE does not have the role of attracting investment, because it is a Government advisory body.[917] The Respondent disagrees with the Claimant's view of CNE as the regulator of the sector. It considers CNE as the supervisor of the relationships between the different operators of the sector.[918]

711. The Respondent further alleges that the internal documents within JGC as well as those documents relating to the negotiation between JGC and Abengoa indicated that JGC was aware of the risks involved in the regulatory change and that it has accepted that risk.[919] In this regard, pointing out that the Loan Agreements and EPC Contracts included provisions of a change in the regulation, the Respondent argues that the Lenders and the parties were expecting a change in the regulation.[920]

712. The Respondent contends that the letter issued by the Ministry addressed to the Chairman of NEXI[921] is not a comfort letter, and even if it could be viewed as such, such letter does not create legally enforceable obligations.[922] The Respondent asserts that it was informative of the fact that the Ministry initiated the procedure for the approval of a revised regulation for CSP technology reducing its remuneration.[923] The Respondent also argues that NEXI was aware that the remuneration regime for the Solacor Plants could change. In the Respondent's view, NEXI assumed regulatory risk in May and June, 2010 based upon the email exchanges between Mr. Yamazaki and Mr. Soler[924] and the exchanges of emails between Naoshi Tamaru of NEXI and Messrs. Ikeda and Yamazaki of JGC in June 2010.[925]

713. The Respondent contends that none of the press releases invoked by the Claimant (official press release after the approval of RD 661/2007, official press releases from November 13, 2009 and December 15, 2009 related to the resolution of the Council of Ministers, the

[916] Resp. Rej., para. 748.
[917] *Ibid*., para. 754.
[918] Tr. Day 1, 119:15-120:2.
[919] Resp. Opening, slides 123-124; Resp. Rej., paras. 948-958.
[920] Tr. Day 1, 171:18-172:23, citing Resp. Opening, slides 125-127.
[921] (**C-0261**).
[922] Resp. Opening, slide 121; see Resp. Rej., paras. 964-969.
[923] Resp. Opening, slide 224.
[924] Tr. Day 1, 171:3-7, referring to (**C-0536**).
[925] Resp. Rej., para. 954; Email dated June 4, 2010 from Naoshi Tamaru of NEXI to Messrs. Ikeda and Yamazaki of JGC (**R-0378**).

official press releases of July 2, 2010 and the official press release from December 3, 2010 announcing the approval of RD 1614/2010) contained any specific commitments assumed by the Respondent never to modify the economic conditions of RD 661/2007 in the future. Neither did these press releases contain any specific commitments to JGC or its investment.[926] The Respondent further contends that in no case did the Claimant accredit that it made its investment by relying on said press releases or even that it had seen them.[927]

714. The Respondent requests that the Tribunal should also consider the request for negative inferences filed by the Respondent because of the failure of the Claimant to produce the internal legal assessment made by JGC and ordered to be produced by the Tribunal.[928]

(d) Disputed Measures

(i) The Legitimacy of the Disputed Measures

715. The Respondent clarifies that it is not invoking a state of necessity, but states that it considers that the economic circumstances surrounding the investment and the Disputed Measures are essential to assess the Claimant's expectations.[929]

716. The Respondent asserts that the economic circumstances in Spain were severe at the time of the Claimant's investment and the Claimant was aware of the fact that it was investing in the middle of a severe crisis in Europe.[930] According to the Respondent, due to the international crisis in 2007, the Spanish economy suffered a severe economic crisis after 2007. The GDP growth rate became negative and the economy contracted by 3.6% in 2009 and the economy continued contracting in 2011 and 2012. Unemployment rate grew from 8% in 2007 to 25% in 2012, and 26.9% in 2013. The fiscal position of the Government of Spain significantly deteriorated as a result. Spain started running budget deficits and by 2012 it exceeded 10% of GDP. The accumulation of budget deficits between 2008 and

[926] Resp. Rej., paras. 1040 and 1042.
[927] *Ibid*., paras. 1041.
[928] Resp., PHB, para. 65, referring to the Respondent's Request for Negative Inference of September 18, 2018.
[929] Tr. Day 1, 173:14-19.
[930] Tr. Day 1, 173:20-24.

2012 resulted in an increase in Spain's Government debt from 39% of GDP in 2008 to 85% of GDP in 2012.[931]

717. Due to the economic crisis, the revenues in the electricity system were negatively influenced by lower demand for electricity.[932] The Respondent submits that it was obvious that the impact on the electricity demand had to be reflected in the subsidies to the renewables, because at the end of the day, all the subsidies were paid by the Spanish consumers.[933]

718. Referring to the first Econ One Report, Annex D (Figure 25), the Respondent states that from 2007 and coinciding with the passing of RD 661/2007, which was the turning point, the tariff deficit sharply increased until the Disputed Measures entered into force.[934]

719. The Respondent states that the cost of subsidies to renewables increased by 816% between 2005 and 2013, and that the Government increased the electricity bill paid by Spanish consumers by 61% between 2007 and 2014. The Respondent emphasises that under the severe economic circumstances with the high unemployment rate in the contracting economy, there was simply no room for further increases of the electricity bills to consumers.[935] The Respondent considers that the explanation above is essential to shape the legitimate expectations of the Claimant in this proceeding.[936]

720. The Respondent states that it entered into a Memorandum of Understanding[937] with the European Union on July 20, 2012 as a result of the need to make an adjustment in the framework of the financial crisis. One of the reforms aimed at correcting macroeconomic control measures to resolve structural imbalances in the Spanish economy in this Memorandum of Understanding included the "*electricity tariff deficit in a comprehensive way*."

[931] Resp. Opening, slides 132-133.
[932] Resp. Opening, slide 134.
[933] Tr. Day 1, 174:12-18; Resp. Opening, slide 134.
[934] Resp. Opening, slide 135, referring to Annex D of the Econ One First Expert Report (Figure 25) (RER-EO1).
[935] Tr. Day 1, 175:5-25, referring to Resp. Opening, slide 138.
[936] Tr. Day 1, 176:1-3.
[937] (**RL-0050**).

721. In sum, the Respondent submits that in adopting the Disputed Measures the Kingdom of Spain has limited itself to exercise its regulatory power within limits of the law, ensuring the maintenance of the essential elements of the regulation, following all the requirements of transparency and acting in a proportionate manner to tackle the tariff deficit, which is a legitimate public purpose. The Claimant knew and should have known that the Respondent could and would exercise its sovereign power to regulate for such a legitimate public purpose. The Disputed Measures are based on the same basic conditions of the prior regulation: (i) pool plus complement binomial, (ii) installation types, (iii) priority of dispatch, (iv) priority of access, and (v) a reasonable and dynamic rate of return on investment cost.

722. The Respondent criticizes that before arguing the existence of a radical and disruptive change, the Claimant should have at least defined the essential elements of the remuneration regime it relied on at the time of the investment, but it has failed to do so.[938]

(ii) Measures under Law 15/2012 and RD-L 2/2013

723. The Respondent claims that it has been proven that the first Disputed Measures in these proceedings, i.e., measures under Law 15/2012 and RD-L 2/2013 (which the Claimant refers to as RF#2) were intended to address inefficiencies in the remuneration of CSP plants in a proportional manner or for legitimate and reasonable public purposes, with no discriminatory effect.[939]

724. The Respondent submits that to address tariff deficit problems, it introduced a number of measures including the 7% TVPEE to increase the incomes for the Spanish electrical system and to reduce all the costs of the system affecting all operators, not limited to the CSP sector.[940]

725. The Respondent explains that CNE made a report on March 7, 2012[941] proposing both short-term and medium-term measures to tackle the tariff deficit. According to the

[938] Tr. Day 6, 64:15-20.
[939] Resp. PHB, para. 68.
[940] Resp. Opening, slide 140; see Resp. C-Mem., paras. 760-801.
[941] CNE Report 2/2012 (**R-0113**).

Respondent, the Disputed Measures applied the proposals (both short-term and medium-term measures) made by CNE in this report.[942]

726. Specifically the Respondent states that the limitation of the use of the back-up gas under Law 15/2012 was to avoid over-compensation.[943] As mentioned earlier, the Respondent contends that the use of the back-up gas has never been considered as a right of the renewables, but just a technical measure to ensure that the CSP facilities could produce energy properly.[944] The Respondent argues that allowing gas to be used to compensate for the lack of solar irradiation could be justified at the time when the implementation of thermo-solar technology facilities was starting from the technical point of view, however, after that initial stage, the subsidy would be contrary to the principle of efficiency and contrary to the consequence of the environmental objectives.[945] Referring to Mr. Montoya's first witness statement, the Respondent argues that with the Disputed Measures in place, the Claimant's CSP plants are allowed to use the gas, but at the minimum level necessary to ensure proper production.[946]

727. The Respondent explains that the substitution of CPI by IPD-IP in updating the remuneration under RD-L 2/2013 was also to avoid over-compensation and distortions in the market.[947] The Respondent claims that the legality of this measure has been upheld by the Spanish Supreme Court.[948] It further claims that this measure produced effects that did not harm the Claimant since it was beneficial to the Solacor Plants.[949] The Respondent asserts that such change was predictable in view of the Supreme Court decisions[950] as every royal decree approved before the Claimant's investment used a different index.[951]

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[942] Tr. Day 1, 178:1-6, referring to Resp. Opening, slide 142; see Resp. C-Mem., paras. 738-744.
[943] Resp. Opening, slide 144; see Resp. C-Mem., paras. 773-790.
[944] Tr. Day 1, 179:3-8.
[945] Resp. C.Mem., para. 778.
[946] Tr. Day 1, 179:16-20. While the Respondent referred to Mr. Montoya's second witness statement at the Hearing, the Tribunal finds that the correct citation is Mr. Montoya's first witness statement, para. 99.
[947] Resp. C-Mem., paras. 791-796.
[948] *Ibid.*, para. 791.
[949] *Ibid.*, para. 793. The Respondent claims that the IPD-IP evolved higher than the CPI in certain periods of 2013, 2014, 2015 and 2016.
[950] Resp. C-Mem., para. 797, referring to (**R-0133**) and (**R-0134**).
[951] Tr. Day 1, 180:7-19.

728. With respect to the measure reducing the premium to zero in the FiP option to sell energy at market price plus premium under RD-L 2/2013, the Respondent submits that the objective of this measure was to correct the existing incoherence between the FiP option and the FiT option that led to the excess of remuneration to renewables and to guarantee the reasonable rate of return principle.[952] The Respondent argues that there were precedents on this issue. It claims that RD 661/2007 abolished the option to sell energy at market price plus premium to PV plants and RD 1614/2010 suspended the premium option for the first year of operation for CSP plants.[953] The Respondent asserts that the effect of this measure was limited timewise as the effects of such measure disappeared with the entry into effect of the new remuneration model introduced by the subsequent overall reform.[954]

(iii) Measures under RD-L 9/2013, Law 24/2013, RD 413/2014 and implementing Ministerial Orders

729. The Respondent claims that it has clearly proven that the Disputed Measures adopted in 2013 and 2014 including RD-L 9/2013, Law 24/2013, RD 413/2014 and MO IET/1045/2014 (which the Claimant refers to as RF#3) also addressed a legitimate public purpose to tackle the tariff deficit, and maintained the essential features of the previous remuneration framework allowing producers to obtain a reasonable return on their investment.[955] The Respondent claims that this new regulatory framework amounts to an evolution of the Spanish electricity system's regulation that observes, in any event, the reasonable rate of return principle within the framework of a sustainable Spanish electricity system.[956]

730. The Respondent argues that all the essential elements, such as the priority of dispatch, the methodology based on standard facilities, the right to the market price without limitation, right to subsidies, reasonable return on investment as an objective, capital markets as the judge of the reasonability of the returns and dynamism in order to guarantee the economic sustainability of the Spanish electricity system and the reasonable return principle, have

[952] Resp. C-Mem., paras. 799-780.
[953] Resp. Opening, slide 147.
[954] Resp. C-Mem., para. 801. At the Hearing, the Respondent claimed that this measure has not been abolished and has been implemented until now. Tr. Day 1, 181:12-15.
[955] Resp. PHB, para. 69.
[956] Resp. C-Mem., para. 806.

been undeniably maintained in the Disputed Measures and thus there is a clear continuity in the essential elements of the regulation.[957]

731. The Respondent states that the first of such essential parameters are the dispatch priority and the access priority which is a clear advantage for the renewables. These have been respected with the Disputed Measures in place.[958]

732. The Respondent contends that the methodology determining the remuneration has always been based on those installation types defined by the 2005-2010 Energy Plan, and the Disputed Measures retained the same methodology based on the same essential parameters.[959] The remuneration is based on the CAPEX plus OPEX plus rate of return on the standard installation type. The definition of the installation types and remuneration parameters are based upon the efficient and well-managed company which was referred to in the economic report on RD 436/2004.[960] Under the classification, the Solacor Plants belong to the standard facility type IT-00604. It further submits that the 2005-2010 Energy Plan did not consider financial cost as investment cost when it estimated the project type profitability around 7% with own resources (prior to funding) and post-tax.[961]

733. The Respondent denies the Claimant's assertion that MO IET/1045/2014 has reduced the cost of the installation types. The Respondent contends that the investment cost considered by MO IET/1045/2014, i.e., EUR 4.5 million per megawatt, is precisely within the range proposed by Roland Berger and Boston Consulting.[962] In the Respondent's view, the Solacor Plants' costs were high due to the no-arm's length transaction between Solacor SPVs and Abengoa entities involved in the implementation of the Solacor Project as EPC contractor or O&M service provider.[963]

734. With respect to the regulatory useful life under MO IET/1045/2014, the Respondent states that there is a requirement imposed by EU regulation that the incentives have to be limited

[957] Tr. Day 1, 188:8-14, citing Resp. Opening, slide 168; Resp. PHB, para. 69.
[958] Resp. C-Mem., paras. 807-810; Resp. Opening, slide 149. Tr. Day 1, 182:11-19.
[959] Tr. Day 1, 182:20-183:3; Resp. Opening, slide 150.
[960] Resp. Opening, slide 151; Tr. Day 1, 182:4-12. The Respondent refers to the (R-0014).
[961] Resp. Opening, 154; Tr. Day 1,183:16-19.
[962] Resp. Opening, slide 160.
[963] Tr. Day 1, 185:1-11; Resp. Opening, slide 157; Tr. Day 6, 68:21-25; see Resp. C-Mem., paras. 857-865.

to the useful life of the plants, which is 25 years.[964] The Respondent claims that the establishment of the regulatory life is entirely coherent with the aim of the aid mechanisms to guarantee the operation of the facility during its useful life and enabling a reasonable rate of return to be obtained.[965] The Respondent also cites the Judgement of the Spanish Supreme Court of June 19, 2012, which held that the relevant provision could not be understood in the sense that "*the feed-in tariff scheme must remain in existence throughout the entire lifetime of the facilities*."[966] Additionally, the Respondent argues that it has proven, not only that the useful life expected by the Claimant at the time of the investment for Solacor 1 and Solacor 2 was of 25 years, but also that those plants would not last more than 25 years, as Prof. Servert concludes.[967]

735. The Respondent asserts that the return of 7.398% (equivalent to the yield on 10-year Spanish Government bonds plus spread of 300 basis point)[968] on investment costs under the Disputed Measures is reasonable.[969] The Respondent points out that while the spread applicable to transport and distribution sector was set at 200 basis points, the spread for renewables was set at 300 basis point. The Respondent considers that 7.398% is more than reasonable because (i) it is much higher than the cost of capital that the Claimant's expert, Compass Lexecon, is using in its DCF calculation (4.24%); (ii) it is aligned with the reasonable rate of return of other EU Member States; and (iii) it is aligned as well with the proposal made by the sector in 2009. In reliance of Econ One Second Expert Report, the Respondent claims that the actual IRR of the Solacor Plants was 13.7% with the Disputed Measures in place.[970]

736. With respect to the review of the regulatory parameters and their revisions, the Respondent asserts that EPA 2013 has included a clear explanation of how the revisions can be made, when the revisions are going to be made and which are the parameters that can be reviewed. Thus, EPA 2013 is giving much more security to the investment, contrary to the Claimant's

[964] Tr. Day 1, 186:5-11, citing Resp. Opening, slide 161.
[965] Resp. C-Mem., para. 899.
[966] (**R-0127**).
[967] Resp. PHB, para. 69 vii.
[968] Resp. Opening, slide 163.
[969] Resp. Rej., paras. 1168-1178.
[970] Tr. Day 1, 186:12-21; Resp. Opening, slide 163, citing Econ One Second Expert Report, p.125 *et seq*.; Resp. PHB, para. 69 viii.

argument that these revisions have increased the uncertainty of the supportive scheme.[971] The Respondent argues that the annual updating using CPI plus 50 bp under the previous remuneration regime resulted in windfall profits for the Special Regime producers and therefore, in the new scheme, the CAPEX portion will not be updated.[972]

737. The Respondent cites the judgement of the Spanish Supreme Court dated April 20, 2017 which dismissed complaints by Solacor 1 and Solacor 2 against the MO IET/1045/2014. In this case, according to the Respondent, the Spanish Supreme Court held that the challenged ministerial order was reasonable and predictable.[973]

738. The Respondent asserts that all those new measures have been praised by international organizations such as the European Commission and the IMF as well as by the market.[974] The Respondent further asserts that the Claimant's partner, Abengoa and Atlantica Yield have stated in publicly published documents that the Disputed Measures had no impairment on the Solacor Plants.[975] In this regard, the Respondent draws to the attention of the Tribunal the statement in the audited annual accounts of Solacor 1 and Solacor 2 stating that "[t]*his new form of remuneration have no material relevance on the evolution of the company*"[976] The Respondent further points out that JGC's partner Abengoa stated in its first half 2013 earnings presentation in August 2013 that it did not expect that the new regulatory reform would have a negative impact to its solar business.[977]

739. The Respondent contends that the Disputed Measures are not retroactive. It claims that the Disputed Measures apply to the existing plants in the future.[978] In support of its position, the Respondent cites a decision by the European Commission rendered in 2016 as well as

[971] Tr. Day 1, 187:7-23.
[972] Resp. Opening, slide 166.
[973] Tr. Day 1, 187:24–188:7, citing Resp. Opening, slide 167 and Supreme Court Judgment 691/2017 of April 20, 2017 (**R-0372**); Resp. PHB., para. 53.
[974] Tr. Day 1, 188:24–189:2, citing Resp. Opening, slide 170.
[975] Tr. Day 1, 189:4-9, referring to Resp. Opening, slides 171-172.
[976] Tr. Day 1, 189:16-24, referring to (**EO-22**), (**EO-23**) and (**R-0382**).
[977] Resp. Opening, slide 171, referring to (**EO-25**).
[978] Resp. Opening, slides, 230-231.

the *Charanne* and *Isolux* awards.[979] For instance, the *Isolux* award quoted by the Respondent states that

> *"The Arbitral Tribunal considers, in accordance with the distinction between retroactivity and immediate application adopted by the tribunal in the Nations Energy v. Panama case, that the system put in place by RDL 9/2013 does not have retroactive effect, but is rather of immediate application. It is because it does not revoke any rights acquired by the Claimant regarding the use of the Plants. It applies to the future. RDL 9/2013 does not provide for the return of remuneration received prior to 14 July 2013, which are intangible."*[980]

740. The Respondent submits that the Disputed Measures, which aimed at tackling the tariff deficit, are reasonable and proportionate in light of the public policy faced by the Kingdom of Spain.[981] It points out that the Disputed Measures have affected all the agents of the Spanish electricity system. Furthermore, reasonable return of 7.398% before tax was granted to CSP generators with the Disputed Measures in place. The Disputed Measures have been appraised as reasonable macroeconomic control measures.[982] The Respondent further claims that the Disputed Measures are not abusive and disproportionate according to the test adopted by other arbitral tribunals such as *Isolux*, *Wirtgen*, *EDF* and *AES Summit*.[983]

741. The Respondent argues that it has not breached the obligation to provide transparent conditions. The Respondent submits that all the Disputed Measures were approved in a transparent process and the Claimant was clearly aware of the approval process of the Disputed Measures.[984] The Respondent managed process in accordance with all standards in view of the case-law of the Spanish Supreme Court and the Constitutional Court, the decision of the EU Commission and arbitral precedents.[985] The Respondent conducted an

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[979] Resp. Opening, slide 232, citing Final Decision C (2016) 7827 by the European Commission, para. 135 (**RL-0091**); *Charanne* Award, para. 548 (**RL-0091**); *Isolux* Award, para. 814 (**RL-0092**).
[980] *Isolux* Award, para. 814 (**RL-0092**).
[981] Tr. Day 6, 72:3-5.
[982] Resp. Opening, slide 236.
[983] *Ibid*., slide 237, referring to *Isolux* Award (**RL-0092**); *Wirtgen* Award (**RL-0111**); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009 (**RL-0035**) ("***EDF* Award**"); and *AES Summit* Award (**RL-0039**).
[984] Tr. Day 1, 188:15-20, citing Resp. Opening, slide 169.
[985] Resp. Opening, slide 235.

extensive public consultation process and received almost 500 submissions of interested parties in this process.[986]

742. The Respondent states that as Roland Berger and Boston Consulting did not render their final reports prior to the approval of the Disputed Measures, those reports were not included in the consultation process.[987] Thus, the Respondent argues, not providing the interested parties with documents that were not taken into account by the regulator in preparing its regulations is not a breach of the ECT.[988]

(e) The Respondent's position on its obligations under the ECT

743. The Respondent submits that it has shown in these proceedings that it has fulfilled its obligations under the ECT. Specifically, the Respondent contends that, against the Claimant's false accusations to the contrary: it has granted FET to the Claimant's investment, including a) respect of the Claimant's objective and legitimate expectations, b) acted in a transparent manner and c) respected proportionality and reasonableness standards when adopting the measures.[989] It has also complied with its obligation to provide stable conditions under the ECT.[990] It states that the balance has been re-established by the Disputed Measures to eliminate situations that generated unjustifiable remuneration and the tariff deficit.[991] The Respondent asserts that RD-L 9/2013 and Law 24/2013 maintain continuity of stable conditions embedded in Law 54/1997.[992]

744. The Respondent also submits that it has not breached its obligation to not undermine by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of the Claimant's investments.[993]

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[986] Tr. Day 1, 224:23–225:3.
[987] Tr. Day 1, 185:12-21.
[988] Resp. Opening, slide 234.
[989] Resp. PHB, para. 72, Resp. C-Mem., section IV.J.
[990] Resp. Opening, slide 229.
[991] Tr. Day 1, 224:11-19, citing Resp. Opening, slide 229.
[992] Resp. Opening, slide 168
[993] Resp. C-Mem., section IV.L; Resp. Rej., V.C.

745. The Respondent also submits that it has neither violated the standard of "*Most Constant Protection and Security*" (MCPS)[994] nor the umbrella clause.[995]

(i) Object and purpose of the ECT

746. The Respondent submits that the object and purpose of the ECT must be taken into account in interpreting the obligation to grant FET under the ECT.[996]

747. Spain underlines that the ECT does not eliminate the sovereign power to regulate, being a "*very well-established principle in the arbitral precedents*";[997] this sovereign power forms the starting point for the specific standards.[998] In any event, the ECT allows State Parties to adopt measures to control the macro economy, based on reasons of public interest.[999]

748. The Respondent stressed that the Claimants' case is to turn the ECT into a discriminatory insurance policy for a frozen amount of public subsidies for foreign investors during 35 years that denies the State to regulate.[1000] The Respondent argues that the subject matter of the ECT is an investment in the energy sector which is a highly strategic and well-regulated sector in the signatory countries of the ECT. According to the Respondent, it is unrealistic for the State Parties to the ECT to agree, in such a strategic sector, to give a kind of insurance policy to foreign investors, which would protect them against regulatory reforms adopted by reason of the general interest.[1001] The Respondent contends that the Tribunal must take into consideration that in strategic sectors such as the energy sector, States enjoy a certain margin to adjust their regulation, in good faith and in a reasonable manner, for the benefit of the public interest and within the limits of the law.[1002]

749. The Respondent asserts that the ECT does not require State Parties to maintain a stable and predictable regulatory framework for every investment and for their entire existence. Article 10(1) of the ECT refers to conditions, but not to a regulatory framework. This in

[994] Resp. C-Mem., section IV.K; Resp. Rej., V.D; Resp. PHB, section IV.C.
[995] Resp. C-Mem., section IV. M; Resp. Rej., V.E; Resp. PHB, section IV.D.
[996] Resp. C-Mem., para. 1044.
[997] Tr. Day 1, 218:9-10.
[998] *Ibid*., 219 6-8.
[999] Resp. C-Mem., para. 1038.
[1000] Tr. Day 1, 215:10-15, 217:19-25, 218:23–219:1, referring Resp. Opening, slide 212; Resp. PHB, para. 73.
[1001] Resp. C-Mem., para. 1032.
[1002] Resp. Rej., para. 1481.

no way annuls or limits the ability of States to change the regulatory framework.[1003] The Respondent further asserts that the Claimant's argument would be tantamount to requiring petrification of the regulatory framework in such a strategic sector as this.[1004]

750. Referring to Article 2 of the ECT, the Respondent contends that the protection which the ECT gives to investments is aimed at achieving the free market of energy throughout Europe, based on the principle of non-discrimination and on market-oriented price formation.[1005] The Respondent claims that once an investment is made, the best protection standard accorded under the ECT to foreign investors and investments is national treatment and that the ECT's greatest ambition is non-discrimination.[1006] The Respondent argues that if national treatment is less favourable than the minimum standard of international law, the latter will be applicable.[1007] Thus, the object and purpose of the ECT is to ensure a "*level playing field*" for energy sector investments and non-discrimination."[1008]

751. Quoting Professor Wälde's view that "international law sets the minimum standard, even if national treatment would be much worse, but when it comes to governments favouring their own companies, then national treatment takes precedence", the Respondent argues that Article 10(1) of the ETC is using the minimum protection standard guaranteed by international law.[1009]

752. The Respondent relies on the words of Professor Wälde who states that the obligations imposed on States in Article 10 of the ECT must be tempered by the provisions set forth in part IV of the ECT.[1010]

> *"one needs to appreciate that these primary obligations are tempered by the miscellaneous provisions of part IV- with reference to sovereignty (Art.18 (1)),*

[1003] Resp. C-Mem., para. 1031.
[1004] *Ibid*., para. 1036.
[1005] *Ibid*., paras. 1009 and 1012; Resp. Rej., para. 1458.
[1006] Resp. C-Mem., para. 1016; Resp. Rej., para. 1452.
[1007] Resp. C-Mem., para. 1075.
[1008] Resp. Opening, slide 213.
[1009] Resp. C-Mem., para. 1016.
[1010] *Ibid*., para. 1036.

presumably an emphasis on respecting the power of economic regulation of states …"[1011]

753. The Respondent also seeks support from Professor Schreuer,[1012] who opines that:

> *"At the same time, it is clear that this principle is not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor's benefit. A general stabilisation requirement would go beyond what the investor can legitimately expect. It is clear that a reasonable evolution of the host State's Law is part of the environment with which investors must contend."*[1013]

754. The Respondent states that the Energy Charter Secretariat confirmed in 2010 that the ultimate aspiration of the ECT in its future evolution is to remove the barriers to non-discrimination. And there is no deviation from this objective of the ECT by adopting regulatory measures that are (1) proportionate, (2) justified on the grounds of public interest and (3) applied indiscriminately to national and foreign investors, *erga omnes*.[1014]

755. The Respondent argues that the standards concerning EU competition law require the proportionality of the subsidies. Thus, the idea that an investor could obtain subsidies that distort competition in the energy market that the ECT seeks to create is incompatible with both the ECT and EU law.[1015]

(ii) Stability obligation under the ECT

756. The Respondent submits that Article 10(1) of the ECT does not refer to "*unchangeable regulatory framework*", but rather "*stable conditions*" and that this, by no means, equals a "*stability clause*".[1016]

757. The Respondent indicates its agreement with the position of the tribunal in the *Charanne v. Spain* case which only analysed the legitimate expectations and stable conditions within

[1011] T W Wälde, "*Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice*" (2004) 1 Transnational Dispute Management 2. (**RL-0054**), quoted in Resp. C-Mem., para. 1036.
[1012] Resp. C-Mem., para. 1037.
[1013] C. Schreuer, Fair and Equitable Treatment in Arbitral Practice, 2005, Journal of World Investment & Trade, p. 365. (**RL-0056**), quoted in Resp. C-Mem., para. 1037.
[1014] Resp. C-Mem., para. 1025.
[1015] Resp. Rej., paras. 1460-1462.
[1016] Resp. Opening, slide 228.

the FET, without referring to the "*prohibition of arbitrariness*" as an autonomous standard.[1017]

758. The Respondent argues that precedents applying the ECT incorporate the guarantee of granting stable and transparent conditions within the principle of FET.[1018] The Respondent's understanding is that it is unreasonable to separate the FET standard of the ECT from the duty to grant stable and transparent conditions and the non-adoption of irrational and disproportionate measures that are prejudicial to the investor.[1019]

759. In support of its submission the Respondent cites *Electrabel, Charanne* and *Isolux*.[1020]

760. The *Electrabel* tribunal stated that:

> *"The first part of Article 10(1) ECT refers to the encouragement and creation of stable, equitable, favourable and transparent conditions for investors which is said to include a commitment to accord at all times fair and equitable treatment to investments. Fair and equitable treatment is connected in the ECT to the encouragement to provide stable, equitable, favorable and transparent conditions for investors."*[1021]

761. The tribunal in *Isolux* stated that:

> *"the Arbitral Tribunal does not find in Article [10(1) ECT] any independent obligation for the Contracting Parties to promote and create stable and transparent conditions for making investments in their territory, the violation of which would generate per se rights in favour of investors from the other Contracting Party. [...]*
>
> *Consequently, the Arbitral Tribunal shall not examine separately the alleged violation by the Kingdom of Spain of an obligation to create stable and transparent conditions for making investments in its territory."*[1022]

(iii) The FET standard under the ECT

762. The Respondent disagrees with the Claimant's view that the ECT's FET standard is autonomous and different from and beyond the minimum standard of treatment of

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1017 Resp. C-Mem., para. 1084.
1018 Resp. Rej., para. 1483.
1019 *Ibid*., para. 1489.
1020 *Ibid*., paras. 1484-1486.
1021 *Electrabel* Decision, para. 7.73 (**RL-0002**).
1022 *Isolux Award*, para. 764-766 (**RL-0096**).

customary international law.[1023] In this regard, the Respondent contends that the Claimant relies on two unique arbitral precedents relating to the ECT, i.e., *Liman Caspian Oil v Kazakhstan*[1024] and *Plama v. Bulgaria*[1025] to defend its interpretation that the FET standard contained in Article 10(1) of the ECT is superior to the concept of this standard in international law and that it deliberately omits other relevant precedents that have applied the ECT standard such as the *AES Summit* award, the *AES Summit* annulment decision or the final award of the *Electrabel* case.[1026] The Respondent further contends that the Claimant improperly relies on Argentinean and Mexican cases based on bilateral treaties or foreign investment laws which are different from the ECT.

763. The Respondent submits that pursuant to the ECT's object and purpose, States are in no way impeded to adopt reasonable and proportionate macroeconomic control measures to avoid market distortions, even if this affects the investor´s earnings. The Respondent argues that the cases cited by Spain show that the FET standard requires a balancing act involving the public interest and the rule of proportionality.[1027]

764. The Respondent submits that the purpose of the Disputed Measures was a legitimate public interest to tackle the tariff deficit. In this regard, the Respondent argues that the Tribunal must assess what the general effect of the Disputed Measures was rather than the specific effect on the Claimant. The Respondent further argues that even if the test is a specific one assessing the effect on the Claimant, there is no damages on the Claimant caused by the Disputed Measures as there has been an increase of value because of the certainty created by the Disputed Measures.[1028]

765. In this regard, the Respondent invokes the *AES Summit* case[1029] which stated that the FET standard of the ECT:

[1023] Resp. C-Mem., para. 1075; Tr. Day 1, 239:15-23.
[1024] *Liman* Award (**CL-0074**).
[1025] *Plama* Award (**CL-0017**).
[1026] Resp. C-Mem., para. 1076, referring to *AES Summit* Award (**RL-0039**); *AES Summit Generation Limited v. Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012 (**RL-0042**) ("***AES Summit* Decision**"); and *Electrabel* Award (**RL-0048**).
[1027] Resp. C-Mem., paras. 1076-1078; Tr. Day 1, 240:16-21.
[1028] Tr. Day 1, 225:14–226:19.
[1029] Resp. C-Mem., para. 1076.

> *"does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals."*[1030]

766. The Respondent states that the arbitration doctrine on the interpretation of the FET standard of the ECT is summed up perfectly in the award of the *Electrabel* case.[1031] In its Award, the tribunal stated that:

> *"(…) the 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 Chech Republic and Arif v Moldova, an FET standard may legitimately involve a balancing or weighing exercise by the host State."*[1032]

767. The Respondent asserts that in the end the Tribunal has to do a balancing exercise, considering on the one hand, the legitimate interest of the investors, and on the other hand the interest of the State, considering all the circumstances of the case.[1033]

768. In this regard, the Respondent submits that the balancing test in this case is very clearly in favour of the Respondent. There was no specific stability commitment made to the Claimant. The only guarantee was a reasonable rate of return on its investment. On the other hand, the Respondent exercised its sovereign power to regulate for a public interest purpose, with measures addressed to all the agents of the system, but still has guaranteed a reasonable return on the investment of the Claimant as promised.[1034]

769. The Respondent considers that absent a specific stability commitment no investor can have legitimate expectations that a regulatory framework will not be modified.[1035]

770. The Respondent submits that the Claimant is obligated to prove the violation by the Kingdom of Spain of certain expectations created legitimately and objectively for the Claimant, but that the Claimant has not substantiated those legitimate and objective

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[1030] *AES Summit* Award, para. 13.3.2 (**RL-0039**).
[1031] Resp. C-Mem., para. 1078.
[1032] *Electrabel Award*, para. 165 (**RL-0048**).
[1033] Tr. Day 1, 229:13-22; Tr. Day 6, 43:13-20.
[1034] Tr. Day 1, 229:23-230:9.
[1035] Resp. Opening, slide 215.

expectations.[1036] The Respondent claims that it has shown that the only objective and reasonable expectation that any investor in the Spanish electricity sector could have is to obtain a reasonable rate of return,[1037] and that in this regard Spain has not violated the legitimate and objective expectations of the Claimant.[1038]

771. The Respondent submits that in the present case Spain has proved that it has not violated the principle of FET contained in the ECT, as this principle has been interpreted by the arbitral tribunals that have applied the ECT[1039] such as the *AES Summit* Award, the decision of the Annulment Committee of the *AES Summit* case, the awards in the *Electrabel*, *Charanne* and *Isolux* cases.[1040]

772. The Respondent submits that because of the power of the State to regulate in the absence of a specific commitment of stability, which is the case in this proceeding, an investor cannot have the legitimate expectation that a regulatory framework, such as the one under discussion in this arbitration, will never be changed.[1041] The Respondent cites the *Plama* award, which held that "*the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws*."[1042]

773. In relying upon the *Electrabel* case, the Respondent submits that it is the burden of the Claimant to prove that the Disputed Measures adopted by the Respondent violate the FET standard of the ECT.[1043]

774. The Respondent asserts that the Tribunal has to take into account what expectation the Claimant could have had at the time it made its investment. In this regard, the Respondent argues that while the Claimant relies on many different documents and representations that

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[1036] Resp. Rej., para. 1492.
[1037] Resp. PHB, para. 77.
[1038] *Ibid.*, para. 76.
[1039] Resp. Rej., 1494.
[1040] *Ibid.*, paras. 1495-1497.
[1041] Resp. C-Mem., para. 1028; Tr. Day 1, 219:9-17.
[1042] (**RL-0034**), para. 219.
[1043] Resp. C-Mem., para. 1079.

were post-dated to its investment, those should not be taken into account to assess the expectation the Claimant had at the time of investment.[1044]

775. In addition, the Respondent relies upon *Charanne v. Spain*, where the tribunal held that:

> *"Converting a regulatory norm, because of the limited nature of the persons that might be subject to it, into a specific commitment taken by the State towards each of those subjects, would constitute an excessive limitation on the States' capacity to regulate the economy on the basis of the general interest.*
>
> *[…] "in the absence of a specific commitment of stability, an investor cannot have the legitimate expectation that a regulatory framework such as the one under discussion in this arbitration will never be changed to adapt it to the needs of the market and the public interest"*[1045]

776. The Respondent submits that when investing, an investor must know and understand (i) the regulatory framework, (ii) how it is applied, and (iii) how it affects its investment. An investor makes his investment based on this knowledge and must be aware of the risks he assumes when making an investment.[1046]

777. The Respondent relies upon *Electrabel v. Hungary* and *Parkerings-Compagniet AS v. Republic of Lithuania* on the importance of due diligence of the investors.[1047] In the words of the *Parkerings* tribunal, quoted by the Respondent:

> *"The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances."*[1048]

778. The Respondent emphasizes the need to assess the expectations from an objective and reasonable, not subjective, perspective of the investor by relying on *Saluka v. Czech Republic*, where the tribunal held that:

> *"The scope of the Treaty's protection […] against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and*

[1044] Tr. Day 1, 219:18-220:3.
[1045] *Charanne* Award, paras. 493 and 510 (**RL-0049**), quoted in Resp. C-Mem., 1030.
[1046] Resp. C-Mem., paras. 1097 and 1110.
[1047] *Ibid*., paras. 1098-1099.
[1048] *Parkerings-Compagniet AS v. Republic of Lithuania*, ISCID No. ARB/05/8, Award, September 11, 2007, para. 333, quoted in Resp. C-Mem., para. 1099 (**RL-0072**) ("***Parkerings-Compagniet* Award**").

considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances."[1049]

779. The Respondent also quotes the *Invesmart* tribunal's holding that:

> *"for the Tribunal, the test of whether such an expectation can give rise to a successful claim at international law is an objective one. It is not enough that a claimant have sincerely held an expectation; the expectation must be reasonable and the Tribunal must make the determination of reasonableness in all of the circumstances. If the expectation was unreasonable (for example, ill-informed or overly optimistic), it matters not that the investor held it and it will not form the basis for a successful claim."*[1050] [Emphasis added by the Respondent]

780. Following the ruling in *Invesmart v. Czech Republic*, the Respondent submits that four points must be taken into account in assessing the existence and the legitimacy of the legitimate expectations: (i) the regulatory framework known to the investor, (ii) the objective and reasonable understanding of that framework any investor could have, (iii) the conduct of the State and (iv) the circumstances of the investor.[1051]

781. With respect to the regulatory framework, the Respondent contends that it is therefore an inexcusable obligation for every investor who invests in Spain to know the general regulatory framework governing investments, which includes the rules and case-law that will be applicable to their investment.[1052] No investor could not know the essential pillars of the Spanish regulatory framework with the essential principle of reasonable return and sustainability, a very specific methodology based on standard facilities, successive royal decrees developing that economic regime modifying one another and the adoption of urgent measures by the Government whenever it was necessary.[1053]

782. The Respondent submits that another essential element regarding the regulatory framework are the Spanish case law, which no investor could not know, and the relevance of EU law. The Respondent submits that Spanish law and EU law and their interpretation are essential facts for the Tribunal to properly apply and interpret the ECT.[1054] Stating that EU law is

[1049] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, para. 304 (**RL-0028**) ("***Saluka* Award**"), quoted in Resp. C-Mem., para. 1100.
[1050] *Invesmart B.V. v. the Czech Republic* (UN-0036-01), Award, June 26, 2009, para. 250 (**RL-0021**) ("***Invesmart* Award**"), quoted in Resp. C-Mem., para. 1103.
[1051] Tr. Day 1, 220:4-18; Resp. Opening, slide 217.
[1052] Resp. C-Mem., para. 1101.
[1053] Tr. Day 1, 220:19-221:7.
[1054] *Ibid*., 215:24-216:19.

applicable to any State Aid scheme within the EU as public order, the Respondent stresses the relevance of Spanish law and EU law to shape the expectations of any investor within the Spanish and EU framework.[1055]

783. With respect to the second element, the Respondent submits that the assessment of expectation must be objective and the contemporaneous understanding of the sector, the market place, the industry association should also be taken into account.[1056]

784. The Respondent emphasises that the investor can only rely on what it knew and what it considered actually at the time of its investment. The Respondent asserts that those documents provided by the Respondent during the document production phase and those post-dated to the Claimant investment are inadmissible.[1057]

785. With respect to the subjective circumstances of the Claimant, the Respondent asserts that the Tribunal has to consider what information the Claimant had and how it could have predicted that the regulatory framework was changed. In this regard, the Respondent emphasises the legal due diligence of Clifford Chance known to the Claimant in 2009, which, in the Respondent's view, shared the same understanding of the regulatory framework with the Respondent.[1058]

786. The Respondent also quotes the words of the *Charanne* tribunal as follows:

> *"To the Tribunal's understanding […] the Claimants could have carried out an analysis of their investment's legal framework in Spanish law and understood that the regulations enacted in 2007 and 2008 could be modified. At least that is the degree of diligence that could be expected from a foreign investor in a heavily regulated sector like the energy industry. In such a sector, thorough prior analysis of the legal framework applicable thereto is essential to make an investment."*[1059]

787. The Respondent submits that a significant number of arbitration precedents, that have applied the legitimate expectations standard contained in the ECT, takes the view that the ECT is not a type of insurance policy in favour of the investor against the risk of changes

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1055 Resp. C-Mem., para. 1045; Tr. Day 1, 217:14-18.
1056 Tr. Day 1, 222:2-15.
1057 *Ibid.*, 222:21– 223:7.
1058 Tr. Day 1, 223:8-21.
1059 Resp. C-Mem., para. 1105, quoting *Charanne* Award, paras. 506 to 508 (**RL-0049**).

in the regulatory framework. It continues that, therefore, (i) it is necessary to have specific commitments made to an investor that the regulation in force will remain unchanged. This has been stated by the *Plama* tribunal and has been ratified by other ECT precedents, such as the *AES Summit*, *EDF* and *Charanne* cases; and (ii) investor expectations must be reasonable and justified in relation to any changes in the laws of the host country.[1060]

(iv) Transparency

788. The Respondent submits that it has not breached the obligation to provide transparent conditions. The Respondent asserts that the obligation to provide transparent conditions is not a standard of protection. The Respondent views that this obligation is breached in case of manifestly unfair or unreasonable behaviour by the State[1061] which it denies in this case.

(v) Most Constant Protection and Security (MCPS) standard

789. As regards the constant protection and security standards, the Respondent argues that this standard must be understood as a physical protection of the investment and of the investors, which in no case has been violated. It adds that even if the aforementioned standard is compared to that of FET, it could also not be understood as infringed.[1062]

(vi)Obligation not to impair the Claimant's investment by unreasonable or discriminatory measures (Non-Impairment)

790. The Respondent submits that it has not breached its obligation to not undermine by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of the Claimant's investments.[1063]

791. The Respondent argues that in order to find this standard in breach, it would not suffice to prove that the measures are exorbitant or discriminatory, but, in addition, one would have to prove that there is undermining in the management, maintenance, use, enjoyment or settlement of the Claimant's investments. The Respondent submits that there is no

[1060] *Ibid*., para. 1134.
[1061] Tr. Day 1, 224:23-25.
[1062] Resp. PHB., para. 86.
[1063] Resp. C-Mem., section IV.L; Resp. Rej., V.C.

impairment, neither are the measures discriminatory or irrational, but quite the contrary, they are rational and proportionate.[1064] Each and every one of the Disputed Measures considered individually do not violate the standard of non-impairment as they are neither discriminatory nor unreasonable and in no case have they resulted in a decrease in the value of the Claimant's investment.[1065]

(vii) Umbrella clause

792. The Respondent argues that the obligation that qualifies for this kind of protection must be one entered into specifically with an investor or its investment and does never extend to the contents of an *erga omnes* regulation.[1066] Accordingly, the Kingdom of Spain has not violated any obligation to maintain the remunerative scheme of RD 661/2007 unchanged, since no such obligation has ever been ever entered into by the Kingdom of Spain vis-à-vis the Claimant or its investment, neither could it ever exist under Spanish Law, and therefore, the protection set out in Article 10(1) ECT in fine has not been breached.[1067]

(viii) In response to the Claimant's alternative claim

793. The Respondent asserts that the Claimant's alternative claim, apparently based on the guarantee of a "*fair return*", presents a legal fiction under which, using a different appearance and name, it attempts to reiterate its initial claim. The Respondent contends that contrary to the Claimant's flawed assumptions, (i) Spain has never guaranteed static profitability, but rather dynamic reasonable profitability in line with the cost of money on the capital markets, (ii) it has never guaranteed a profitability of 9.5% after tax as claimed by the Claimant and (iii) 9.5% after tax, is not equivalent to 12.7% before tax.[1068]

D. Tribunal's Analysis

794. At the outset, the Tribunal wishes to express that it is grateful to both Parties, their witnesses and experts for their invaluable assistance throughout this proceeding. In coming to the Decision, the Tribunal has considered the respective positions of the Parties, whether

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[1064] Resp. Rej., paras. 1787-1788.
[1065] *Ibid.*, para. 1792.
[1066] Resp. PHB., para. 88.
[1067] *Ibid.*, para. 87.
[1068] *Ibid.*, paras. 92-94.

they are expressly referred to or not in this Decision, including but not limited to the following:

a) The Parties' submissions and arguments as well as factual exhibits and legal authorities submitted to the Tribunal;

b) Witness statements, experts' reports and their testimony at the Hearing;

c) Transcripts of the Hearing; and

d) All other submissions filed by the Parties on the record of this arbitration proceeding.

(1) Standard of protection under the ECT

(a) ***Introduction***

795. Beyond the fact that Article 10(1) of the ECT is applicable to the dispute, the Parties widely disagree on the meaning of this particular provision invoked by the Claimant, the scope of the Respondent's obligation thereunder and its application to the facts of the case.

796. The focus of the Parties' contentions has been on the first and the second sentences of Article 10(1) of the ECT[1069] which provides that:

> *"Each Contracting Party shall in accordance with the provisions of this Treaty, encourage and create stable, favourable and transparent conditions for Investors of the other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of the other Contracting Parties fair and equitable treatment."*

797. In the Tribunal's view, the current state of the arbitral jurisprudence covering the Spanish solar energy measures calls for two general observations from the viewpoint of international law as a legal order.

798. Firstly, it must be noted that the relevant cases involving disputes related to Spanish renewable energy, all of them decided after 2014, have, to a considerable extent, been based on different factual patterns which may have properly given rise to different legal assessments. In particular, the cases concerned have arisen out of measures adopted at

[1069] As the Parties' main contention has been focused on the first two sentences of Article 10(1) of the ECT, the Tribunal will address in detail the standard of protection under the first and second sentences of Article 10(1) in this section, and the remaining part of Article 10(1) such as the MCPS, the Non-impairment and the Umbrella clause in paragraph 1065 *infra*.

different points in time for installations utilizing different technologies when the legal order of Spain had evolved and when investors were faced with different legal settings at the time of their investment.

799. Not surprisingly, then, the outcome of cases would vary, dependent on the factual and legal matrix particular to the time of investment, the technology type of installations and the corresponding expectations of the investors surrounding the investment in question.

800. For instance, an investor making an investment in 2007 in Spanish CSP installations would find an investment climate different from one who entered the country in 2013, given that the legal order of Spain had undergone substantial changes during those six years.

801. The tribunal in *SolEs v. Spain* properly underlined that the various Spanish cases differed, as regards the time of investment, the type of renewable energy, the pleadings and the evidence presented. In this regard, the *SolEs* tribunal aptly stated that "*in circumstances in which a tribunal's conclusions follow from accumulated inferences of fact…the conclusion in any case is highly specific to that case*."[1070]

802. Awards reaching different outcomes obviously present no issues of consistency or subjectivity when they concern such diverse factual settings as well as differences in the pleadings and the evidence presented. The tribunal in *Antin v. Spain,* for instance, specifically highlighted that the *Charanne* tribunal's analysis was restricted to the 2010 regulations and, within such limited scope, it found that it could not draw the conclusion that Spain breached its obligation to provide regulatory stability.[1071]

803. In *Isolux v. Spain*, the tribunal examined, along the same lines, whether an investor could expect in 2012 that the then existing regulatory framework could generate for the claimant a legitimate expectation that such regulatory framework would not be changed. The *Isolux* tribunal denied that this was the case, given that when the investor decided to invest in Spain, the regulatory framework applicable to renewable energies had already been modified and was undergoing several studies that made its review inevitable and when the

[1070] *SolEs* Award, para. 334 (**CL-0209**).
[1071] *Antin* Award, para. 558 (**CL-0182**), citing *Charanne* Award, para. 484 (**CL-0009t**).

legality of the successive amendments relating to the PV sector to which the claimant belonged had been upheld by domestic Spanish jurisprudence.[1072]

804. In *Cube Infrastructure v. Spain*, the tribunal had to consider investments in the PV sector made in April 2008 and in hydro plants made in 2011. The tribunal analysed the evolution of the Spanish rules during this period and differentiated its determination of legitimate expectations in accordance with the state of the legal regime at the various points of investment.[1073]

805. Beyond the specificity of individual cases, the situation becomes more complex when the diversity of views among tribunals concerns a different understanding of the same legal provisions, without regard to underlying facts. Here, the basic fabric of the current international landscape of investment arbitration comes into question.

806. It is true that the ensemble of current rules has been designed by the international community as decentralized and fragmented: the wordings of treaties differ, as do the pleadings by the parties. In addition, equally important, the composition of tribunals differs, and no rule of precedent provides for harmonization of jurisprudence.

807. Given this conceptual setting based on both the party autonomy and on the diversity of arbitral tribunals, it may appear as contrary to the foundations of the current investor-State dispute resolution system to lament any diversity of jurisprudence; such diversity may appear to be the consequence and price of the existing divergent foundational arrangements.

808. At the same time, distinct concerns will arise when a legal system lacks consistency and predictability due to systemic issues inherent in the diversity and fragmentation of a legal order. In the long-term, these concerns may become increasingly visible, especially in an area of law focused on legal stability such as international investment law.

809. For the purpose of drafting this Decision, and eventually the Award, the Tribunal considers it useful, against this background, to take into account both the need to respect the party autonomy as accepted in the arbitration practice, but also the goal of consistency and

[1072] *Isolux* Award, paras. 784 *et seq.* (**CL-0151**).
[1073] *Cube* Decision, see particularly paras. 305 *et seq* (**CL-0203**).

predictability, inherent in the rule of law. So far, the focus of many awards has been mainly on the circumstances of each case and the pleadings on the applicable law submitted by the parties. To the extent, however, that the Spanish renewable energy cases concern the application and interpretation of Article 10 of the ECT, investment tribunals should aim at interpreting the content of this provision in a coherent way.

810. A modest, but not insignificant contribution to a development favoured by this Tribunal consists of an effort to place this Decision and the eventual Award into the context of previous decisions and awards, and not to pretend that no earlier award would exist which would not be suitable to throw light on the issues before the Tribunal, or could not be distinguished. Such an approach may hopefully contribute to a more consistent jurisprudence informed by the advantages (or shortcomings) of previous jurisprudence and may thus lead to the meaningful and steady evolution of international investment law. In this regard, the Tribunal appreciates the Parties' diligent efforts to bring to the Tribunal's attention publicly available decisions and awards pertaining to Spanish ECT cases rendered after the submission of their Post-Hearing Briefs[1074] and share their respective comments on a substantial number of them. The Tribunal has considered them in its review of the same or similar issues in this case, although not all of them have been expressly referred to in this Decision.

(b) ***Overview of the first two sentences of Article 10(1) of the ECT***

811. The rules written into Article 10(1) of the ECT are at the heart of the regime of substantive protections granted by the ECT to foreign investors. Together, these rules provide for a scheme of guarantees written in broad terms.

812. The Tribunal notes that the Claimant initially took the position that the stable conditions set out in Article 10(1) are clearly part of the fair and equitable treatment standard under the ECT.[1075] In its Post-Hearing Brief, the Claimant claims the Respondent's breach of the first sentence of Article 10(1) separate from the breach of the FET standard of the second

[1074] Those awards and decisions are (**CL-0201**) through (**CL-0211**) and (**RL-0131**) through (**RL-0144**).
[1075] Cl. Mem., Section X, paras. 1131 *et seq.*, in particular, para. 1137 quoting *Plama* Award, para. 173 (**CL-0017**); Cl. Reply, Section V.

sentence.[1076] The Respondent considers that it is unreasonable to separate the FET standard of the ECT from the duty to grant stable and transparent conditions and the non-adoption of irrational and disproportionate measures prejudicial to investors.[1077] The Respondent contends that it has granted FET to the Claimant's investment and that it has also complied with its obligation to provide stable conditions under the ECT (see para. 743 *supra*).

813. This Tribunal is of the view that the wording of the first two sentences of Article 10(1) of the ECT is different from the classic formulation of the FET standard, as they emphasize the Contracting Parties' duty to "*encourage and create stable, equitable, favourable and transparent conditions*" which "*shall include a commitment to accord at all times…fair and equitable treatment*". It is true that an obligation to provide stable conditions is included in the FET standard, but the duty to create stable conditions in Article 10(1) of the ECT may be seen as a more strict and rigorous standard than the classic standard of the FET when it comes to matters of stability in the sense of ongoing stability. In this regard, the *Antin* tribunal rightly stated that "[t]*he stability of the legal regime is reinforced in the first sentence of Article 10(1) of the ECT…*"[1078]

814. Both the sentence 1 and sentence 2 of Article 10(1) of the ECT are expressed with the term "*shall*". Accordingly, the Tribunal considers that the obligations concerned are binding and not just aspirational.

815. In conclusion, as regards the meaning of sentences 1 and 2 of Article 10(1) of the ECT, the Tribunal considers that these provisions jointly require that the host State accord FET to investors and, in particular, maintain fundamental stability of the regulatory regime, specifically by not overturning the essential characteristics of such regime.

(c) ***The duty to create stable conditions***

816. The Respondent does not dispute its obligation to provide stable conditions under the ECT as a matter of principle, although it submits that the sovereign power forms the starting point for this specific standard in the interpretation of its obligation under the ECT taking

[1076] Cl. PHB., paras. 126 and 127.
[1077] Resp. Rej., para. 1489; see para. 758 *supra*.
[1078] *Antin* Award, para. 524 (**CL-0182**).

into consideration the object and purpose of the ECT.[1079] As stated earlier (in para. 748 *supra*), the Respondent's core argument is that the Claimant's case is to turn the ECT into a discriminatory insurance policy for a frozen amount of public subsidies for foreign investors in a highly strategic and well-regulated sector during 35 years and to deny the State's right to regulate. The Respondent asserts that it is unrealistic for the Parties to the ECT to agree in such a strategic sector like energy to give a kind of insurance policy to foreign investors as if the rules were petrified. The Respondent argues that pursuant to the ECT's objective and purpose, States are in no way impeded to adopt reasonable and proportionate macroeconomic control measures to avoid market distortions, even if this affects the investor's earnings.[1080]

817. This Tribunal is of the view that the meaning of the first sentence of Article 10(1) regarding the duty to create stable conditions is aligned with the object and purpose of the ECT. The ECT has been written in recognition of the long-term nature of investments in the energy sector and the corresponding need of protecting investors against future harmful measures of the host State during the long period of an energy project. Energy projects are typically designed as long-term investments with substantial up-front investment for the investors to be recouped with a profit over a period of a decade or two or even longer, usually supported by elaborate financing arrangements. Hence, the emphasis on stability in rules containing investment protections specifically for the energy sector arises from this nature of long-term energy projects and its financial support structure. The Tribunal agrees with the Claimant's submission that the need for stable and effective legal regimes to promote investments in the energy sector, and the role of the ECT in this regard have been repeatedly recognized by multinational organizations and fora.[1081]

818. The tribunal in *Antin v. Spain* explained that the term "*stable*" meant "*not likely to change or fail; firmly established*" in light of its ordinary meaning in reliance upon the Oxford English Dictionary.[1082] The *Antin* tribunal characterized stability of the conditions for

[1079] Tr. Day 1, 219:6-8.
[1080] See para. 763 of this Decision.
[1081] See Cl. Reply, para. 80 and footnote 130.
[1082] *Antin award*, para. 528.

foreign investors as "*a leitmotif in the text of the ECT*."[1083] This Tribunal agrees with the view expressed by the *Antin* tribunal.

819. The tribunal in *SolEs Badajoz v. Spain* considered that FET would be interpreted to provide fundamental stability for the essential characteristic of the regime[1084], and that these essential features must not be suddenly and unexpectedly removed.[1085]

820. However, even though the ECT imposes the duty of stability on the Contracting Parties, the Tribunal agrees with the Respondent that the stability does not mean freezing or petrification of the legal regime.

821. The line is overstepped, however, between admissible changes and inadmissible changes requiring compensation, in case the host State decides to restructure its legal order in a radical or fundamental manner which crosses out the business assumptions upon which the investment has been built.

822. In this conclusion, this Tribunal is comforted by the fact that other tribunals which have addressed this issue under the Article 10(1) of the ECT have expressed their positions in terms similar to those outlined above, notwithstanding the fact that some divergence relates to conceptual nuances found in arbitral jurisprudence regarding the understanding of the duty of stability and the FET standard.

823. The tribunal in *Antin v. Spain* stated that under the ECT States have the power to regulate and to amend existing rules, provided that they do not "*suddenly and unexpectedly eliminate the essential features of the regulatory framework in place*", citing the award in *Charanne v. Spain*[1086]. In the words of the *Antin* tribunal:

> "*... a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered – i.e., stripped of its key features – as applied to existing investments in ways that affect investors who invested in reliance on those regimes.*"[1087]

[1083] *Ibid.,* para. 526.
[1084] *SolEs* Award, para. 315.
[1085] *Ibid*., para. 316.
[1086] *Antin* Award, para. 531, citing *Charanne* Award, paras. 513-514 and 517.
[1087] *Ibid*., para. 532.

(d) The duty to accord FET

(i) FET and legitimate expectations

824. As in many other renewable cases against Spain, the Claimant has based its FET claims on the duty to respect legitimate expectations, inherent in the concept of FET.

825. As outlined earlier (in paras. 604 and 750 *supra*), the Parties disagree as to the contents of the obligation to afford FET under Article 10(1) of the ECT. While the Claimant submits that FET in Article 10(1) is an autonomous standard different from and beyond the minimum standard of treatment of customary international law, the Respondent contends that once the investment is made, the best protection standard accorded under the ECT to foreign investors and investments is national treatment[1088] and that only if national treatment is less favorable than the minimum standard of international law, the latter will be applicable.[1089]

826. Like other tribunals which addressed this issue, this Tribunal is in agreement with the Claimant's submission that FET has been consistently interpreted as more protective than the minimum standard of treatment under customary international law.[1090] There is no textual basis to argue that the duty to provide FET under the ECT is synonymous with the obligation to respect the minimum standard of international law. Accordingly, the Tribunal does not agree with the Respondent's assertion that under Article 10(1) ECT the protection the investors are entitled to receive is that of the minimum standard of treatment under customary international law.

827. The tribunal in *Antin v. Spain* has properly explained that it does not agree with the proposition that the ECT sets no more limits on the regulatory power of States than the minimum standard of international law.[1091] Correspondingly, the host State's power to regulate has been narrowed by the drafters of the ECT. In the view of the Tribunal, by becoming a Contracting Party to the ECT, the Respondent accepted the limitation on its regulatory power imposed by the ECT.

[1088] Resp. C-Mem., para. 1016; Resp. Rej., para. 1452.
[1089] Resp. C-Mem., para. 1075.
[1090] Cl. PHB, para 124.
[1091] *Antin* Award, para. 530.

828. In response to the arguments of Spain that the main objective of the ECT is to guarantee non-discrimination (national treatment) of foreign investors, the *RREEF* tribunal aptly stated that Article 10 of the ECT guarantees FET to foreign investors, with the precision that this treatment will not be "*less favourable than that required by international law*" and that "*the minimum standard as applied traditionally in international law is included in the FET which adds to it in favour of the investor.*"[1092] It added that "*while it is not expressly mentioned in Article 10(1) ... respect for the legitimate expectations of the investor is implied by this provision and is part of the FET standard*."[1093]

829. Previous tribunals have had to address FET in cases against Spain, and their results show a measure of similarity.[1094] Over time, as jurisprudence has evolved, the concept of legitimate expectations has become "*familiar in the context of analyses of claims of breaches of FET provisions*".[1095]

830. The tribunal in *Novenergia v. Spain* cited the observation of the tribunal in *Electrabel v. Hungary*, stating that the protection of the investors' reasonable and legitimate expectations is widely accepted as the "*most important function of the fair and equitable treatment standard.*"[1096] It stated that the stability and transparency obligation is simply an illustration of the obligation to respect the investor's legitimate expectations through the FET standard.[1097]

831. The tribunal in *NextEra v. Spain* also stated that the protection of legitimate expectations is an essential element of the provision of the FET under Article 10 of the ECT.[1098]

832. The Tribunal considers that the stability promises in the domestic law and regulations such as Royal Decrees of the Respondent, as well as other official and informal assurances and

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[1092] *RREEF* Decision, para. 258 **(CL-0202).**
[1093] *Ibid*., para. 260.
[1094] The tribunal in *RREEF* Decision, "*is convinced that it is of no avail to cite the long litany of case-law*", having tried to define the FET standard, but goes on to state the elements of FET to be considered as relevant: transparency, consent protection and security, non-impairment, non-discrimination, proportionality, reasonableness, and, implied, the protection of legitimate expectations (para. 260), with a high threshold of proof and reasonableness as the main criterion (para. 262).
[1095] *Cube* Decision, para. 386 (**CL-0203**).
[1096] *Novenergia* Award, para. 648, citing *Electrabel* Award, para. 7.75.
[1097] *Novenergia* Award, para. 646.
[1098] *NextEra* Award *and* Decision, para. 582.

representations made to attract investment could be the basis of establishing or reinforcing the Claimant's legitimate expectations on the stability of the regulatory regime relied on by the Claimant to be protected under international law. Previous tribunals took similar views, in particular when such stability promises were made to attract foreign investment.

833. The Tribunal shares in principle the view expressed by the tribunal in *Cube Infrastructure v. Spain*:

> "*We emphasise that no investor is entitled to assume that the regulatory regime in place at the time that its investment is made will continue to remain in force. States have the sovereign right to amend their legislation. But States also have the right, and the legal power, to make representations as to the future treatment of investments in such a manner as to create expectations that cannot be defeated without violating a duty of Fair and Equitable Treatment. In this case, the Respondent held out the assurance of the stability of specific regulatory provisions as an inducement to invest in the renewable energy sector, and was not free to walk away from that assurance at will. Investors were entitled to rely upon that assurance of stability as a firm commitment.*"[1099]

834. Along the same lines, referring to previous decisions such as *El Paso v. Argentina*, *Waste Management v. Mexico* and *Saluka v. Czech*, the tribunal in *Charanne v. Spain* underlined that "*a State cannot induce an investor to make an investment (thus giving rise to legitimate expectations) and then disregard the commitments arising out of those expectations.*"[1100]

835. Arbitral jurisprudence has shown divergent lines of reasoning in the understanding and conditions for the recognition of legitimate expectations. The conventional approach has been to identify the state of the law of the host State at the time of the investment and to relate the investor's expectations to the laws so found.[1101]

836. The Parties agree, and the Tribunal accepts, that an investor's legitimate expectation must be determined at the time of investment. However, the Parties disagree as to whether specific commitments or undertakings addressed to a particular investor are required as a

[1099] *Cube* Decision, para. 397.
[1100] *Charanne* Award, para 486 (**CL-0009t**), referring to *El Paso Energy Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Award, October 13, 2011; *Waste Management Inc. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/3, Award, April 30, 2004; and *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006.
[1101] See, e. g., *Antin* Award, para. 537.

basis of the Claimant's legitimate expectations. The Claimant submits that even if there is no such specific commitment from the Government, the tribunal could find a breach of the FET standard and a breach of the obligation to provide fundamental stability in the essential characteristics of the legal regime (see para. 611 *supra*).[1102] To the contrary, the Respondent contends that absent a specific stability commitment, no investor can have the legitimate expectation that a regulatory framework will not be modified (see para. 769 *supra*).[1103]

837. Review of arbitral precedents in cases involving Spanish renewable energy disputes under the ECT shows three distinct patterns of diverging views on this issue.

838. A majority of cases takes the position that specific commitments made to a particular investor are not necessary to an FET claim based upon legitimate expectations. For instance, in *SolEs Badajoz v. Spain*, the tribunal ruled that the host State laws at the date of investment would shape the legitimate expectations and that "*special commitments made to an investor*" were not necessary to an FET claim. It further stated that an investor's legitimate expectations can also arise from provisions of law and regulations and from statements made by or on behalf of the State for the purpose of inducing investment by class of investors.[1104]

839. The tribunal in *Novenergia v. Spain* stated that the FET standard does not give a regulatory stability *per se*, but it protects an investor "*from a radical or fundamental change to legislation or other relevant assurances by a State that do not adequately consider the interests of existing investments already made on the basis of such legislation.*"[1105] It further stated that an expectation that "*the regulatory framework will be stable can arise from, or be strengthened by, state conduct and of statements*".[1106]

840. A very different approach, found in a smaller number of cases, finds such expectations only in the case of "*assurances*" narrowly defined as promises by the host State made to a particular investor. For instance, the tribunal in *Micula v. Romania* stated that:

[1102] Tr. Day 2, 73:11-19.
[1103] Resp. Opening, slide 215.
[1104] *SolEs* Award, para. 313 (**CL-0209**).
[1105] *Novenergia* Award, para. 654 (**CL-0173**).
[1106] *Ibid.*, para. 651.

> *"[T]he fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability."* [1107]

841. The tribunal in *InfraRed v. Spain* was also of the opinion that a legitimate expectation of stability (i.e. immutability) could only arise in the presence of a specific commitment tendered directly to the investor or industry sector at issue.[1108] The *Charanne* tribunal also took the same position.[1109]

842. Another line of jurisprudence also starts out from the requirement of specific assurances but goes beyond individual promises and also recognizes certain expectations raised by such general laws which define promises in a manner giving rise to expectations in distinct, defined terms.

843. From this perspective, the tribunal in *Antin v. Spain* observed that:

> *"... the expectations of the investor need to originate from some affirmative action of the State, either "in the form of specific commitments made by the host State to the investor ... or in the form of representations made by the host State, for example, with respect to certain features of a regulation aimed at encouraging investments in a specific sector. In other words, legitimate expectations cannot arise from subjective considerations of the investor absent an affirmative action of the State which, objectively determined, evidences that the State intended to describe a particular treatment or regime on which the investor could rely when making its investment."*[1110]

844. The tribunal in *Masdar v. Spain* elaborated that two schools of thought exist with regard to the source of legitimate expectations; the first one is focused on the general statements in general laws or regulations at the time of the investment, the second on the existence of a specific commitment by the host State toward an investor.[1111] However, the *Masdar* tribunal abstained from formulating its own position. It stated that without being detained by the majority of the *Charanne* tribunal, it had to consider not only the totality of the Spanish legislative regime applicable to CSP installations, but also had to take into account the existence of specific commitments, outside the general legislation or general

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[1107] *Micula* Award, para. 666.
[1108] *InfraRed* Award, para. 366 (**CL-0210**).
[1109] *Charanne* Award, para. 499 (**CL-0009t**) (**RL-0049EN**).
[1110] *Antin* Award, para. 538.
[1111] *Masdar* Award, para. 490 *et seq*.

documentation. Based on its broad view of a "*specific commitment*", the *Masdar* tribunal concluded that Spain had undertaken a clear and specific commitment addressed to each project in specific letters related to the process of the registration under RAIPRE rules. On that basis, without ruling as to whether RD 661/207 was a specific commitment or not, the *Masdar* tribunal found the breach of the FET obligations pursuant to Article 10(1) of the ECT.[1112]

845. The *9REN* tribunal disagreed with the view that the legitimacy of the expectation must focus on a particular investor. It stated that the need for a specific undertaking to that investor was not shared by UNCTAD[1113] and observed that "*a representation is no less 'specific. if … it is addressed to an identifiable class of persons, namely prospective investors whose money was solicited by Spain's FIT program*" and viewed Article 44(3) of RD 661/2007 as a "*specific undertaking within the contemplation of the jurisprudence*".[1114]

846. In *Isolux v. Spain*, the tribunal ruled that an investor may derive legitimate expectations from rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making its investment, with reference to an UNCTAD study.[1115]

847. In conclusion, this Tribunal considers that specific assurances or undertakings addressed to a particular investor are not indispensable to create legitimate expectations that the regulatory framework will be stable. However, if the State has given specific assurances or representations to a particular investor or a particular sector by laws, royal decrees or other forms of representations to induce investments, such assurances or representations could strengthen the legitimate expectations of investors to be protected under Article 10(1) of the ECT.

(ii) Legitimate expectations and the State's right to regulate

848. None of the tribunals in Spanish renewable cases has considered that the existence of legitimate expectations would have the effect to freeze the legal order of the host State in

[1112] *Ibid*., paras. 511-522
[1113] *9REN* Award, para. 215 (**CL-0208**), citing UNCTAD, Fair and Equitable Treatment (2012), n 263, p.69.
[1114] *Ibid*., para. 257.
[1115] *Isolux* Award, para. 775 et seq. (**CL-0151**)(**RL-0092**); See also *Charanne* Award, para. 486.

relation to the investor; changes and adaptations of a limited magnitude would have to be made over time in response to changing circumstances, and an investor should not thereby be surprised.

849. The Tribunal agrees that the power of the host State to regulate and amend its legislation is not disputed but considers that this power is not unfettered.[1116]

850. This Tribunal considers that as regards the protection of the investor's legitimate expectations, the operation of this maxim of investment law as a part of fair and equitable treatment, may not necessarily fully coincide with the scope of application of a rule requiring stable conditions.

851. Following a series of earlier decisions, this Tribunal considers that legitimate expectations regularly find their essential basis in the state of the law at the time when the investment was made.

852. A few decisions (the "*second school of thought*", in the words of the *Masdar* tribunal (see para. 844 *supra*) have refused to agree with this framework and instead have exclusively recognized such expectations which were based on commitments entered into by the host State specifically in its bilateral relation with a particular investor.

853. However, it is by no means evident why the FET standard should operate only in the narrow confines of specific representations. This Tribunal finds it more convincing to assume a broader significance of the FET clause, in particular in the context of the first sentence of Article 10(1) of the ECT which imposes the Contracting Parties a duty to create stable conditions for the investment into the energy sector.

854. In this regard, the Tribunal agrees with the Claimant's submission that if specific commitments, promises or assurances have been made by the host State, the form, content, clarity and specificity of the commitment, promise or assurance determines the degree to which such a limitation applies to the host State's exercise of its sovereign right to amend or modify the regulatory framework relied on by the investors and that specific

[1116] See *Masdar* Award, paras. 485-486 and the cases referred therein.

commitments are not just those addressed to a particular investor or group of investors, but also those which are "*specific regarding their object and purpose*."[1117]

855. However, this Tribunal considers that an investor who knew, or should have known, at the time of his or her investment, that the host State would not be able or willing to respect the legal stability should not under all circumstances act on the assumption that the law would not change. The investor who made an investment in such circumstances could not have a legitimate expectation that the law or regulatory framework would not change. This maxim has been recognized by tribunals in the context of the change of Spanish legislation after 2010.[1118]

856. This Tribunal considers, however, that the scope of application of this principle is significantly narrowed down by the recognition that, as a rule, an investor is entitled to believe that a State is able and willing to accept the previous expressions of its will and to honour its commitments.

(iii)Balancing exercise

857. The Parties disagree as to whether the FET standard in Article 10(1) of the ECT requires a balancing act involving the public interest and the rule of proportionality.

858. The Respondent submits that the FET standard of the ECT does not protect against a State's right to legislate or regulate in a manner which may negatively affect an investor's investment, provided that the State acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals (see para. 765 *supra*). The Respondent further submits that in such balancing, the tribunal must assess the general effect of the measures in dispute rather than the specific effect on the investor (see para. 764 *supra*). As stated earlier (see para. 743 *supra*), the Respondent claims that it has respected the proportionality and reasonableness standard when adopting the Disputed Measures. It states that the balance has been re-established by the Disputed Measures to eliminate situations that generated unjustifiable remuneration and the tariff deficit. However, at the

[1117] Cl. Mem., para 1166.
[1118] See *Novenergia* Award, para. 686 analyzing *Isolux* Award, *RREEF* Decision, paras. 392 *et seq*., and *Cube* Decision, paras. 341 *eq seq*.

Hearing the Respondent stated that "[i]*n the end, what this Tribunal has to consider is, on the one hand, the interest of the investors, the legitimate interest of the investors; on the other hand, what were the interests of the state, according to all the circumstances of the case.*"[1119]

859. The Claimant contends that the Respondent's test of balancing only requires to check the existence of a rational policy and the reasonableness of the act in relation to that policy, and accordingly is problematic because it obviates the interests and protection of the aggrieved party (see para. 636 *supra*).

860. The tribunal in *Novenergia v. Spain* agreed that an assessment of Spain's actions under the FET standard allowed for a balancing exercise by the Respondent in appropriate circumstances citing the tribunal in *Electrabel v. Hungary* which stated as follows:[1120]

> *"[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."*
>
> *"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."*

861. The tribunal in *RREEF v. Spain* views that in the absence of a specific commitment, the test is to determine whether the changes in the regulations amount to a substantial change to the legal framework applicable to investors. It calls for an assessment of the importance of the extent of the alterations suffered by the investors to the conditions of their investments taking into account the "*global balance of costs and benefits*" which the investors could reasonably expect when they made their investment compared with what can be expected on the basis of the ulterior modifications.[1121]

862. The tribunal in *SolEs v. Spain* ruled that the FET provision of the ECT "*does not operate as a stabilization provision that applies generally to the laws and regulations in place at the time of an investment*" and it requires a weighing of the investor's "*legitimate and*

[1119] Tr. Day 1, 229:17-22.
[1120] *Novenergia* Award, para. 657, citing *Electrabel* Award, paras. 165 and 180.
[1121] *RREEF* Decision, para. 322.

reasonable expectations on the one hand" and the State's "*legitimate regulatory interests on the other*". It further observed that

> *"the legitimacy of the investor's expectations and the host State's scope to modify its regulatory regime without violating the FET obligation must be measured in light of any undertakings of stability that are contained in the laws, regulations and authoritative pronouncements of the host State, upon which the investor relied when it made its investment."*[1122]

863. Having reviewed the Parties' submissions and the arbitral precedents on this issue, this Tribunal agrees with the Claimant in that the balancing exercise in the context of the FET of Article 10(1) of the ECT should consider the reasonableness of the measures in relation to the rational policy on the one hand, and the severity of such measures on the interest and protection of the aggrieved party, in particular when the host State has given assurances or promises of stability to attract investment. The Tribunal also considers that the tribunal in *Electrabel v. Hungary* which the Respondent invokes in its support (see para. 766 *supra*) in fact stated that a balancing or weighing exercise is required to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests (see para. 860 *supra*)

(iv)Legitimate expectation and the Claimant's knowledge

864. The Respondent submits that an investor makes his or her investment based on the knowledge of the regulatory framework and must be aware of the risks he or she assumes when making the investment. The Respondent further submits that in order to assess the existence and the legitimacy of the Claimant's expectations, circumstances at the time of an investment must be assessed, which must include the regulatory framework known to the investor at the time of investment, objectivity and reasonableness of the investor's understanding of that framework, the conduct of the State and subjective circumstances of the investor (see para. 780 *supra*). The Claimant does not contest this as a matter of principle.

865. The Tribunal agrees, in principle, with the Respondent that in determining legitimate expectations the following should be taken into consideration: (i) the regulatory framework

[1122] *SolEs* Award, para. 318.

known to the investor at the time of the investment, (ii) the objective and reasonable understanding of that framework any investor could have, (iii) the conduct of the State and (iv) the circumstances of the investor.[1123] The Tribunal considers that the finding of the investor's legitimate expectations should be based on a fact specific inquiry on a case-by-case basis.[1124]

866. As stated earlier (see para. 777 above), in reliance on arbitral precedents such as *Electrabel v. Hungary, Parkerings-Compagniet AS v. Republic of Lithuania*, the Respondent stresses the importance of due diligence by the investors.

867. In the context of legitimate expectations, this Tribunal agrees that the scope of knowledge acquired by the investor in its exercise of due diligence may become relevant in assessing the investor's expectation. In general, however, this Tribunal is of the opinion that the requirement of due diligence must not be construed in a broad manner. Its limited relevance is reflected in the fact that neither investment treaties typically nor the ECT in particular refer to it; the specific circumstances will have to be considered.[1125]

868. The tribunal in *Isolux v. Spain* rightly accepted that the investor might not be required to carry out a comprehensive legal due diligence. It observed that the key issue in determining whether the expectations alleged by the investor were reasonable was what any prudent investor should know regarding the regulatory framework before investing.[1126]

869. An issue of some complexity arises under Article 10(1) of the ECT in case the host State re-arranges the legal and business conditions under circumstances known beforehand to the investor. The *Isolux* tribunal stated that an investor might not have legitimate expectations generated by the regulatory framework when it foresaw and anticipated the unfavorable developments of the regulatory framework before investing.[1127] The *RREEF* tribunal also took the position that if the investors were made aware that the State's legal

[1123] Tr. Day 1, 220:4-18.
[1124] See *Antin* Award, para. 536.
[1125] See, e.g., *Isolux* Award, July 6, 2016, para. 781; *Novenergia* Award, para. 679.
[1126] *Isolux* Award, para. 781.
[1127] *Isolux* Award, para 781.

regime was subject to possible changes in the future, whether the investors' diligence was due or not is not relevant.[1128]

870. A related issue is the Respondent's argument that every investor should know the general regulatory framework governing investment, which includes the rules and case-law that will be applicable to their investment, and their relevance (see para. 781 *supra*). The Tribunal is of the view that the assessment of an investor's legitimate expectation should consider the totality of the regulatory framework relied on by the investor taking into account the stability commitments built in the laws and regulations, duly interpreted, and representations and assurances made by the host State to attract the investment from the international law perspective.

(2) Application of the law to facts

871. Having established the standard of protection under the first and second sentences of Article 10(1) of the ECT elaborated above, the task of the Tribunal in this section is to determine: (i) whether or not the Claimant has established the existence and contents of legitimate expectations, as claimed, in regard to the stability of the remuneration regime under the regulatory framework relied on by it at the time of its investment. In this process, the Tribunal will also review whether or not the Respondent has provided specific commitments, promises or assurances as to the stability of the feed-in remuneration regime applicable to the Solacor Plants, as claimed by the Claimant; and (ii) whether or not the Claimant has established that the subsequent Disputed Measures taken by the Respondent fundamentally altered the essential features of the remuneration regime the Claimant relied on and thus frustrated the Claimant's legitimate expectations in breach of the Respondent's international obligations under Article 10(1) of the ECT.

(a) ***Date of investment***

872. The Parties disagree on the date of the Claimant's investment, a threshold matter in identifying the relevant regulatory framework relied upon by the Claimant and determining the existence and contents of the Claimant's legitimate expectations. It is also relevant in

[1128] *RREEF* Decision, para. 398.

assessing whether the Claimant knew or should have known at the time of its investment the possibility of changes to the regulatory regime subsequent to its investment.

873. The Claimant initially submitted that the date of investment was July 28, 2010 when its Board of Directors adopted a resolution approving the Claimant's investment in the Solacor Project.[1129] In its Post-Hearing Brief, it claims that the date of its initial investment is August 6, 2010 when JGC entered into irreversible commitments to invest by entering into various agreements for the implementation of the Solacor Project such as Shareholders' Agreements, Loan Agreements, EPC Contracts and O&M Contracts (see paras. 486 to 491 *supra*).[1130] The Respondent contends that June 22, 2010 when the Claimant signed the Sale and Purchase Agreement of Shares should be regarded as the date of the Claimant's investment, and therefore, the so-called July 2, 2010 Agreement and RD 1614/2010 should not be considered as a part of the regulatory framework relied on by the Claimant at the time of its investment (see para. 665 *supra*) and as such should not be considered as the basis of the Claimant's legitimate expectations.

874. The Tribunal finds reasonable the Claimant proposition that the test determining the investment date should be the date on which the investment becomes irreversible and the date on which financial risk of the project is assumed (see para. 486 *supra*). The JDA entered into between JGC and Abengoa Solar in 2009 provided that "[t]*he execution of the Shareholders' Agreement means the Parties' commitment of the equity funding pursuant to the provisions of the Shareholders' Agreement*."[1131] In that regard, the Tribunal finds that the Claimant's submission that August 6, 2010 be regarded as the date of the Claimant's investment is convincing. On this date the Claimant entered into a firm commitment to the Solar Project by entering into the Shareholders' Agreement, financing arrangements and other agreements necessary for the implementation of the Solacor project. The evidence on the record of this proceeding, including the testimony of Mr. Endo at the Hearing, shows that notwithstanding the strong request from Abengoa Solar to proceed with the investment quickly, the Claimant was cautious not to make a firm commitment to make the investment

[1129] Cl. Opening, slide 60.
[1130] C PHB, paras. 16 – 19.
[1131] (**C-0338**) JDA, Clause 3.

in the Solacor Project until it confirmed the CSP sector's agreement with the Ministry announced on July 2, 2010 and the financing from Lenders as well as the issuance of an insurance by NEXI were secured.[1132]

875. Explaining why JGC signed the Sale and Purchase Agreement of Shares on June 22, 2010, Mr. Endo testified that "*in the worst case scenario we would be willing to take the loss of €30,000, and that is why we signed the SPA.*"[1133] Considering the nominal value of the shares acquired by JGC on June 22, 2010 (EUR 31,304), with the exit condition if the Financial Closing would not take place on or before August 2, 2010, the Tribunal does not accept the Respondent's argument that June 22, 2010 should be regarded as the Claimant's date of investment for the purpose of assessing the Claimant's legitimate expectations.

(b) Regulatory framework at the time of the Claimant's investment and the Claimant's legitimate expectations

(i) Historical evolution of the remuneration regime for CSP plants in Spain

876. Having determined the date of the Claimant's investment, in this subsection, the Tribunal will look into the historical evolution of the regulatory regime for CSP plants in Spain leading to the regulatory regime relied on by the Claimant at the time of its investment, in particular, RD 661/2007, the July 2, 2010 Agreement and RD 1614/2010 (which incorporated the major contents of the July 2, 2010 Agreement).

877. The Respondent emphasizes the importance of the 2000-2010 Energy Plan and the 2005-2010 Energy Plan which, it claims, defined the methodology of calculating remuneration based on the concept of standard facilities, and argues that they should also be included as the regulatory framework at the time of the Claimant's investment. Furthermore, the Respondent insists that in addition to RD 661/2007, (i) successive amendments to royal decrees governing the economic regime applicable to renewable plants implementing EPA 1997 (RD 2818/1998, RD 436/2004 and RD 1578/2008), and RD-L 7/2006 and (ii) Spanish

[1132] Tr. Day 2 [Endo] 46:13-47:16.
[1133] Tr. Day 2 [Endo] 47:14-16.

Supreme Court decisions since 2005 through 2009 should also be added to the regulatory framework to be considered.

878. The Tribunal does not consider them as the regulatory framework relied on by the Claimant in the strict sense of the term. However, considering that they could shed light on the understanding of the regulatory framework at the time of the Claimant's investment in the historical evolution of the Spanish regulatory framework, the Tribunal will expand the scope of inquiry to include those additional domestic laws and regulations as well as court judgments to the extent the Tribunal considers them relevant and helpful in assessing the Claimant's legitimate expectations.

879. Careful review of the evolution of the Spanish regulatory framework implementing the mandate of EPA 1997 from RD 2818/1998, RD 841/2002, RD 436/2004 and RD 661/2007 over 10 year period from 1997 to 2007 leads the Tribunal to form a view that the Respondent had consistently pursued a policy towards promoting investment in renewable energies, in general, and in the CSP sector in particular, by offering an attractive feed-in remuneration regime since late 1990s until it adopted the first batch of the changes to the regulatory regime in 2012.

880. The Respondent expressed its intent to promote renewable energy to meet the target set by EPA 1997 and EU Directives, and such policy direction was reflected in the successive royal decrees, each of which offered, according to Respondent, a more favourable and predictable feed-in remuneration regime for CSP technology than the one it replaced, with a stated objective of reducing uncertainty and improving stability of the regime to induce investment into this sector. The Respondent clearly recognized the importance of regulatory stability to the potential investors and publicized its commitment to the regulatory stability and legal security in various official and informal forms of communication as discussed below.

881. In the following paragraphs, the Tribunal highlights the provisions or texts of those laws and royal decrees, as well as the Respondent's official and unofficial representations, which have led the Tribunal to form the view expressed above.

882. The preamble of EPA 1997[1134] declared that special arrangements for electricity generation known as the special regime, the demand-side management programmes and, above all, the promotion of renewable energies added to its position within the Spanish legal system.[1135] Article 30(4) of EPA 1997 mandated the Government to supplement the remuneration for installations under the Special Regime and in setting the premium to take into account, among others, the investment costs incurred so as to achieve reasonable profitability rates with reference to the cost of money on capital markets. The policy objective expressed in EPA 1997 was to promote renewable energies in order for renewable energy sources to cover at least 12% of Spain's total energy demand by the year 2010. This objective should be taken into account in the setting of premiums.[1136]

883. The preamble of RD 2818/1998[1137], the first Royal Decree implementing EPA 1997, stated that the regulatory framework provided therein aimed to promote the Special Regime installations, by establishing a "*new system of temporary incentives*", subject to "*no time limit*" in such a way as to contribute at least 12% to the energy demand in Spain in 2010.[1138] It adopted a remuneration framework which was composed of the market price and premium as an additional payment to encourage the development of the Special Regime facilities.[1139] Under this Royal Decree solar thermal technology producers under the Special Regime could choose to receive one total price of a certain number of pesetas per KWh instead of the market price plus premium option.[1140]

884. As stated earlier (see para. 134 *supra*), RD 2818/1998 prescribed reviews of the premiums every four years.[1141] However, unlike its successors (RD 436/2004, RD 661/2007 and RD 1614/2010), RD 2818/1998 did not include any provision exempting existing facilities in operation from the application of future revisions of the premiums.[1142]

[1134] For a detailed account of EPA 1997, see paras. 124 to 131 of this Decision.
[1135] (**R-0003EN**)(**C-0036tt**) EPA 1997, Preamble, p.12.
[1136] *Ibid.*, Sixteenth transitory provision.
[1137] For a detailed account of RD 2818/1998, see paras. 132 to 134 of this Decision.
[1138] (**C-0050t**)
[1139] Article 26 (Price for delivered electric power) (**C-0050t**); Cl. Mem., para.9.
[1140] Resp. C-Mem., paras. 337 and 338, citing Articles 26 and 28 of RD 2818/1998.
[1141] *Ibid.*, para. 345.
[1142] Cl. Mem., paras. 202 and 203.

885. The 2000-2010 Energy Plan,[1143] adopted in 1999, established an objective of 200 MW of CSP installed capacity by 2010. It stated that considering the high level of solar radiation in Spain, Spain might become a pioneer in the commercial development of CSP technology.[1144] This plan expressly acknowledged the need for legal stability with regard to feed-in remuneration schemes by stating that "[s]*tability is likewise needed in development and subsidy programs to avoid market uncertainties over a lack of clarity on investment conditions*."[1145]

886. Under the 2001 EU Renewable Directive,[1146] approved in September 2001, Spain's indicative target was to draw 29.4% of its electricity from renewable sources by 2010.[1147]

887. According to the Respondent, the purpose of RD 436/2004[1148] was to reach the objectives of the 2000-2010 Energy Plan and eliminate the volatility of the previous system in calculating the remuneration for renewable energies.[1149] The Tribunal considers that the remuneration regime set forth in RD 436/2004 had become much more specific as compared to the one in RD 2818/1998, and thereby reduced the uncertainty of revenues of the Special Regime facilities. It maintained the feed-in remuneration system and offered the Special Regime facilities the choice between the FiT and FiP options. Utilizing the average or reference electricity tariff set by the regulator ("**TMR**"), it stipulated that the remuneration of CSP installations comprised of (i) *Tariff: 300%* [of TMR] *during the first 25 years from their commissioning and 240% from then onwards (ii) Premium: 250% during the first 25 years from their commissioning and 200% from then onwards; (iii) Incentive: 10%.*[1150]

888. RD 436/2004 provided that installations that use solar radiation as primary energy for electricity generation might use equipment that use a fuel to maintain the temperature of the hot transmission fluid to compensate the lack of solar irradiation, up to 12% of total

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[1143] For a detailed account of 2000-2010 Energy Plan, see paras. 135 to 136 *supra* of this Decision.
[1144] 2000-2010 Energy Plan, p.74 (**C-0046t**); Cl. Mem., para. 181.
[1145] 2000-2010 Energy Plan, pp. 96-97 (**C-0046t**); Cl. Mem., para. 180.
[1146] See para. 137 of this Decision.
[1147] (**RL-0015**) Annex, p.I.283/39.
[1148] For a detailed account of RD 436/2004, see paras. 139 to 148 *supra* of this Decision.
[1149] Resp. C-Mem., para. 370.
[1150] RD 436/2004, Article 33(3) (**R-0082EN**).

electricity production if the facility sold its energy at the regulated tariff (FiT), and up to 15% if the facility sold its energy under the FiP option.[1151]

889. Like its predecessor RD 2818/1998, RD 436/2004 provided for a possibility of revision of tariffs, premiums, incentives and supplements, first in 2006, and every four years thereafter. However, it included an express provision grandfathering existing facilities in operation at the time of revisions from such future revisions. The text of Article 40(3) reads as follows[1152]:

> *"3. The tariffs, premiums, incentives and supplements resulting from any of the revisions provided for in this section 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."* [Emphasis added]

890. Article 33(4) of RD 436/2004 provided for a possible revision earlier than 2006, notwithstanding the above-mentioned provision, whenever the CSP technology "*reaches 200 MW of installed capacity, the figures for the tariff, incentives and premiums stated in this article shall undergo revision*."

891. The Tribunal considers that the difference between RD 2818/1998 and RD 436/2004 is significant in terms of the stability of the remuneration regime from an investor's perspective. Both RD 2818/1998 and RD 436/2004 expressed the Respondent's intention that the remuneration stipulated therein would be reviewed every four years. An investor considering an investment under RD 2828/1998 could not have any expectation that the stipulated remuneration would continue beyond each four-year term and thus should take into account such uncertainty in making an investment decision. On the other hand, with Article 40(3), RD 436/2004 sent a clear message to prospective investors that: (i) the reviews and possible revisions of remuneration in 2006 and every four years thereafter would apply only to new facilities and that (ii) whenever CSP technology would reach 200 MW of installed capacity, the figures for the tariff, incentives and premiums stated in this article should undergo revision. Accordingly, an investor considering an investment in the renewable energy sector in Spain under RD 436/2004 could have a reasonable expectation

[1151] *Ibid*., Article 2(1).
[1152] *Ibid*., Article 40(3).

for the continuation of the tariff and premium stipulated in the remuneration regime at the time of its investment and accordingly make an investment decision based upon such expectation. Such investor would have to accept a certain risk of volatility in tariff arising from the linkage of tariff to the TMR to be determined by the regulator under the remuneration regime of RD 436/2004.

892. In the Tribunal's view, RD 436/2004 included a clear indication that the Respondent recognized the need to offer a stable and predictable regulatory framework to promote investment in view of the long-term nature of energy projects. The Tribunal considers that the Respondent determined to apply reviews and revisions of tariffs, premiums, incentives and supplements only to new facilities so that investors need not be worried about future revisions to be made by the Respondent subsequent to their investment. Furthermore, the Respondent made it clear that the tariffs and the premiums would continue to apply without time limit beyond 25 years. In this regard, this Tribunal agrees with the Claimant's submission that Article 40(3) of RD 436/2004 was an obvious "*sign*" to private investors and the "*capital markets*" intended to generate investor confidence by enhancing the legal certainty of investments subject to the Special Regime.[1153]

893. CNE's understanding of Article 40(3) of RD 436/2004, as expressed in CNE Report 2007,[1154] is in line with this Tribunal's reading as stated above. After stating that in Spain "*remuneration for electricity production under the special regime has traditionally been highly volatile, which in the opinion of investors has caused regulatory uncertainty and ultimately legal uncertainty*", CNE observed that:

> *"Royal Decree 436/2004 attempts to build on legislation with a view to permanency guaranteeing a very convenient regulatory certainty - without necessarily setting the legislation in stone.*
>
> *According to Royal Decree 436/2004, the tariffs, premiums, incentives and supplements used to calculate remuneration for electricity produced under the special regime (and accordingly the rate of return on investments) will be reviewed every four years in view of the results produced and in relation to the expected targets. In addition, Article 40 of this Royal Decree indicates that the parameters (tariffs, premiums, incentives and supplements) that must be used to calculate the remuneration on a productive asset during its entire service life must be valid when*

[1153] Cl. Mem., para. 204.

[1154] CNE Report 2007 (**C-0044**) (**R-0110**).

> *the asset is started-up. To put it another way, an electricity productive asset under the special regime installed for example in 2005 will calculate its remuneration for its entire service life with the parameters applicable in 2005, regardless of its annual adjustment."*[1155] [Emphasis added]

894. In the Tribunal's view, the 2005-2010 Energy Plan[1156] approved in 2005 clearly illustrated the Respondent's continuing desire to promote renewable energies to fulfil the target of 29.4% set for Spain in the 2001 EU Renewable Directive. This plan indicated the Respondent's realization that the solar energy development was notably below its objective.[1157] The need for subsidies to promote investment in initial projects and the uncertainty regarding the institutions that could be sources of financing were identified as the economic barriers in the use of solar resources.[1158]

895. The Tribunal finds that the CNE Report 2007,[1159] issued in February 2007, which commented on the proposed royal decree (which ultimately became RD 661/2007), is relevant and helpful in understanding the background of RD 661/2007. It is noteworthy that, commenting on the draft of RD 661/2007 which did not contain any grandfathering language limiting the application of the quadrennial revisions to new facilities, CNE emphasized the importance of legal certainty and expressed a view balancing the legal certainty and regulatory flexibility. It stated that the principle of legal certainty was not by definition an anti-evolutionary or conservative principle. It stated that the principles of legal certainty and protection of legitimate expectations:

> *"only require that regulatory innovation - especially if sudden, unpredictable or unexpected - be carried out with certain guarantees and caution (sufficient transition periods for adaptation and, where applicable, compensatory measures) that cushion, moderate and minimise as far as possible the defrauding of expectations generated by previous regulations."*[1160]

896. The CNE Report 2007 also emphasized the importance of minimizing regulatory uncertainty in the following words[1161]:

[1155] (**R-0110EN**) pp.18-19.
[1156] For details of 2005-2010 Energy Plan, see paras. 149 to 153 *supra* of this Decision.
[1157] (**C-0055t**), Section 2.2., pp.19 and 20.
[1158] *Ibid.*, 3.4.2.7, p.142-143.
[1159] (**C-0044**)(**R-0110**). For a detailed account of CNE Report 2007, see paras. 156 to 158 *supra* of this Decision.
[1160] (**R-0110EN**), p.18.
[1161] *Ibid.*, 5.3 b), p.16

> *"5.3 On the criteria that should inform regulation of the special regime*
>
> *b) Minimize regulatory uncertainty. The NEC understands that transparency and predictability in the future of economic incentives reduces regulatory uncertainty, incentivising investments in new capacity and minimizing the cost of financing projects, thus reducing the final cost to the consumer. The regulation must offer sufficient guarantees to ensure that economic incentives are stable and predictable throughout the service life of the facility, In each case, regulation must provide both transparent annual adjustment mechanisms, associated to robust trend indexes (such as the average or reference tariff, the CPI, ten-year bonds, etc.) and regular reviews that only affect new facilities (e.g., every four years) with regard to investment costs, which could also affect the reduction of operating costs at existing installation."* [Emphasis added]

897. Pointing out that the draft of RD 661/2007 was retroactive (in that it aimed to apply not only to new plants, but to plants already in existence at the time of its entry into force), the CNE Report 2007 included the CNE's Managing Board belief on the need of the legal certainty as follows:

> *"The NEC Managing Board believes that, although it is difficult to defend the petrification of regulations, it is necessary to try to achieve sufficient legal certainty to counteract regulatory uncertainty and risk as much as possible; only in this way can there be sufficient investment.*
>
> *The constitutional doctrine admits that if its need is sufficiently justified, it is possible to retroactively enforce a regulation provided that, in exchange, an adequate transition period is established and investors are compensated.*
>
> *In the opinion of the majority of the NEC Managing Board, the need to retroactively enforce the proposed Royal Decree is not sufficiently justified…"*[1162] [Emphasis added]

898. The Tribunal considers it important that in view of CNE's critical comment emphasizing the fundamental importance of minimizing regulatory instability, the Government added the last sentence of Article 44(3) to the final version of RD 661/2007. The Tribunal notes that the importance of this CNE Report 2007 was highlighted by the tribunals in the *Masdar*[1163] and *Antin*[1164] cases.

[1162] *Ibid.*, p.19.
[1163] *Masdar* Award, para. 496.
[1164] *Antin* Award, para. 541.

(ii) The remuneration regime for CSP plants at the time of the Claimant's investment

899. The Tribunal considers that the Respondent enhanced the legal stability of the remuneration regime in RD 661/2007[1165] as compared to the one in RD 436/2004 to promote investment in renewable energies, in particular CSP technology. The Tribunal considers that from the legal stability point of view of potential investors, the most important improvement in RD 661/2007, as compared with RD 436/2004, is Table 3 of Article 36, backed by the grandfathering clause of Article 44(3).

900. As explained earlier (see para. 166 *supra*), RD 661/2007 set forth the rates and premiums for each category of renewable energy installations (including CSP technology) in specific numbers for regulated tariff and reference premium, assigning different numbers for the first 25 years and thereafter (without any limit on the period of time), and thereby eliminated the volatility of the future remuneration due to the linkage to the TMR in RD 436/2004, subject to only annual CPI updates. This table also introduced the concept of the cap and the floor system to the FiP option by introducing the upper limit and lower limit numbers, apparently to reduce the uncertainty in the FiP option for both investors and the cost of the electricity system. Each of the upper limit and lower limit numbers stay the same for the first 25 years. Reduced numbers apply thereafter.[1166]

901. The remuneration stipulated in specific numbers in Table 3 of Article 36 of RD 661/2007 was backed by the grandfathering clause in the last sentence of Article 44(3). Article 44(3) of RD 661/2007 provided for the possibility of revision of the regulated tariff, premiums, supplements and the lower and upper limits in the future in the light of the degree of compliance with the 2005-2010 energy plan and of the energy efficiency and savings strategy in Spain together with the new targets to be included in the Renewable Energies Plan for 2011-2020, but explicitly stated that future revisions on the regulated tariff, the upper and lower limits indicated in that paragraph "*shall not affect*" qualified existing facilities.[1167] The text, in pertinent part, reads as follows:

[1165] For a detailed account of RD 661/2007, see paras. 159 to 176 *supra* of this Decision.
[1166] (**C-0037t**) Article 36 and Table 3.
[1167] (**R-0084EN**) Article 44(3).

> *"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."* [Emphasis added]

902. The Tribunal finds the difference in the way Article 40(3) of RD 436/2004 and Article 44(3) of RD 661/2007 were phrased is significant in conveying the Respondent's message of the legal stability to the potential investors in terms of explicitness and clarity. Article 40(3) of RD 436/2004 provides that the revisions provided for in that paragraph "*shall apply solely to the plants that commence operating subsequent to the date of the entry into force*…". Thus, the message of grandfathering of existing facilities is indirect, i.e., by interpretation. By contrast, the text of Article 44(3) of RD 661/2007 is explicit and straightforward in that it provides that the revisions indicated in this paragraph "*shall not affect*" the existing facilities.

903. The contemporaneous official press release announcing the enactment of RD 661/2007, issued by the Spanish Government on May 25, 2007, titled as "*The Government assigns priority to profitability and stability in the new Royal Decree on renewable energy and cogeneration*", stated that the purpose of RD 661/2007 was to improve the remuneration of the less mature technologies such as CSP and thereby to promote investment in such sector so as to be able to meet the objective of 12% of Spain's energy consumption in 2010 from renewable sources.[1168]

904. Contrary to the Respondent's argument (see para. 674 *supra*), in the official press release, the Ministry announced that the remuneration for the CSP installations under RD 661/2007 was an improvement over that under RD 436/2004 as follows:

> "For other technologies which require a boost due to their limited development, as with… thermoelectric solar power, the profitability increases to 8% with the transfer of production to distributors and between 7% to 11% if they participate in the market."

[1168] Ministry of Industry, Tourism and Commerce, "*The Government assigns priority to profitability and stability in the new Royal Decree on renewable energy and cogeneration*", May 25, 2007 (**C-0075t**).

> *"Thus, increases in the regulated tariff compared with that envisaged in Royal Decree 436/2004 are …… 17% for thermosolar installations……*
>
> *When installations opt to participate in the production market, the premium obtained shall be variable according to the hourly market price. To this end, lower and upper limits are established for each of the technologies, known as cap and floor limits. Under this system, the premium will be adjusted in such a manner that the total remuneration obtained by an installation shall remain within such limits in each hourly period."*

905. In the same official press release, the Ministry explained the meaning of Article 44(3) in an unequivocal language, without any caveat, as follows:

> *"Any revisions of tariffs to be carried out in the future shall not affect the facilities already in operation. This guarantee provides legal certainty for the producer, providing stability for the sector and promoting its development."* [Emphasis added]

906. The Ministry also represented the Spanish Government's commitment in the following words in this official press release:[1169]

> *"The government's commitment to this energy technologies has been the reason why in the new regulation stability in time is sought allowing business owners to plan in the medium and long term, as well as a sufficient and reasonable return which, like the stability, makes the investment and engagement in this activity attractive."* [Emphasis added]

907. The Tribunal notes that the Parties disagree on the interpretation and the legal effect of the last sentence of Article 44(3) of RD 661/2007. However, irrespective of the interpretation and the legal effects of this provision under Spanish law, in particular under the theory of hierarchy of legal order, the Tribunal views that the plain reading of the texts of RD 661/2007, its preamble and the Ministry's representation in the official press release together with the CNE Report 2007 commenting on the draft of RD 661/2007 as well as the evolution of the regulatory regime clearly show that the Respondent intended to send an unequivocal message to potential investors in the renewable sector that it had decided to assign "*priority to profitability and stability*" to attract investment in the renewable

[1169] *Id.*

energy sector, in particular those less mature technologies including the CSP technology. For that purpose, the Respondent offered more attractive and stable feed-in remuneration regime as compared to those of RD 436/2004.

908. This Tribunal does not view that RD 661/2007, in particular, the last sentence of Article 44(3), is a stabilization commitment, *per se*, to "*freeze*" the remuneration regime of RD 661/2007 for perpetuity. The Respondent clearly indicated its intention to review the tariffs, premiums, supplements and the upper and lower limits in 2010 and every four years thereafter according to specific criteria. However, at the same time, the Tribunal is of the opinion that the Respondent made an explicit commitment that such revision of the regulated tariff and the upper and lower limits "*shall not*" affect the qualifying existing plants already in operation at the time of such revisions. In that regard, this Tribunal views that the last sentence of Article 44(3) is a clear and straight-forward message of grandfathering to the effect that in the event revisions of the tariffs, premiums and the upper and lower limits are made in the future, the existing facilities could continue to get the benefit of the regulated tariff and the upper and lower limits (except for premium and supplements) as set forth in the Table 3 of Article 36 at the time of their investment. The figures stipulated in Table 3 of Article 36 were specific numbers, for 25 years (with higher number) and beyond (with reduced number), subject only to an annual update using CPI. Given the long-term nature of investments in the energy sector, this scheme apparently eliminated investors' concern over the uncertainty of the future revenue streams of the renewable plants to a substantial degree.

909. In the view of the Tribunal, by the text of Article 44(3) of RD 661/2007, its preamble and the Respondent's representation in the contemporaneous official press release on RD 661/2007, the Respondent communicated the following messages to investors in the renewable energy sector:

(i) that its policy at the time of the enactment of RD 661/2007 was to boost investment in less developed renewable energy sectors, including CSP technology, by offering the feed-in remuneration regime with higher profitability with the assurance of the stronger stability of the remuneration regime than the prior remuneration regime under RD 436/2004;

(ii) that CSP installations would continue to have a right to choose between two remuneration options, i.e., regulated tariff (FiT) and pool plus premium (FiP);

(iii) that the Respondent had determined, taking into account the parameters set by EPA 1997, the specific figures stipulated in Table 3 of Article 36 for each of the different categories of renewable installations (regulated tariff, reference premiums, the upper and lower limits) and, expected that this remuneration would increase the profitability of CSP installations to 8% with the regulated tariff option, and between 7% to 11% with the FiP option;

(iv) that such stipulated remunerations would apply to the operational lifetime of the installations without any limit on the period of time, although after 25 years, the remuneration would become less as specified;

(v) that the tariffs, premiums and caps and floors were to be annually updated in accordance with general CPI less 0.25% until the end of 2012 and less 0.5% onwards;

(vi) that the CSP installations might continue to use the back-up fuel and obtain the feed-in remuneration for the electricity produced by using the back-up fuel up to the specified limits (12% for the FiT option and 15% for the FiP option);

(vii) that a review (and revision) was to be made on the tariffs, premiums, supplements and lower and upper limits in 2010 and then every four years;

(viii) that the revisions of the regulated tariff and the upper and lower limits (except for premium) in the future should not affect existing facilities which have complied with the RAIPRE registration requirement; and

(ix) that the right to priority access to the transmission and distribution grid and energy dispatch priority was granted.

910. Accordingly, the Tribunal considers that RD 661/2007, together with its preamble and the Ministry's representation in the contemporaneous press release and the transition history from RD 2818/1998 through RD 661/2007 gave rise to legitimate expectations of prospective investors considering investment in the Spanish CSP sector, including the

Claimant, that the stability of the feed-in remuneration regime offered by RD 661/2007 as well as the specific grandfathering clause set forth in Article 44(3) would be respected by the Respondent in the future.

911. Mr. Endo stated the Claimant's understanding of Article 44(3) of RD 661/2007 as follows in his first witness statement:

> *"JGC decided to invest in Spain primarily because Spain's Feed-in regulatory framework and the rights granted by Royal Decree 661/2007 ("RD 661/2007") were attractive. CSP installations in operation were shielded from any future regulatory changes subject only to CPI adjustments, which meant that stable and predictable revenues from the projects were guaranteed."*[1170]
>
> *"At JGC we certainly took this clear and precise rule at face value. Article 44(3) of RD 661/2007 was a legal rule entirely consistent with the Feed-in Model principles underlying RD 661/2007, which sought to encourage investments in renewable projects by creating stable and predictable economic conditions."*[1171]

912. Contending that there is no stabilization commitment in RD 661/2007 to pay the specified tariffs and premiums throughout the useful life of the facilities, the Respondent asserts that it never granted a right to a specific level of premium or regulated tariff during the whole useful life of the plants and that the tariffs and the premiums of RD 661/2007 were the means by which to achieve reasonable rate of return and that it was set in order to provide typical facilities with a profitability of around 7% with their own resources and after taxes.[1172] The Tribunal does not find any support for this argument in the text of Article 44(3) of RD 661/2007, its preamble and the Respondent's representation in the contemporaneous official press release on RD 661/2007 which the Tribunal reviewed earlier. The evidence on the record in this proceeding points to the contrary. In the Tribunal's view, the message the Respondent conveyed through RD 661/2007 and the associated press release cannot be clearer.

913. The Tribunal views that the Respondent, as a sovereign, must have made a deliberate decision to offer the feed-in remuneration regime to investors to attract investment in the renewable energy sector, in particular less mature technology such as the solar thermal

[1170] CWS-ME_t, para. 20.
[1171] *Ibid.*, para. 34.
[1172] Resp. C-Mem., paras. 452-453.

(CSP) sector. The Tribunal considers that the specific numbers stipulated in Table 3 of Article 36 of RD 661/2007 with an annual updating mechanism using the CPI index represented the reasonable rate of return determined by the Respondent at the time of the enactment of RD 661/2007 in accordance with the mandate of EPA 1997. The Tribunal does not find any evidence that the Respondent made any reservation or warning to investors in RD 661/2007 or by other means that the Respondent was at liberty to change the stipulated tariffs and premiums on the basis of the notion of reasonable rate of return to be determined by the Respondent at will or to restructure the remuneration system as a whole. The Tribunal does not find any evidence on the record either that any of the Spanish authorities considered Article 44(3) of RD 661/2007 or the major feature of the remuneration regime under RD 661/2007 to be in contravention of the mandate given by EPA 1997.

914. The Tribunal does not find convincing the Respondent's argument that the last sentence of Article 44(3) of RD 661/2007 only refers to the regulated tariff and the upper and the lower limits, and therefore the grandfathering commitment is literally limited only to the tariff and the upper and the lower limits. Considering the context of the specific remuneration figures in the feed-in remuneration regime defined in RD 661/2007, and the Spanish Government's repeated assurances of legal stability and security, the Tribunal views that investors' legitimate expectations arising from the Respondent's stability commitments and assurances relating to RD 661/2007 would not necessarily be limited to the tariff and the upper and lower limits, but should extend to the essential characteristics of the framework of the remuneration regime built in RD 661/2007 as a whole. The Respondent's repeated assurances of stability would be futile if the Respondent were free to change essential elements of the feed-in remuneration regime in RD 661/2007, other than the tariff and upper and lower limits, which might affect the profitability, and thereby could seriously undermine the expectations of investors who relied on such assurances in making a long-term investment. The Tribunal considers that the Respondent's determination of the specific remuneration numbers in Table 3 of Article 36 of RD 661/2007 was based on the implied proposition that other essential elements of the feed-in remuneration regime of RD 661/2007 would be maintained in the future.

915. The Tribunal does not find convincing either the Respondent's argument, based upon the hierarchy of rules, that Article 44(3) refers to the specific kind of revision and thus only those specific kinds of revisions cannot affect the existing facilities, but not any kind of revision. The Respondent asserts that the Respondent is free to restructure the regulatory regime to address a macroeconomic sustainability problem in the Spanish electricity sector. Again, the Respondent's repeated assurances of stability would be futile if the Respondent were free to effect such restructuring without bearing any legal consequences under international law in view of its explicit assurances of legal stability of the remuneration regime for existing facilities to encourage investment into Spain. In this regard, this Tribunal takes comfort that the majority of earlier tribunals in the cases involving Spanish renewable energies have reached similar conclusions. For instance, the tribunal in *Cube Infrastructure* rightly observed that:

> *"It is true that Article 44.3 RD 661/2007 did not specifically and explicitly exclude the possibility of its repeal by a later law: but, as the Press Release and RD 661/2007 itself stated, retroactive alteration of the regime applicable to existing facilities registered under the Special Regime was excluded, and there is no reason to view that representation as being subject to the implied qualification that it would remain effective only until the State exercises its undoubted legislative power to override it. If it were otherwise, it would be practically impossible for a State ever to give an undertaking upon which anyone could rely, or for legitimate expectations ever to arise. Certainly, situations of necessity may arise which, as a matter of international law, would excuse non-compliance with certain undertakings: but the Respondent did not raise the defence of necessity in this case."*[1173]

916. The evidence presented in this proceeding supports the Claimant's submission that the Respondent's representatives working at *Invest in Spain* and IDAE communicated the legal stability of the feed-in remuneration regime to the representatives of the Claimant prior to its investment.[1174] The Tribunal was not able to find any warning or hint of possibility of restructuring given by these agencies to the Claimant from the evidence on the record of this proceeding. For instance, the PowerPoint file (in Japanese) Ms. Garcia of *Invest in*

[1173] *Cube* Decision, para. 289.
[1174] See CWS-ME-t, paras. 44, 45, 56 and 60-62; Manuela Garcia's email to Shibuya, dated June 18, 2009 (**C-0093**) attaching translation of the presentation in Japanese (**C-0092, in Japanese**).

Spain sent to JGC representatives by an email dated June 18, 2009 after their meeting in Madrid explained that:

> "*Any revision in the feed-in-tariff thereafter will not apply to the plants already in operation. This is the commitment to the stability and development of this sector which is to be a legal backup for generators.*"[1175] [Emphasis added]

917. The evidence on the record also shows that since 2005 the Spanish Government sent a consistent message of an appealing and stable feed-in remuneration regime to potential investors to attract investments into the renewable sector, including promotional pamphlets by IDAE[1176] and *Invest in Spain*'s roadshows.[1177] For instance, the presentation material of *Invest in Spain* dated November 15, 2007 stated that the premium system of the feed-in remuneration was guaranteed under the RD 661/2007 Special Regime and that within the EU "*Spain offers one of the most attractive combinations of incentives, low costs, political stability and economic transparency*."[1178] Mr. Uribe, then Spanish Secretary of State stated at the US-Spain Business Sustainability Forum in October 2009 that "*Spain is the only European country where a solar thermal plant has been exploited commercially with success*" and that "[f]*eed-in-tariff mechanisms have provided a reliable and stable regulatory environment*."[1179]

918. The Tribunal agrees with the Claimant's claim that RD 661/2007 was a great call on investors.[1180] Apparently, RD 661/2007 attracted investment in the CSP sector, and thus the Respondent faced the new situation in 2009 that the planned investment in CSP technology would exceed the capacity target of 500 MW set in RD 661/2007 in 2009.

919. Setting the mandatory national target for Spain for the share of energy derived from renewable sources in gross final consumption of energy in 2020 at 20%,[1181] the Directive 2009/28/EC of the European Parliament and of the Council of April 23, 2009 stated that

[1175] Legal Structure, Manuela García, Service Manager for Investors, *Invest in Spain* (**C-0092t**).
[1176] IDAE, The Sun can be yours, 2005 (**C-0072**); IDAE, The Sun can be yours, 2007 (**C-0073**); Cl. Opening, slide 50; Tr. Day 1, 24:16-17.
[1177] *Invest in Spain* Roadshow, Opportunities in Renewable Energy in Spain, November 15, 2007 (**C-0090**); Opportunities in Renewable Energy in Spain, March 2009 (**C-0582**), cited in Cl. Opening, slides 51 and 52.
[1178] (**C-0090**) slides 16, 32 and 40.
[1179] Speech in Los Angeles on October 26, 2009, pp. 5 and 7 (**C-0482**).
[1180] Tr. Day 1, 24:3-5; Cl. Opening, slide 48.
[1181] EU Directive 2009/28/EC, Annex I (**RL-0017**).

"[t]*he main purpose of mandatory national targets is to provide certainty for investors and to encourage continuous development of technologies which generate energy from all types of renewable sources.*"[1182]

920. RD-L 6/2009[1183] indicated that the Respondent recognized the problems arising from the growing tariff deficit in the electricity sector and felt urgency in introducing certain measures to address them in 2009. The preamble stated that the growing tariff deficit was "*producing serious problems, which, in the current context of international financial crisis is profoundly affecting the system.*"[1184]

921. The Tribunal finds that RD-L 6/2009 and the Resolution of the Council of Ministers of November 13, 2009[1185] reflected the outcome of the Respondent's balancing efforts between the difficult tasks of promoting investment in the renewable energy sector to meet the mandatory national target for 2020 and at the same time to address the growing tariff deficit. RD-L 6/2009 set the yearly limit of the income deficit of settlement of the regulated activities of the electricity sector for the years 2009 until 2012.[1186] The introduction of the system of "*Remuneration Pre-assignment Register*" under RD-L 6/2009 was intended to allow the Government to carry out the appropriate planning for those under the Special Regime and to guarantee the necessary legal security for the project developers to begin the construction of plants with the benefit of knowing beforehand that their facilities would qualify under the Special Regime, subject to compliance with specific deadlines and conditions.[1187]

922. The Council of Ministers Reference issued by the Secretary of State for Communication of Spain on November 13, 2009 indicated this balancing effort of the Respondent in the

[1182] *Ibid.,* Preamble 14.
[1183] For a detailed account of RD-L 6/2009, see paras. 178 to 183 *supra* of this Decision.
[1184] (**R-0072EN**).
[1185] For a detailed account of the Resolution of Council of Ministers of November 13, 2009, see paras. 184 to 190 *supra* of this Decision.
[1186] (**R-0072EN**)(**C-0038t**) Article 1.
[1187] (CWS-ES) Mr. Eduard Soler Babot's Witness.Statement, para. 28; Email from Mr. Eduard Soler Babot to Mr. Yusuke Yamazaki of May 13, 2009 (**C-0129/C-0129t**).

following words under the caption of "*Approval of Schedule for new wind and thermosolar facilities for the next three years*":

> *"Today's resolution means that developers can now see the landscape for the next three years, thus allowing them to plan their business well in advance. Further it brings in the necessary certainty for promoters and for the industry associated with these important sectors of renewable energies, as well as rationalizing the annual increase in the cost of power that for consumers has meant the rolling of these facilities."*[1188] [Emphasis added]

923. The Tribunal considers that the press release of the Ministry of Industry, Tourism and Commerce on December 15, 2009 announcing that for thermosolar technology, 56 applications with a total capacity of 2,339.89 MW had been registered in four different phases[1189] confirmed the Respondent's continuing commitment to provide the CSP sector long-term stability for the registered projects (including Solacor 1 and Solacor 2 put on the Phase 2 list). The Ministry stated in the press release that:

> "Completion of the pre-registration stage confirms the Government's commitment to provide the sector with visibility and long-term stability,_making the huge development of these technologies compatible with their secure integration in the system with an acceptable impact on electricity prices." [Emphasis added]

924. The Parties are in contention over the legal nature of what the Claimant refers to as "*July 2, 2010 Agreement*".[1190] The evidence on the record, in particular, the trail of documents, starting with the Ministry's press release of July 2, 2010 ("*Industria cierra con los sectores eólico y termosolar un acuerdo para revisar sus marcos retributivos*")[1191]; Protermosolar's press release of the same date[1192], the document titled as the "*Agreement with the thermo-solar sector* (*Acuerdo Con el Sector Termosolar*)" sent by Mr. Antonio Hernández, Director General of Energy Policy and Mines of the Ministry, to Dr. Crespo of Protermosolar on July 8, 2010[1193] and the evidences of Mr. Caravantes, Professor Vaquer Caballeria and Dr. Crespo, show that irrespective of the legal interpretation of the July 2, 2010 Agreement under Spanish law, there was a meeting of minds between the Ministry and the CSP sector,

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[1188] (**C-0138t**).
[1189] (**C-0132t**).
[1190] For a detailed account of the contents of the July 2, 2010 Agreement, see paras. 191 to 201 *supra* of this Decision.
[1191] (**C-0040**).
[1192] (**C-0222**).
[1193] (**C-0219**).

be it called an agreement, consensus or an outcome of a procedure of public consultation, as to the revision to the RD 661/2007 remuneration regime as set out in the July 2, 2010 Agreement.[1194]

925. Mr. Caravantes testified at the Hearing that:

> *"the act [Law 54/1997] stated that there might not be a need for a public hearing if the proposal had been developed on the basis of active involvement of the professional associations representing the industry."*[1195]
>
> *"So this alleged agreement basically reflects the fact that there was a dialogue with the sector, and an agreement, and the sector was expressing its acceptance of these new measures that would be included in a new regulation."*[1196]

926. Professor Vaquer Caballería, the Respondent's expert, testified at the Hearing that:

> *"I don't say that there was no consensus. Yes, there was discussion of the thermosolar industry; maybe there was consensus concerning the drafting of the rule. This is perfect, and this is according to the law. But I would never qualify that as an agreement, as a binding agreement, as a pact, as a commitment."*[1197]
>
> *"Moreover, the so-called "agreement", <u>I have no problem in saying it is an agreement if by "agreement" we mean consensus</u>, if we mean cooperation between the companies and the government for the purposes of working out a royal decree, to see what is more convenient for the general public and what is less damaging to the individual interest, in the cases of economic crisis where it's necessary to adjust the remunerative scheme.... But, in no case could it be considered to be a source of obligation."*[1198] [Emphasis added]

927. The Tribunal considers that Dr. Crespo's explanation of the CSP sector's understanding during the Hearing was in line with Mr. Caravantes' testimony.[1199] Acknowledging that he was referring to a common-sense notion, Dr. Crespo responded to the questioning of the Respondent's counsel regarding the meaning of a "*global regulatory pact*"[1200] in his second witness statement as follows:

[1194] As noted in footnote 108 of this Decision, the Tribunal's use of the term "July 2, 2010 Agreement" should not be viewed as the Tribunal's determination of the legal nature thereof.
[1195] Tr. Day 3 [Caravantes] 107;14-18.
[1196] Tr. Day 3 [Caravantes] 106;22-107:1.
[1197] Tr. Day 3 [Vaquer Caballeria] 178:11-16.
[1198] *Ibid.*, [Vaquer Caballeria] 189:2-9.
[1199] Tr. Day 2 [Crespo] 131:14-25; 132:12-133:14.
[1200] CWS-LC2, paras. 18 and 25.

> *"what we did was offer an alternative solution for the government to reduce payments to thermosolar plants; and in exchange for that, we would be given some guaranteed operating hours and stable remuneration."*[1201]

928. The evidence on the record of this proceeding leads this Tribunal to form the view that, irrespective of its legal nature under Spanish law, the July 2, 2010 Agreement represented consensus between the Government and the CSP sector and as such gave rise to the Claimant's legitimate expectations that the Respondent would respect such consensus as announced in the Government's official press release of July 2, 2010 and implement it in a new royal decree amending RD 661/2007.

929. The evidence on the record also confirms the Claimant's submission that the contents of the press release were ultimately converted into RD 1614/2010 except for the delay of the operation of CSP plants mentioned in the press release which were implemented by the Offering and Acceptance Letters exchanged between the regulator and each of the CSP plants, including Solacor 1 and Solacor 2.[1202]

930. Therefore, the Tribunal accepts the Claimant's claim that it confirmed the contents of the July 2, 2010 Agreement before it made a firm commitment to invest into the Solacor Project, and accordingly considers the July 2, 2010 Agreement and RD 1614/2010 to be included in the regulatory framework the Claimant relied on at the time of its investment as the basis of the Claimant's legitimate expectations.

931. The Ministry stated in the July 2, 2010 Press Release that the agreement between the Ministry of Industry, Tourism and Commerce and wind and thermosolar energy industry representatives, i.e., Spanish Wind Energy Association (AEE) and the Spanish Thermosolar Industry Association (Protermosolar), included "*short-term measures that will reduce the impact of these technologies on the price of electricity as well as <u>long-term measures which will provide these technologies with stability and certainty for their future development</u>*".[1203] [Emphasis added]

[1201] Tr. Day 2 [Crespo] 132:23-133:2.
[1202] Cl. Mem., Sections III. 9.7 and 9.8; Tr. Day 3, 144:5-20.
[1203] (**C-0040/C-0040t**).

932. This press release emphasized the stability of the regulation as follows:

> *"this agreement strengthened the visibility and stability of the regulation of these technologies for the future, guaranteeing the current premiums and tariffs of RD 661/2007 for facilities in operation (and for those included in the pre-register) after 2013."* [Emphasis added]

933. The stability assurance in the above press release was incorporated in Article 4 of RD 1614/2010[1204] in a manner similar to Article 44(3) of RD 661/2007 as follows:

> *"For thermosolar technology facilities under Royal Decree 661/2007, of May 25, the revisions of tariffs, premiums and lower and upper limits, to which Article 44.3 of said Royal Decree refers, shall not affect those facilities finally registered in the administrative Register of power production facilities under the special regime [RAIPRE] of the General Directorate of Energy Policy and Mining as of May, 7 2009, nor to those facilities pre-registered on the remuneration pre-allocation Register pursuant to the Fourth Transitional Provision of Royal Decree-Law 6/2009 of April 30…"*[1205] [Emphasis added]

934. It is noteworthy that Article 4 of RD 1614/2010 was specifically addressed to the CSP technology facilities while Article 44(3) of RD 661/2007 was addressed to the Special Regime facilities, not limited to CSP facilities. Furthermore, the provision in RD 1614/2010 was very specific in defining those facilities exempt from the application of future revisions. Premium was added to the list of exempted elements.

935. The Council of Ministers' Reference, issued by the Secretariat of State for Communication dated December 3, 2010 announced the passing of RD 1614/2010[1206], offered the following explanation on RD 1614/2010:

> *"The new regulations, which were agreed with both sectors last July, have the main objectives of obtaining savings to benefit consumers and to make the objectives of promotion of renewable energies compatible with those of limiting electricity production costs to guarantee the sustainability of the electricity system.*
>
> *The regulation also involves reinforcement of the visibility and stability of the regulation of these technologies in the future, and guarantees the present premiums and tariffs of Royal Decree 661/2007 as of 2013 for installations in operation and for those included on the pre-register."* [Emphasis added]

[1204] For a detailed account of RD 1614/2010, see paras. 203 to 209 of this Decision.
[1205] (**R-0088EN**).
[1206] (**C-0277/C-0277t**) Council of Ministers Reference, December 3, 2010, p.3.

936. In the Tribunal's view, Article 4 of RD 1614/2010, read together with the contemporaneous documents originating from the Respondent in the process of enacting RD 1614/2010 mentioned above, included specific promises and assurances to investors in the CSP sector that the Respondent would guarantee the "*present*" tariffs, the upper and the lower limits as well as premiums, notwithstanding future revisions, as represented by the Government and stipulated in RD 1614/2010.

937. Accordingly, the Tribunal is of the opinion that the Claimant could reasonably and legitimately expect that the regulated tariffs, premiums and the upper and lower limit and the essential elements of the remuneration regime under RD 661/2007, as modified by the July 2, 2010 Agreement (ultimately by RD 1614/2010), at the time of its investment would continue to apply during its operational lifetime, provided that their facilities would be registered with RAIPRE on time.

938. The duty laid down in Article 10(1) of the ECT requires that the Kingdom of Spain encourage and create stable conditions for investors of other Contracting Parties and to accord them FET. In the Tribunal's view, the Spanish regulatory regime governing the Claimant's investment under discussion, in particular RD 661/2007, RD-L 6/2009 and RD 1614/2010 together with the representations and announcements of the relevant Ministry in contemporaneous press releases, expressed the Respondent's unequivocal assurances and guarantees for stability of the continuing application of the remuneration regime relied on by the Claimant at the time of investment. These consistent assurances and guarantees should be the benchmark to determine whether the Respondent is in breach of its obligations to provide stability and FET under Article 10(1) of the ECT by implementing the Disputed Measures. In this sense, the Tribunal considers that the Respondent's stability assurances and guarantees, irrespective of their individual or collective nature or interpretation under the domestic Spanish law and its rule of hierarchy of norms, reinforce its international obligation to create and maintain stable conditions and to provide FET. In this regard, the Tribunal considers that the stability promises in the domestic law and other official and informal assurances of the Respondent and Article 10(1) of ECT could be the basis of the Claimant's legitimate expectations in this case.

939. In the Tribunal's view, another notable aspect shown by the July 2, 2010 Agreement was the process of the Respondent's seeking consensus through dialogue with the CSP and wind sectors when it intended to make adjustments to the remuneration regime. This process apparently had created a positive expectation of the Claimant on the scope and manner of future revisions to the remuneration regime. The Tribunal recalls Mr. Endo's testimony at the Hearing that:

> "… I believe that the agreement between the industry association and the minister, reached in July 2010, was done in line with the procedure mentioned in this conclusion *[of Clifford Chance Report]*. And following that procedure a minor change was made."[1207]

940. The tribunal in *NextEra v. Spain* similarly and rightly observed that "*the process by which RD 1614/2010 came into effect would also have engendered the expectation that Spain would not unilaterally make changes to the regime without consultation with the solar energy sector*." It further stated that this process also would have reinforced the expectation that investors could expect that there would be no radical changes made to the economic regime.[1208]

941. While RD 661/2007 is a royal decree of general application to renewable energy sectors, RD 1614/2010, implementing what the regulators and the wind and CSP sectors agreed in July 2010, is a royal decree applicable to wind and CSP technologies. As stated earlier, in particular, Article 4 of RD 1614/2010 is a special provision applicable only to CSP facilities. The Tribunal considers that this could be another factor reinforcing the Claimant's legitimate expectations as claimed.

(iii) Offering and Acceptance Letters

942. The Tribunal considers that with the exchange of offering letters and acceptance letters between the regulator and the individual CSP plants, including Solacor 1 and Solacor 2, the Government pursued the implementation of the July 2, 2010 Agreement while the CSP sector was looking for specific assurances as to the continuing application of the remuneration regime of RD 661/2007, as modified by RD 1614/2020, to its investments.

[1207] Tr. Day 2 [Endo] 30:21-25.

[1208] *NextEra* Award and Decision, para. 594.

The first goal was satisfied because Solacor 1 and Solacor 2 accepted to delay their right to incorporate electrical power, however, the CSP sector could not get the specific assurances it was looking for because of the Ministry's evasive answer.

943. Dr. Crespo testified at the Hearing that:

> *"In the agreement there were some special considerations, and there was a communication, a specific communication to every plant. So first of all the plants decided to delay the commissioning as per the wish of the ministry, first of all; and then the ministry, in exchange for that, sent a letter to the plants that provided them with the applicable remuneration."*[1209]

944. The evidence on the record of this proceeding shows that prior to the taking effect of RD 1614/2010 (December 9, 2010), each of Solacor 1 and Solacor 2 sent a letter to the Ministry, dated as of December 1, 2010, notifying the waiver of their respective right of the entry into operation with a "*request for a Resolution communicating the remuneration conditions for the operational life of the facility*"[1210]. The Ministry replied in writing in March 2011, confirming the acceptance of the waivers, and responding to the request on the remuneration conditions. The Ministry's Acceptance Letter addressed to Solacor 1 stated that:

> *"at the request of the applicant, the information requested is hereby provided.*
>
> *Pursuant to the above, this Directorate [...]*
>
> *Communicates that, at present, under the provisions of paragraph 1 of the fifth transitional provision of Royal Decree-Law 6/2009, of April 30, the remuneration applicable to the facility is made up of the tariffs, premiums, upper and lower limits and supplements established by RD 661/2007, of May 25, and updated annually by Order of the Minister of Industry, Tourism and Commerce, with the current values from January 1, 2011 being as follows"*[1211] [the table in the same format of Table 3 of Article 36 of RD 661/2007, with the current values from January 1, 2011 followed, but not reproduced here.]

945. The Claimant submits that the exchange of the Offering Letters and the Acceptance Letters should be deemed as binding "*declaratory contracts*". Claiming that it is hard to imagine a clearer representation by Spain of the stability of the remuneration regime under RF#1

[1209] Tr. Day 2 [Crespo] 153:10-17.
[1210] (**C-0294**) and (**C-0296**).
[1211] (**C-0295t**).

for the Solacor Plants than these Acceptance Letters, the Claimant cites the tribunal in *Masdar v. Spain* in support of its submission (see para. 539 *supra*).

946. The Respondent disputes the legal nature of the Acceptance Letter under Spanish domestic law. It asserts that it was merely an administrative communication informing about the current remuneration regime in force at that time, but not a commitment. It further argues that the Acceptance Letters issued in March 2011 were dated after the Claimant's investment which could, therefore, in no way be the basis for the Claimant's alleged expectations.[1212]

947. Irrespective of the legal effect of the exchange of Offering Letters and the Acceptance Letters between the Ministry and the individual Solacor Plants under Spanish law and whether they created binding obligations as "*declaratory contract*" under Spanish law, the Tribunal finds that those letters did not grant specific assurances on the application of the economic regime under RD 661/2007 during the operational lifetime of Solacor 1 and Solacor 2. In fact, in the Offering Letter, each Solacor SPV requested "[t]*o receive communication of the remuneration conditions applicable to the facility during its operational life*"[1213]. However, they received an Acceptance Letter which only referred to the economic regime in force at that date, "*that, at present, ... the remuneration applicable...*".[1214] Thus, the Tribunal is not persuaded that the Acceptance Letters, *per se*, amounted to specific firm assurances as argued by the Claimant on the application of the RD 661/2007 regime (as modified by RD 1614/2010) beyond the first 25 years. Nonetheless, the overall context of the specific information requests by each Solacor Plant and the Ministry's response make it plausible that the investors' stability expectations were reinforced.

(iv) Registration on RAIPRE

948. It is undisputed that the Solacor 1 and Solacor 2 Plants had been duly registered on RAIPRE within the prescribed timeframe, the former on January 19, 2012 and the latter on February

[1212] See para. 696 of this Decision.
[1213] (**C-0294t**)(**C-0294**), "que le sean comunicadas las condiciones retributivas de la instalación durante su vida operativa".
[1214] (**C-0295t**)(**C-0295**), "que, en la actualidad, ... la retribución aplicable ...".

21, 2012.[1215] The Parties, however, disagree on the legal nature and consequence of the registration on RAIPRE.

949. The Claimant submits that the process of registration including the Pre-Assignment Register and the final registration on RAIPRE prescribed by Spanish law has given rise to the Claimant's legitimate expectations on the continuing benefit of RD 661/2007 remuneration regime. The Claimant argues that registration on RAIPRE is not a mere administrative registration as argued by the Respondent, but a specific commitment granting the rights to the benefit of RD 661/2007 to the Solacor Plants (see para. 543 *supra*).

950. The Tribunal does not consider that the legal nature or consequence of registration on RAIPRE under Spanish law bears much significance in determining the Claimant's legitimate expectations because the Tribunal has determined that the Claimant had legitimate expectation at the time of its investment that the Solacor Plants would be entitled to the benefit of RD 661/2007, as modified, upon the final registration on RAIPRE on time. In this regard, the Tribunal considers it sufficient to conclude that with the registration of the Solacor Plants on RAIPRE on time, the final condition for the Claimant to claim legitimate expectations was fulfilled.

(v) Arbitral Jurisprudence

951. Tribunals in the arbitration cases involving renewable energy in Spain, in particular in the CSP sector, have expressed diverse views as a matter of principle on whether a specific commitment is an essential element in establishing investors' legitimate expectations. They also differ as to the question of whether RD 661/2007, the July 10, 2010 Agreement, RD 1614/2010, associated press releases or other representations of the Respondent as well as the exchange of the offering and acceptance letters and the registration on the Pre-Assignment Register and RAIPRE, individually or collectively, included the Respondent's specific commitment or assurances on the continuing application of RD 661/2007 to existing plants. The majority of the tribunals share this Tribunal's views accepting investors' legitimate expectations in one way or another, but some with different nuances or different

[1215] Certificate of Final Registration in the RAIPRE of Solacor 1 (**C-0088**); Certificate of Final Registration in the RAIPRE of Solacor 2 (**C-0089**).

interpretations of the evidence presented, while a minority of tribunals expressed different views denying the existence of the investors' legitimate expectations. The Tribunal will briefly review some of the arbitral jurisprudence involving Spanish renewable energy related disputes below.

952. *Antin v. Spain*: Having reviewed RD 661/2007, the CNE Report 2007, press releases of the Ministry, the 2005-2010 Energy Plan, RD 1614/2010 and preambles of the relevant royal decrees in the case involving an investment in the CSP sector, the tribunal in *Antin v. Spain* observed that:

> *"In the present case, the preamble of the royal decrees enacted by the Spanish Government —specifically RD 661/2007 and RD 1614/2010— reflect the Respondent's intention to provide for and guarantee the stability of the legal and economic regime applicable to RE projects. Previous and subsequent acts by State entities, including reports from the CNE, press releases from the Ministry and advertising material prepared together with InvestInSpain, all emphasise the stability of the regulatory regime set forth under RD 661/2207. The stability of the regulatory regime for investments in the RE sector was thus the leitmotiv of Spain's acts at the time of the Claimants' investment."* [1216] [Emphasis added. Footnote omitted]

953. With respect to Articles 44(3) of RD 661/2007 and Article 4 of RD 1614/2010, the *Antin* tribunal viewed that even if these articles, *per se*, could not give rise to a legitimate expectation that compensation applicable to the investors' CSP plants would remain completely unchanged, "*said provisions did reflect Spain' commitment to ensuring the stability and predictability of the existing economic regime*."[1217]

954. With respect to the legal nature of the registration on RAIPRE, the *Antin* tribunal was not persuaded that registration in RAIPRE was simply an administrative requirement to sell energy without any further legal consequences. It held that:

> *"Given the precision and detail exhibited in the royal decrees, particularly the contemplation that the treatment would be accorded for a defined period of time, the Tribunal has no difficulty in concluding that this falls squarely into the type of State conduct that was intended to, and did, give rise to legitimate expectations of the Claimants."*[1218]

[1216] *Antin* Award, para. 548.
[1217] *Ibid.*, para. 553.
[1218] *Ibid.*, para. 552.

955. *Masdar v. Spain:* As explained earlier (see. para. 844 *supra*), the tribunal in *Masdar v. Spain* stated that "*it has to consider the totality of the Spanish legislative regime applicable to CSP installations, but it must also take account of the existence of specific commitments, outside the general legislation or general documentation.*"[1219] The *Masdar* tribunal viewed that the specific commitments were shown by the Ministry in the process of Pre-Assignment registration, the acceptance letters in response to CSP plants' offering letters and concluded that:

> *"irrespective of whether the general provisions of RD 661/2007 would be sufficient…, the Tribunal concludes that, in any event, the Claimant had legitimate expectations that the benefits granted by RD 661/2007 would remain unaltered."*[1220]

956. *NextEra v. Spain*: The tribunal in *NextEra v. Spain* considered that none of RD 661/2007, RD 1614/2010, the registration on Pre-assignment Register and RAIPRE, the exchange of waiver and acceptance letters individually constituted a basis for investors' legitimate expectations claim, but that "*they do provide context for that claim*". The primary basis for the claim, in the *NextEra* tribunal's view, was statements and assurances made directly to *NextEra* by Spanish authorities and these created expectations about the economic regime that would apply to claimants in respect of their investment. Pointing mainly to statements in writing to the investors by Spanish officials, including the official press release of July 2, 2010,[1221] the *NextEra* tribunal observed that:

> *"the use of terms such as 'guaranteeing' and 'preserv[ing] legal security' in letters from a Spanish minister can reasonably be taken as statements that the Spanish government had no intention of making significant changes to the investment regime set out in RD 661/2007 and that this could be relied upon by the investor."*[1222]

957. The tribunal in *NextEra* found that the process, involving extensive consultations between the Ministry and the solar energy sector, by which RD 1614/2010 came into effect would also have engendered the expectation that Spain would not unilaterally make changes to the regime without consultation with the solar energy sector. It stated that "[t]*his process*

[1219] *Masdar* Award, para. 511.
[1220] *Ibid.*, para. 521.
[1221] *NextEra* Award and Decision, paras. 588-590 (**CL-0206**).
[1222] *Ibid.*, para. 593.

also would have reinforced the expectation that the Claimants could expect that there would be no radical changes made to the economic regime based on RD 661/2007 as modified in RD 1614/2010."[1223]

958. Novenergia v. Spain**:** the *Novenergia* tribunal observed that statements and assurances were made by Spain in Law 54/1997, RD 436/2004 and RD 661/2007[1224] and that "[t]*he commitment from the Kingdom of Spain could not have been clearer*", and a considerable number of investors in renewable energy invested in reliance on the statements and assurances of the Spanish government.[1225]

959. Cube Infrastructure v. Spain: The tribunal in *Cube Infrastructure v. Spain* underlined that the most significant representations in relation to the PV investments in the Government press release accompanying RD 661/2007, an explanatory statement by the Government as to the meaning and effect of RD 661/2007, were the repeated and explicit statements that RD 661/2007 itself had no retroactive effect and that future tariff revisions also would have no retroactive effect.[1226] These commitments in the nature of a "*grandfathering"* provision were binding and they were adopted "*to provide legal safety, to provide stability to the sector, and to foster its development*."[1227] The *Cube Infrastructure* tribunal, by a majority, considered that with respect to investment in PV technology in 2008, the investors' reliance on Spain's representations mentioned above was justified for the reasons, among others, that the text of RD 661/2007 was "*clear and specific*"; those representations were emphasised by their clear and specific restatement in the Government press release issued on the same day as RD 661/2007; and the significance of Spain's representations as to the stability of RD 661/2007 was ultimately not a matter of Spanish law but of international law, operating in the context of Article 10(1) ECT.[1228] The *Cube Infrastructure* tribunal, by a majority, viewed that RD 661/2007 was a complex, sophisticated regime designed to be

[1223] *Ibid*., para. 594.
[1224] *Novenergia* Award, para 666 (**CL-0173**).
[1225] *Ibid*., para. 667.
[1226] *Cube* Decision, para. 273 (**CL-0203**).
[1227] *Ibid*., paras. 278-279.
[1228] *Ibid*., para. 401.

stable; and it was reasonable for the claimants to expect stability from it and to act in reliance upon it.[1229]

960. The tribunal in *Cube Infrastructure v. Spain* observed that stability is not the same as petrification and thus even a stabilized regime can be amended. In this regard, it did not regard every deviation from the original scheme established by RD 661/2007 as a violation of the duty of the FET under Article 10(1) of the ECT.[1230] It held, however, that the obligation required that where the State represented that certain provisions would be maintained for a certain time, those provisions either were maintained for that time or were adjusted in a manner that did not significantly alter "*the fundamental economic basis of investments made in reliance of that representation*."[1231]

961. *9REN v. Spain*: The tribunal in *9REN v. Spain* considered that Article 44(3) of RD 661/2007 embodied a clear and specific undertaking (as defined by the international investment law jurisprudence) that unambiguously created in the investor the legitimate expectation that the regulatory framework relied on by investors would not change in the future for existing installations. This tribunal observed that:

> *"Article 44.3 of RD 661/2007 was a specific undertaking within the contemplation of the jurisprudence. A representation is no less "specific" if (as here) it is addressed to an identifiable class of persons, namely prospective investors whose money was solicited by Spain's FIT program."*[1232]

962. *SolEs v. Spain*: Along the same lines, the *SolEs* tribunal found that in March 2010 when the investor made its investment, the State's regulations and associated regulatory reports indicated that "*the stability of a FIT assigned to a particular plant was a fundamental aspect of the design of the regulatory regime that was in place*" when the investor invested.[1233]

[1229] *Ibid*., para. 404.
[1230] *Ibid*., para. 408.
[1231] *Ibid*., para. 412.
[1232] *9REN* Award, para. 257.
[1233] *SolEs* Award, para. 423.

963. A few previous awards have taken different views as regards the understanding and meaning of RD 661/2007, in particular, Article 44 (3) of RD 661/2007.

964. <u>*Charanne v. Spain*</u>*:* The *Charanne* tribunal considered that RD 661/2007 [and 1578/2008] were not to be classified as specific commitments as they were not "*specifically directed at each investor*", but were of "*a general nature that characterises any law or regulation by their specific scope*"[1234] and ruled that RD 661/2007 and the related documents were "*not specific enough to have generated an expectation as to the fact that RD 661/2007 and 1578/2008 would not be modified*."[1235] The *Charanne* tribunal viewed that a different interpretation "*would be equivalent to freeze the legal framework*."[1236] This reasoning was also applied to the effect of a registration under the provisions of RAIPRE.[1237]

965. <u>*Foresight v. Spain*</u>: The tribunal in *Foresight v. Spain* agreed with the *Charanne* tribunal in that the investors in PV technology could not have the legitimate expectation that the regulatory framework laid down by RD 661/2007 and RD 1578/2008 would remain unchanged during the entire lifespan of their plants.[1238] However, the *Foresight* tribunal was of the view that the investors had legitimate expectations that the regulatory framework would not be fundamentally and abruptly changed, depriving them of a significant part of their projected revenues, as opposed to merely modified.[1239] The tribunal considered that the investors' legitimate expectation that the remuneration and benefits their PV facilities received would not be radically changed were based foremost on the express language of RD 661/2007, which set out fixed FiTs to be paid for the entire operating life of a PV facility and that this expectation was reinforced by statements of Spanish officials emphasizing the stability of the remuneration regime for PV facilities registered under RD 661/2007 and promoting the possibility of returns for investors well above 7%.[1240]

[1234] *Charanne* Award, para. 493.
[1235] *Ibid.*, para. 497.
[1236] *Ibid.*, para. 503.
[1237] *Ibid.*, paras. 509 *et seq.*
[1238] *Foresight* Award, para. 376 (**CL-0201**).
[1239] *Ibid.*, para. 377.
[1240] *Ibid.*, para. 378.

966. *RREEF v. Spain*: The tribunal in *RREEF v. Spain* stated that Article 44(3) of RD 661/2007 and Articles 4 and 5 of RD 1614/2010 showed that adjustments were to be envisaged.[1241] While the *RREEF* tribunal acknowledged that undertakings or assurances given by the State could be explicit or implicit, it considered that informal representations could present difficulties and thus tribunals had increasingly insisted on clarity and the appropriate authority to give undertakings binding on the State. The *RREEF* tribunal was of the view that none of the representations invoked by the investors (Article 44(3) of RD 661/2007 and Article 4 and 5.3 of RD 1614/2010 for PV) could 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.

967. Accordingly, *RREEF* tribunal concluded that:

> *"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."*[1242]

968. *BayWa v. Spain*: The tribunal in *BayWa v. Spain* viewed that the thesis that a particular royal decree, notably RD 661/2007, stabilized the remuneration regime was inconsistent with Article 30(4) of EPA 1997. It further observed that "*although grandfathering may be best practice it is not in the Tribunal's view required by the ECT. Nor does the Tribunal accept that the three 'grandfather clauses' cited above [Article 40(3) of RD 436/2004, Article 44(3) of RD 661/2007 and Article 5(3) of RD 1614.2010] established any general principle*".[1243]

969. *InfraRed v. Spain*: The tribunal in *InfraRed v. Spain* maintained that a legitimate expectation of stability (i.e. immutability) could only arise in the presence of a specific commitment tendered directly to the investor or industry sector at issue. It further observed that the "[t]*ribunal is mindful of the significant limitation that a "stability" obligation*

[1241] *RREEF* Decision, para. 319.
[1242] *Ibid*., para. 399.
[1243] *BayWa* Decision, paras. 471-472 (**RL-0141**).

would impose on the host state's sovereign legislative powers. The Tribunal cannot give effect to such a significant limitation of state sovereignty in the absence of a specific expression of consent by the host state."[1244]

970. The *InfraRed* tribunal considered that the evidentiary record of the case did not support (i) the existence of a promise or commitment by Spain to "*freeze*" the original regulatory framework relied on by investors and all of its component laws, regulations, rules and remuneration variables, nor (ii) the existence of a specific promise or commitment by Spain to protect CSP producers from changes to all aspects of the original regulatory framework. In the view of the *InfraRed* tribunal, the representations or enactments that could potentially be construed as a specific commitment by Spain in this regard constituted, at best, a commitment to shield CSP producers from subsequent regulatory changes to *certain elements* of the original regulatory framework.[1245]

971. The *InfraRed* tribunal considered that it seemed obvious that the regulatory changes subsequently enacted by the Respondent (RD-L 6/2009 and RD 1614/2010) preclude *"a finding that RD 661/2007 and/or its associated press release gave rise, in and of itself, to a legitimate expectation of stability or immutability of the entire Original Regulatory Framework*."[1246] The *InfraRed* tribunal further considered that RD-L 6/2009 and the requirement to register on RAIPRE and the Pre-Assignment Register were part of Spain's efforts to curb the tariff deficit and were meant to restrict the conditions governing access to remuneration under the Special Regime, not to guarantee immutable economic rights to all CSP plants or a steady flow of remuneration over their operational life.

972. However, the *InfraRed* tribunal was of the view that the July 2, 2010 Agreement, RD 1614/2010 and the exchange of letters of waiver and the Council of Minister's Resolutions in December 2009 did give rise to a legitimate expectation that CSP plants registered on the Pre-assignment Register would be shielded from subsequent regulatory changes to

[1244] *InfraRed* Award, para. 366 (**CL-0210**).
[1245] *Ibid.,* para. 406.
[1246] *Ibid.*, para. 407.

three specific elements (tariffs, premiums and lower and upper limits) of the original regulatory framework, and that this expectation was violated by Spain.[1247]

(vi) Due diligence

973. Having reviewed the Parties' respective submissions and the evidence on the record of this proceeding, the Tribunal considers that the Claimant conducted an appropriate level of due diligence expected of investors in similar circumstances. It retained Spanish legal counsel who conducted legal due diligence and provided legal advice on the Spanish regulatory regime. It conducted meetings with representatives of various Spanish government agencies including *Invest in Spain* and IDAE and in consultations with its Spanish partner, Abengoa Solar, closely monitored the dialogues between the CSP sector and the Government which resulted in the July 2, 2010 Agreement and ultimately RD 1614/2010. In addition to its own due diligence, the fact that the Lenders, reputable financial institutions, and NEXI, an experienced insurer, conducted their own due diligence and decided to participate in the Solacor Project supports the adequacy of the Claimant's due diligence.

974. As the Respondent put significant reliance on the due diligence report issued by Clifford Chance[1248] and argues that this report supports "*each and every pillar of its case*" (see para. 709 *supra*), the Tribunal finds it appropriate to give a detailed review of the report in the following paragraphs. The record on this proceeding shows that this report, issued to the Lenders in a draft form on August 24, 2009, was reviewed by the Claimant before it made an investment.

975. Regarding the "*Rights of Special Regime Producers*", the Clifford Chance Report referred to five rights, namely the right to connect their generators to the electricity distribution or transport company's grid in parallel; the right to transfer their net production of electric energy or sell energy to the system by means of the distribution or transport company, as long as the grid was capable of absorbing all the energy; the right to receive the remuneration foreseen in RD 661/2007 for the complete or partial sale of their net

[1247] *Ibid.*, para. 410.
[1248] (**C-0574**) For a detailed account of the Clifford Chance Report, see paras. 302 to 209 of this Decision.

generated electric energy, choosing one of the two remuneration options set out in Article 24(1) of RD 661/2007; the right to sell all or part of their net production by means of direct lines. (However, the economic regime set out in RD 661/2007 would not be applied to the energy sold by means of direct lines.); and, the right to priority access and connection to the electric grid in accordance with Annex XI of RD 661/2007 or any regulations that may eventually substitute the former.[1249]

976. The report mentioned that the so-called Special Regime producers could use back-up fuel in order to compensate the lack of solar irradiation as long as this did not exceed 12 percent (for the FiT option) or 15 percent (for the FiP option) of the total energy production.[1250] In subsequent chapters the report outlined the economic regime with details including tariffs, the updating/adjustment mechanism and the grandfathering clause.

977. After stating the amount of the regulated tariffs, reference premiums and higher and lower limits applicable as of January 1, 2009,[1251] the Clifford Chance Report explained that RD 661/2007 foresaw the following two types of review of those amounts.

978. The first one was the "*annual review*". It stated that in accordance with Article 44(1) of RD 661/2007, the amount corresponding to the tariffs, premiums, supplements and upper and lower limits defined therein would be reviewed on an annual basis and that the reference for said review would be the increase of the CPI minus 0.25 until December 31, 2012 and minus 0.50 thereafter. Clifford Chance warned that "*should the CPI be less than 0.25 or 0.50, respectively, in said periods, the amounts corresponding to tariff, premiums, supplements and upper and lower limits would suffer a negative adjustment*".[1252]

979. The second type of review was the four-yearly review. The Clifford Chance Report explained that according to Article 44(3) of RD 661/2007, the tariffs, premiums, supplements and upper and lower limits would be reviewed taking into account the costs associated with the specific technology, the degree of participation of the special regime in meeting demand and its effect on the technical and economic management of the system,

[1249] (**C-0574**) ítem II.C, p.5-6.
[1250] *Ibid*., ítem II.B.3, p.4.
[1251] *Ibid*., item III.A) 4, p.8-9.
[1252] *Ibid*., item III.B.1.a), p.11.

at all times guaranteeing reasonable rates of return with reference to the cost of money on the capital markets. It also stated that each four years thereafter a new review would take place, according to the same criteria.

980. The Clifford Chance Report added that:

> *"However, this article also specifically states that the four-yearly reviews of the regulated tariff and the upper and lower limits on the aggregate of the reference market price and the reference premium will not affect those installations that entered into operation prior to 1 January of the second year after the year during which the review has taken place."*[1253]

981. The Clifford Chance Report further stated that Article 44(3) of RD 661/2007 allowed to infer *a contrario sensu*, "*that these reviews may affect the other concepts contemplated above, that is, the aforementioned premiums and supplements*".[1254]

982. Although the Claimant submits that its right is grounded, among other causes, in the grandfathering clause or the stabilization commitment embodied in Article 44(3) of RD 661/2007[1255], the expression stabilization commitment and/or grandfathering clause was not expressly used in the Report. Nevertheless the Clifford Chance Report clearly described the stability commitment made in Article 44(3) of RD 661/2007.[1256]

983. The Report also dealt with the possibility of new legislation in case the projects recorded in the remuneration Pre-assignment Registry exceeded the target set for CSP plants in RD 661/2007. It reads:

> *"Finally, a Royal Decree will approve a new legal-economic framework for facilities that are recorded in the pre-assignment Registry once the target set for solar thermal plants in RD 661/2007 has been exhausted. Said new Royal Decree will aim to establish a sufficient and adequate economic regime to promote the entry into service of this type of installations, stimulating the research and development of the sector and thus allowing installations to reduce their costs, improve their operability and contribute to the development of the competitiveness of the sector".* [1257]

[1253] *Ibid*, item III.B.1 b), p.11.
[1254] *Id*.
[1255] Cl. Mem., p. 182; Cl. Reply, *inter alia,* para.19.II.b, 21, 27, 35, 100, 198, 201-2, 227, 595.IV, 610 and 615.
[1256] (**C-0574**), p.26.
[1257] *Ibid*., item III.C.6, p.14

984. Contrary to the Respondent's argument (see para. 709 *supra*), this Tribunal does not agree that the Clifford Chance Report supports the Respondent's case. After reviewing the Spanish judicial precedents, the Clifford Chance Report concluded as follows:

> *(i) It is possible for a reglamentary disposition to modify the economic regime established in RD 661/2007 affecting solar thermal plants included in its scope.*
>
> *(ii) However, in order for said disposition to be valid, it must respect, among others, the principles of legal certainty and legitimate expectations, taking into account of the various elements such as "the predictability of the modification", "the existence of exterior signs by the Administration creating the belief that a reglamentary change will not take place" and "the existence of sufficient transitory measures or compensatory measures".*[1258] [Emphasis added]
>
> *(iii) It has to ensure that the special regime electric energy installations receive reasonable rates of return with regard to the investment costs incurred as established in Law 54/1997.*

985. With respect to "*the existence of exterior signs by the Administration*" creating the belief of stability, the Clifford Chance Report opined that:

> *"In the case at hand, said belief could be found on the fact that the Spanish Government, by means of the provisions contained in articles 36 and 44.3 of RD 661/2007, has established a series of tariffs, premiums and supplements to be received during the whole useful life of solar thermal plants for the sale of the electricity they generate. Additionally, notwithstanding the provision of future reviews of said tariffs, premiums, supplements and upper and lower limits in view of the results of the reports monitoring the compliance with the Renewable Energies Plan (PER) 2005-2010, the Energy Efficiency and Saving Strategy in Spain (E$) and of those new objectives included in the next Renewable Energies Plan for the period 2011-2020, article 44.3 of RD 661/2007 expressly states that the reviews of the regulated tariff and the upper and lower limits on the aggregate of the reference market price and the reference premium will not affect those installations that have entered into service prior to January 1 of the second year after the year during which the review has taken place."*[1259]

986. With respect to the "*existence of sufficient transitory measures or compensatory measures*", citing the rulings of Spanish Supreme Court cases and of the Court of Justice of the European Communities, the Clifford Chance Report opined that "*the legislative change*

[1258] *Ibid*., pp. 28-29.
[1259] *Ibid*., p.26, quoted in Cl. Opening, slide 88.

must also be produced 'with sufficient transitory measures for the subjects to accommodate their economic conduct or with the due corrective or compensatory measures'."[1260]

987. Mr. Endo confirmed that JGC reviewed the Clifford Chance Report issued to the Lenders and stated as follows in his second witness statement:

> *"22. Our overall conclusion after analyzing that report was that the Spanish legal system protected those investors covered by the Special Regime from unexpected and retroactive legislative reforms. In our view, the Clifford Chance report confirmed Lovells' advice concerning the certainty and stability of the applicable regulatory framework.*
>
> *23. Contrary to Spain's suggestion…, our expectation was not (and has never been) that Spain would "petrify" its regulatory framework or that Spain could never modify its laws. Rather, our expectation was that Spain would comply with the specific legislative promises and representations made to foreign investors like us and not apply any adverse changes to the RD 661/2007 feed-in remuneration regulatory regime retroactively to existing CSP installations like the Solacor Project."* [1261] [Emphasis added and Footnote omitted]

988. On the second day of the Hearing, in response to questions put by the Respondent's counsel, Mr. Endo testified that:

> *"According to the final report of Clifford Chance, as the conclusion states, I was explained that there are very careful procedures in place that allow for reasonable expectations to be met, that guarantee legal stability, and that in any cases of change in law or legislation, there will be due compensation that must be paid. And so because there are such careful procedures in place as a background to this FIT system, so that was the explanation that I have received."*[1262]
>
> *"I have no understanding that there is a complete overhaul of the system itself. But at the same time, as stated in this conclusion, I thought that there is at any time a possibility of adjustment within the reasonable scope. But that adjustment within the reasonable scope is a completely different matter to a complete system overhaul."*[1263] [Emphasis added]

989. Referring to a paragraph in the Clifford Chance Report stating that ""[i]*t has to ensure that the special regime electric energy installations receive reasonable rates of return with regard to the investment costs incurred as established in Law 54/1997*", the Respondent counsel posed a question to Mr. Endo at the Hearing:

[1260] *Ibid.*, p.26.
[1261] CWS-ME 2(t), paras. 22 and 23.
[1262] Tr. Day 2 [Endo] 25:24-26:7.
[1263] Tr. Day 2 [Endo] 29:6-12.

> *"So when you read this document, even if it was not rendered for JGC, did you see that the limit to any change was the principle of reasonable rate of return with regard to the investment cost, as it is put black and white in this document?"*

Mr. Endo answered:

> *"Yes, and I believe that the agreement between the industry association and the minister, reached in July 2010, was done in line with the procedure mentioned in this conclusion. And following that procedure, a minor change was made. That was my understanding."*[1264]

990. The Tribunal considers that Mr. Endo's evidence above portrays the Claimant's expectation at the time of its investment. The Tribunal finds Mr. Endo's witness statement and testimony at the Hearing truthful and does not find any evidence on the record of this proceeding which casts doubt on the credibility of his testimony.

991. The Parties generally disagree as to the relevance of the Spanish Supreme Court's case law in the determination of the Claimant's claims in this arbitration. The Respondent alleges that such case law is a fact that must be taken into account by the Tribunal as a fundamental element in determining the specific extent of investors' rights and obligations under Spanish law. Consequently, in the Respondent's view, it is an element that has to be considered in determining any legitimate expectations that the Claimant might have had. The Claimant argues to the contrary that the Supreme Court's case law cannot be understood to override the clear and unambiguous statements and assurances made by Spain concerning the meaning of RD 661/2007 and RD 1614/2010. The Claimant also asserts that the fact that measures might be considered valid as a matter of Spanish law does not render the measures legal under international law and that, in any event, the Supreme Court judgments on which Spain relies do not support the Respondent's arguments.

992. As stated earlier, the Tribunal is of the view that Spanish Supreme Court judgements operate as fact, not applicable law. As such, they can be considered to the extent relevant in determining legitimate expectations that the Claimant might have had at the time of its investment. In this regard, the Tribunal is of the opinion that only those judgments that pre-

[1264] Tr. Day 2 [Endo] 30:21-25.

dated the Claimant's investment in August 2010 can have relevance, if any, on the Claimant's legitimate expectations.

993. In its ruling of December 15, 2005 cited by the Clifford Chance Report,[1265] the Spanish Supreme Court determined that

> *"no legal obstacle exists to prevent the Government … from modifying a specific remuneration system, as long as it is maintained within the limits established by the Law on the Electricity Sector…*
>
> *Therefore, there may be no objection to the modification of the means to calculate tariffs or premiums when this modification does not clash with the Law. It is also true… that the principle of legitimate expectations may impose limits to such modification. However, in this case the appeal is not founded upon specific arguments about the essentiality of the supposed change and its impact on the balance of rights and obligations of the affected installations, rather it is based, in general, on an erroneous understanding that any unfavorable modification constitutes an infringement of said principle."*

994. In its ruling of October 25, 2006, the Supreme Court pointed out that:

> *"The remuneration regime we are analysing does not, on the other hand, guarantee to owners of special regime facilities a certain level of profit or income in relation to those obtained in previous years, nor the indefinite permanence of the formulas used to set the premiums."*[1266]
>
> *"legal safety is not incompatible with changes to regulations from the point of view of the validity of the latter, […] The same consideration applies to the principle of legitimate expectation […] The appellants argue that their investments in the production of electrical energy under the special regime were made at a certain time "trusting that the Administration would not change the legal conditions that were determining to them (…) deciding to build the facilities", and as such they deduce that the lowering of premiums following Royal Decree 2351/2004 compared to the premiums set in Royal Decree 435/2004 violates said principle. This reasoning, referring to an incentivising mechanism such as the premiums in question, cannot be shared."*[1267]

995. Having reviewed the Parties' respective arguments and submissions, the Tribunal agrees with the Claimant's submission that they do not support the Respondent's contention that the Claimant should have been aware that the Government could make sweeping changes such as the Disputed Measures to the remuneration regime of RD 661/2007. In fact, the Tribunal finds that due diligence reports informed the Claimant about the possibility of

[1265] (**C-0574**) p.22.
[1266] (**R-0120**), quoted in Resp. C-Mem., para. 305.
[1267] *Ibid*., quoted in Resp. C-Mem., para. 315 and footnote 152.

changes and the conditions for them to be lawful but nothing in the said reports supports a change of paradigm.

996. In this connection, this Tribunal agrees with the caution expressed by the tribunal in *SolEs Badajoz v. Spain* when it observed that because each judgment of the Spanish courts addressed specific facts and provisions of law and regulation, the parties' selective quotations from various judgments were of limited assistance to the tribunal.[1268]

997. In the Tribunal's view, the conclusion of the Clifford Chance Report reviewed by the Claimant discussed above was based on its analysis of Spanish Supreme Court precedents available at the time of its issuance. The Tribunal notes that the Clifford Chance Report discussed two Supreme Court judgments referred to above (see paras. 993 and 994 *supra*) which the Respondent invoked in support of its position[1269]. At the same time, it also referred to other previous Supreme Court cases addressing the principle of legitimate expectations[1270] according to which the legislative change must also be produced "*with sufficient transitory measures for the subjects to accommodate their economic conduct or with the due corrective or compensatory measures*".

998. With respect to two Supreme Court cases rendered in December 2009[1271] (which were not addressed in the Clifford Chance Report), the Tribunal finds the Claimant's argument (see para. 559) convincing in that the context of the Claimant's claims and the basis of the court judgement were not relevant to the determination of the Claimant's legitimate expectations in this proceeding.

999. Moreover, as rightly pointed out by the tribunal in *Cube Infrastructure v. Spain*[1272], those judgments of Spanish courts "*do not address the question of legitimate expectations arising out of the provisions of RD 661/2007 – notably out of Article 44.3 – as specifically*

[1268] *SolEs* Award, para. 430 (**CL-0209**).
[1269] Ruling of the Supreme Court dated December 15, 2005 [RJ 2006\246] (**R-0119**), referred to in Resp. C-Mem., para.312 and Ruling of the Supreme Court dated October 25, 2006 [RJ 2006\8824] (**R-120**), referred to in Resp. C-Mem., para.313.
[1270] (**C-0574**) pp.24-25.
[1271] Judgement of December 3, 2009 (**R-0123**), referred to in Resp. C-Mem., para. 320; Judgement of December 9, 2009 (**R-0002**), referred to in Resp. C-Mem., para. 322.
[1272] *Cube* Decision, para. 300 (**CL-0203**).

explained by the Government, that assert explicitly and without qualification that changes to tariffs and premiums will not have retroactive effect." Therefore, in the Tribunal's view, they are not relevant in addressing the question of legitimate expectations of the Claimant under Article 10(1) of the ECT.

1000. Further, as the *SolEs* tribunal aptly observed, the Tribunal is of the view that the Spanish Supreme Court cases before 2010 did "*not address changes in the remuneration of an existing plant that are comparable in significance to the abolition of the Special Regime*."[1273]

1001. Accordingly, this Tribunal agrees with the majority of the tribunal in *Foresight v. Spain* when it aptly considered that:

> *"a reasonable investor would not have interpreted the Spanish Supreme Court jurisprudence concerning modifications to earlier support schemes as a warning that Spain had the power to abrogate RD 661/2007 and replace it with a radically different support scheme."*[1274]

1002. The Tribunal also agrees with the Claimant that the Spanish proceedings brought by Solacor SPVs against MO IET/1045/2014 (see 561 *supra*) were not relevant to the assessment of the Claimant's legitimate expectations at the time of its investment.

1003. As stated earlier (see paras. 661 to 664 *supra*), the Respondent argues that the supportive measure for renewable energy is state aid under EU law, and as such constitutes a public order matter for Spain. In support of its position, the Respondent invokes EC Decision on the State Aid SA.40348 (2015/NN) rendered in November 2017[1275] and argues that the proper analysis of the EU regulation, as an essential fact that should shape the legitimate expectations of any investor receiving state aid out of a supportive scheme from a Member State, must lead to the conclusion that the Claimant could not have the legitimate expectation to receive *sine die* a specific level of state aid as it now claims. The Claimant

[1273] *SolEs* Award, para. 430.
[1274] *Foresight* Award, para. 378.
[1275] Decision of the European Commission regarding the Support for Electricity generation from renewable sources, cogeneration and waste (State Aid S.A. 40348 (2015/NN)) (**RL-0091**).

contends that the Respondent's reference to the concept of state aid under European law could not justify its breach of Article 10(1) of the ECT (see para. 595 *supra*).

1004. The Tribunal finds the Respondent's argument unconvincing. There is no evidence on the record of this proceeding showing the Respondent's notification of the remuneration regime under RD 661/2007 as state aid to the EC or any challenges made against the legality of RD 661/2007 under EU law at the time of the Claimant's investment in August 2010. The November 2017 decision of the EC was rendered long after the Claimant's investment. Moreover, the Tribunal's review of the EC Decision of November 2017 indicates that this decision did not address whether the remuneration regime of RD 661/2007 is incompatible with EU State Aid law. Accordingly, the Tribunal does not view that EU law could be the basis denying the Claimant's legitimate expectations.

1005. In addition to the argument based on the Clifford Chance Report discussed above, the Respondent contends that the Claimant might have foreseen that the premiums might be reduced in the interest of solving the unsustainability of the Spanish electricity system through the due diligence reports produced by advisors and consultants during the due diligence (see paras. 703 to 708 *supra*). The Tribunal does not find the evidence on the record supports the Respondent's argument in this regard.

1006. The Respondent's argues that the Claimant should have foreseen from Pöyry's report that the premiums might be reduced in the interest of solving the unsustainability of the Spanish electricity system (see para. 706 *supra*) as its answer was aligned with the explanation of the Respondent as it showed a clear relationship between the tariff deficit and the evolution of renewables. In view of this report's statement that the Spanish government has tackled the tariff deficit issue through RD-L 6/2009 by allowing TPA's to rise in a controlled manner,[1276] the Tribunal does not find the Respondent's argument convincing.

[1276] "Answers to Solacor Questionnaire" issued by Pöyry Energy Consulting to Abengoa Solar in November 2009 (**C-0624**) Answer to Question 4 (Please develop the explanation on tariff deficit in relation to the increase of CSP project); See para. 324 of this Decision. Pöyry's report explains TPA as an income collected to clients that actually covers the renewable subsidies (premium to CSP etc.). This report stated that "*[a]ccording to RDL 6/2009, the TPA by 2013 is aimed to cover the regulated costs, typically distribution, transmission and renewable subsidies and it will fluctuate freely in line with real costs however it is not determined by the Government the actual workings yet. What is seems clear is the intention that TPA will be calculated (as opposed to fixed) considering real costs and not policy criteria.*"

1007. In support of its argument that the Claimant might have foreseen the regulatory changes, the Respondent refers to a portion in AON's due diligence report on compliance risk stating that "*this environment is dynamic and therefore it is possible that the regulatory framework will change…*"[1277] (see para. 708 *supra*). However, this Tribunal takes note of the next paragraph where AON stated that "*but they are neither imminent nor foreseeable.*"[1278] Accordingly, the Tribunal does not find that AON's report supports the Respondent's argument.

1008. The Respondent also argues that the industrial sector was aware of the fact that Article 44(3) was not a stabilization commitment, pointing out, for instance, explanation of APPA (Association of Renewable Energy Generators) to the sector that any rational investor, when planning facilities of this type must consider the risk that such remuneration could be lowered.[1279] However, the evidence on the record of this proceeding shows that the document cited by the Respondent (R-0295) is APPA's comments on the draft of RD 661/2007 which did not include a grandfathering clause, not on the final RD 661/2007. The same is true of another document cited by the Respondent as contemporary interpretation of the industry.[1280] Accordingly, the Tribunal finds those arguments without merit.

1009. The Tribunal considers the Respondent's allegation that the Claimant and Abengoa as well as the Lenders were expecting a change in the regulation (see para. 711 *supra*) without merits. The Tribunal agrees with the Claimant's explanation that a provision of a change in regulation in those agreements is a standard clause to allocate risks between the parties. The Respondent's allegation that NEXI assumed the regulatory risk with awareness that the remuneration of the Solacor Project might change (see para. 712 *supra*) is also without any merit considering that NEXI's business is to insure against political risks.

1010. The Respondent criticizes the Claimant's reliance on the presentations of IDAE and *Invest in Spain*. The Respondent contends that at the time that the presentations were issued,

[1277] Resp. Rej., para. 921, quoting Insurance Consultancy Report issued by AON in July 2010 (**C-0631**) Chapter 2, Section 1.1.2. at p.11; Resp. Opening, slide 111.
[1278] (**C-0631**), p.11.
[1279] Tr. Day 1, 146:5-13, referring to (**R-0295**) dated March 2007 commenting on draft of RD 661/2007 in Resp. Opening, slide 59.
[1280] Resp. Opening, slide 59, citing AEE (Spanish Wind Energy Association), Article of January 19, 2007.

Invest in Spain was a private law entity, with functional and financial autonomy, with its only connection with the State being that it was financed with public capital. The Respondent maintains that *Invest in Spain* has not carried out functions involving public prerogatives now or previously.[1281] The Claimant's understanding was that *Invest in Spain* was an administrative unit of the Spanish Government in charge of promoting foreign investment in Spain. According to the Claimant, the Spanish Embassy in Tokyo arranged a meeting with *Invest in Spain*. The Tribunal takes note of the representation of *Invest in Spain* in its presentation materials that "*Invest in Spain, is the leading government organization that supports foreign companies seeking to set up or expand their business in Spain. We are a ONE-STOP-Shop for investors.*"[1282] Accordingly, in the Tribunal's view, the Respondent's criticism against the Claimant's reliance on *Invest in Spain* does not appear convincing.

(c) Disputed Measures

1011. The Tribunal now turns to the Disputed Measures to determine the question as to whether or not the Respondent fundamentally or radically altered the essential characteristics of the remuneration regime relied on by the Claimant through adopting the Disputed Measures and frustrated the Claimant's legitimate expectations in breach of Article 10(1) of ECT.

1012. Having reviewed the Parties' respective submissions and arguments and the evidence on the record of this proceeding, the Tribunal concludes that the answer to both questions is affirmative in regard to the regulatory changes introduced in mid-2013 through RD-L 9/2013, EPA 2013, RD 413/2014, MO IET/1045/2014 and subsequent measures. The majority of the Tribunal also finds that the initial regulatory changes introduced between 2012 and mid-2013 through law 15/2012 and RD-L 2/2013 (except for the 7% TVPEE) frustrated the Claimant's legitimate expectations and thus constituted a breach of Article 10(1) of the ECT. The analysis follows in the paragraphs below.

1013. In the Tribunal's view, it is apparent that the Spanish Government had been seeking ways to seriously tackle the tariff deficit in the electricity sector at least since 2009. For instance,

[1281] Resp. Rej., para. 748 (**R-0296**).
[1282] Opportunities in Renewable Energy in Spain (March 2009), slide.30 (**C-0582**); Opportunities in Renewable Energy in Spain (November 2007), slide 42 (**C-0090**).

RD-L 6/2009 set the maximum tariff deficit limit for years 2009 until 2012 and then RD-L 14/2010 of December 23, 2010 increased the maximum tariff deficit limit established by RD-L 6/2009 for years 2011 and 2012 in view of the impossibility of meeting the previous limits. The Tribunal views that the July 2, 2010 Agreement was one of the outcomes of such efforts made by the Respondent securing agreement of the wind and CSP sectors.

1014. H.E. Mr Mariano Rajoy's investiture speech as President of the Spanish Government on December 19, 2011 (see para. 212 *supra*) clearly illustrated the severity of the concerns over the growing tariff deficit of the Spanish electricity system felt by the new Spanish Government and signaled his Government's subsequent measures to tackle this problem.[1283] The evidence on the record of this proceeding shows that his new Government started with a rather cautious approach in 2012, keeping the feed-in remuneration scheme, in principle, and respecting the entitlements of existing facilities, but toward the end of 2012 stepped up the intensity and magnitude of the measures which ultimately dismantled the feed-in remuneration scheme in disregard of the Respondent's previous commitments and assurances of legal stability of the remuneration regime under RD 661/2007 and RD 1614/2010 on the rationale that the existing facilities under the Special Regime enjoyed "*over-compensation*".

1015. RD-L 1/2012[1284] which, according to the Respondent, was the first of the reform measure relating to the electricity sector taken by the new Government, suspended the Remuneration Pre-assignment registration procedures and eliminated economic incentives for new renewable energy producers. However, it kept the grandfathering clauses of the earlier remuneration regime (RD 661/2007 and RD 1614/2010) intact.[1285] Accordingly, the Solacor Plants which had already been registered in the Remuneration Pre-Assignment Register at the time of the entry into force of RD-L 1/2012 were allowed to continue to get the benefit of the original remuneration regime.[1286] RD-L 1/2012 indicated that the Government would introduce a new remuneration model taking into account the new economic situation, signaling further reform measures in the near future. The preamble

1283 (**R-0173**).
1284 For a detailed account of RD-L 1/2012, see paras. 212 to 217 of this Decision.
1285 RD-L 1/2012 (**C-0359/C-0359**t).
1286 Cl. Mem., para 616.

stated that "[t]*he aim is to create a system that fosters market competition through mechanisms similar to those used in other European Union Countries while ensuring the future viability of the system*."

1016. Minister José Manuel Soria López's reply letter to the Japanese Ambassador Satoh, dated April 9, 2012[1287] (see para. 351 *supra*) indicated that the Respondent intended to pay due regard to the legal certainty and regulatory stability for foreign investors in designing the reform measures as late as April 2012. However, the subsequent measures taken by the Respondent in late 2012 through 2014 showed that the Respondent apparently put priority to cut the tariff deficit at the cost of the stability of the remuneration regime for the existing facilities. In the view of the Tribunal, the evidence on the record of this proceeding has established that in line with the aim expressed in the preamble of RD-L 1/2012, the Respondent introduced changes in the remuneration regime provided for by RD 661/2007, in piecemeal by Law 15/2012 in December 2012 and RD-L 2/2013 in February 2013, and then by a total redesign of the remuneration system by RD-L 9/2013 in July 2013, Law 24/2013 in December, 2013, RD 413/2014 and MO IET/1045/2014 in June 2014.

(i) Law 15/2012 and RD-L 2/2013

1017. The measures introduced by Law 15/2012,[1288] the first regulatory changes impacting the Claimant's investment in the Solacor Plants, included elimination of the application of the RD 661/2007 economic regime to the electricity produced using back-up fossil fuels in CSP installations and the introduction of a 7% charge on the value of the electric power production (TVPEE). These measures applied to existing plants including Solacor 1 and Solacor 2 from January 1, 2013.

1018. The Tribunal has already decided that it lacks the jurisdiction over the TVPEE issue. Accordingly, the TVPEE is excluded from the Tribunal's scope of review of the Respondent's liability.

[1287] (**C-0370t**).

[1288] (**C-0372**) (**R-0030**) For a detailed account of Law 15/2012, see paras. 225 to 226 of this Decision.

1019. RD-L 2/2013[1289] brought two more changes to the remuneration regime relied on by the Claimant: (i) replacement of CPI with IPD-IP (CPI to constant taxes without food or energy products) in updating the tariffs, premiums and the upper and lower limits; and (ii) reduction of the amount of the premium to a value in the pool plus premium option prescribed in RD 661/2007 to zero. These measures applied to existing plants. Although RD-L 2/2013 formally entered into force on February 2, 2013, the measures went into effect retroactively from January 1, 2013. According to the Respondent, the purpose of these measures was "*to avoid their* [energy producers under the Special Regime] *over-remuneration.*"[1290]

1020. The Claimant claims that the right to use back-up fuels was one of the essential characteristics of the original regime and its abrogation was not foreseeable, and that the increase up to 15% of back-up fuel from 12% in the FiT option was a *quid pro quo* for the CSP sector's agreement to the one-year suspension of the FiP option in the July 2, 2010 Agreement. According to the Claimant, the economic impact of the non-use of back-up fuel would entail a reduction of the total remuneration of 12% (see para. 563 *supra*). The Claimant further claims that RD-L 2/2013 in effect eliminated the FiP option, one of the essential characteristics of the original regime it relied on, and that this elimination was not foreseeable either (see para. 564 *supra*). The Claimant also argues that the replacement of CPI index with IPD-IP entailed a serious decrease in the updating rate and as such was a breach of the Claimant's legitimate expectations. (see para. 565 *supra*).

1021. The Respondent submits that it has proven that the disputed measures under Law 15/2012 and RD-L 2/2013 were intended to address inefficiencies in the remuneration of the CSP plants in a proportional manner or at legitimate and reasonable public purposes, with no discriminatory effect.[1291] The public policy reasons for these measures, the Respondent argues, were avoidance of over-compensation and distortions in the market. The Respondent contends that the use of the back-up fuel had never been considered as a right of renewables, but a technical measure. The Respondent submits that the legality of the

[1289] (**C-0373**) (**R-0077**) For a detailed account of RD-L 2/2013, see paras. 227 to 231 of this Decision.
[1290] (**C-0373**) (**R-0077**) Preamble of RD-L 2/2013.
[1291] Resp., PHB, para. 68.

replacement of CPI with the other index was upheld by the Supreme Court, and thus such change was predictable (see paras. 726 and 727 *supra*). It argues that the changes corrected inefficiencies in how the updating index was calculated. The Respondent contends that the suppression of the FiP option was also a measure to avoid situations of overcompensation in a scenario of pool prices not corresponding to initial projections, and at the same time a foreseeable measure as it had already been adopted in 2010 for the first year of operation of the plants.[1292]

1022. The Tribunal does not find any evidence on the record of this proceeding that such changes were predictable and that the Claimant knew or should have known such changes in the future at the time of its investment.

1023. The majority of the Tribunal considers that as signaled by RD-L 1/2012, the measures adopted in Law 15/2012 and RD-L 2/2013 were apparently taken as the first steps leading to further sweeping reform measures later in 2013. The basic structure of the feed-in tariff system was maintained, but the measures taken were not just marginal in nature.

1024. The majority of the Tribunal considers that the reduction of the amount of the premium to a value in the pool plus premium option to zero was in breach of the specific commitment the Respondent made in Article 4 of RD 1614/2010 which included "*premium*" in the scope of the grandfathering clause. In the Tribunal's view, it was in effect an elimination of the option to choose the FiP given to the Special Regime producers, which was one of the essential characteristics of the remuneration regime relied on by the Claimant.

1025. The majority of the Tribunal considers that the use of back-up fuel up to certain percentage of the total production and the annual updating mechanism for the values of the tariffs, premiums, supplements and the lower and upper limits using CPI as an index were essential elements of the remuneration regime under the RD 661/2007 and RD 1614/2010 relied on by the Claimant, irrespective of whether each of them could be deemed as a right under Spanish domestic law. RD 661/2007 specified the annual updating mechanism for the values of the tariffs, premiums, supplements and lower and upper limits as defined therein,

[1292] *Id.*

using the CPI less twenty-five basis points (0.25%) until December 31, 2012 and fifty basis points (0.5%) thereafter.[1293] CSP plants had been allowed to use the back-up fuel up to 12% of the total production of electricity on an annual basis in case the FiT option was chosen, and 15% in case the FiP option was chosen both in RD 436/2004 and RD 661/2007.[1294] RD 1614/2010 raised the limit of the percentage of the back-up fuel production from 12% to 15% during the one year period when the CSP plants were required to apply only the FiT option reflecting the agreement reached with the CSP sector in the July 2, 2010 Agreement. The Tribunal is sympathetic with the Respondent's assertion that the use of the back-up fuel was a technical feature. However, the majority of the Tribunal considers that it is difficult to deny that the Respondent had used this feature as one of the incentivizing elements in the remuneration regime. If this was a purely a technical feature, there is no logical explanation to differentiate the percentage between the two options. Furthermore, the increase to 15% for the first twelve months while the CSP plants were not allowed to opt for the FiP option[1295] also indicates that the Respondent considered use of the back-up gas as an element of remuneration in addition to its technical feature. Considering the potential impact of those features of the remuneration regime of RD 661/2007 on the profitability of CSP plants in general, and on the Solacor Plants in particular, the majority of the Tribunal is of the view that the Claimant had legitimate expectations that these features would continue to apply during the lifetime of the Solacor Plants. Accordingly, the majority of the Tribunal considers that these measures, assessed together with the subsequent measures taken by Law 15/2012 and RD-L 2/2013, constituted a breach of the Claimant's legitimate expectations, and as such, a breach of Article 10(1) of the ECT. The Tribunal notes that their impact would be rather limited because the RF#3 followed soon after those measures took effect as explained below.

(ii) RD-L 9/2013, EPA 2013, RD 413/2014, MO IET/1045/2014 and subsequent measures

1026. The evidence on the record before this Tribunal shows that from July 2013, the Respondent started taking more radical reform measures as compared to the reform measures taken

[1293] Article 44(1) and the First Additional Provision of RD 661/2007 (**C-0037t**)(**R-0082EN**)
[1294] Article 2 of RD 436/2004 and Article 2 of RD 661/2007.
[1295] RD 1614/2010, Article 3(3) (**C-0039t**).

earlier. The new remuneration model introduced by RD-L 9/2013[1296] was based on the concept of the "*efficient and well-managed*" "*standard facilities*" and the "*reasonable rate of return*" to be determined by the regulators. The preamble of RD-L 9/2013 explained that the measures introduced by RD-L 9/2013 aimed at ensuring the financial stability of the electricity system as indispensable premise of its economic sustainability and the security of its supply. In the Tribunal's view, the whole focus of these reform measures was on the financial stability of the electricity system and insufficient regard was given to the stability promises given to existing investors to attract investments under the previous royal decrees.

1027. In the Tribunal's view, a simple comparison of the texts of Article 30(4) of EPA 1997 with the amendment made by RD-L 9/2013 clearly shows the fundamental paradigm change between the previous and the new remuneration regimes applicable to renewable energy producers. The Tribunal agrees with the Claimant's submission that it is a total change of the system.

1028. Article 30(4) of EPA 1997 provided that to work out the premiums for those under the Special Regime, "*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*."[1297] In contrast, the amendment made by RD-L 9/2013 infused the new concepts of "*standard facility*", "*standard revenue*", "*standard operating cost*", "*standard value*" and "*an efficient and well-managed company"* into the remuneration regime. It states, in pertinent part, as follows:

> *"For purposes of calculating this specific remuneration, the Law shall consider the following for any standard facility throughout its [regulatory] useful life and in reference to the business activity carried out by an efficient and well-managed company:*
>
> *a) The standard revenue for the sale of the energy generated, valued at the production market price.*
>
> *b) The standard operating costs.*
>
> *c) The standard value of the initial investment."*[1298][Emphasis added]

[1296] (**C-0386**) (**R-0024**) (BOE, July 13, 2013). For a detailed account of RD-L 9/2013, see paras. 232 to 243 of this Decision.
[1297] (**R-0003EN**).
[1298] (**R-0024EN**).

1029. It then adds that:

> *"This reasonable rate of return shall focus, before tax, on the average yield in the secondary market of the Obligations of the State within ten years by applying the appropriate differential.*[1299] [Emphasis added]

1030. RD-L 9/2013 applies to both existing and new facilities, without due regard to the grandfathering clauses in RD 667/2007 and RD 1614/2010 and the promises and assurances of legal stability given by the previous Government. Instead, the First Additional Provision (Reasonable profitability of production facilities with the right to feed-in tariff scheme) of RD-L 9/2013 provides that:

> *"… for the facilities that as of date of the entry into force of this Royal Decree law have the right to a feed-in tariff scheme, the reasonable rate of return shall focus, before taxes, on the average yield in the secondary market for ten years prior to the entry into force of this Royal Decree-Law of the Obligations of the State within ten years increased by 300 basic points …"*

1031. EPA 2013 [1300] incorporated the measures introduced by RD-L 9/2013 and formally eliminated the distinction between the Ordinary Regime and the Special Regime, thereby subjecting the renewable producers exclusively to the Specific Remuneration system created by RD-L 9/2013.

1032. This Tribunal considers that the following statement in the preamble of EPA 2013 is a clear manifestation of the Government' intention to fundamentally change the essential features of the previous remuneration regime applicable to renewable energy producers.

> *"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."*[1301] [Emphasis added]

[1299] *Id*.
[1300] EPA 2013 For a detailed account of EPA 2013 (**C-0377/C-0377t**) (**R-0048**), see paras. 247 to 257 of this Decision.
[1301] (**R-0048EN**).

1033. In the Tribunal's view, the decisive objective for undertaking this reform, according to its preamble, was to correct "*a structural deficit*" the causes of which "*lie in the excessive growth of certain costs items owing to energy policy decisions without ensuring their correlative income from the system*"[1302] and to address "*the risk of the bankruptcy of the electrical system.*"

1034. RD 413/2014,[1303] and MO IET/1045/2014[1304] further defined in greater detail the new Specific Remuneration framework for renewable energy producers and applicable remunerative parameters which were fundamentally different from the remuneration regime under RD 661/2007. Specifically, RD 413/2014 offered a special treatment of existing facilities that were already in receipt of the feed-in-tariff when RD-L 9/2013 came into force. Those existing facilities, including the Solacor Plants, were entitled to benefit from the Specific Remuneration framework introduced under RD 413/2014, but for those facilities the pre-tax reasonable return should be based on the average yield on ten-year government bonds in secondary markets over the ten years prior to the entry into force of "*RD-L 9/2013, increased by a spread of 300 basis points, without prejudice to any of the reviews foreseen for each regulatory period.*"[1305] Under Annex III of MO IET/1045/2014, the Respondent established 7.398% as the "*reasonable return*" value for renewable energy producers. This value would apply until the end of the first regulatory period (July 12, 2013 - December 31, 2019) and would be subject to discretionary reviews for subsequent regulatory periods.[1306]

1035. The Respondent offers no explanation how this rate was determined other than a brief reference in the preamble of RD 413/2014 to "[*i*]*n line with legal scholarship on this matter in recent years.*" Further, no explanation was given why the remuneration would be limited to the regulatory useful life which MO IET/1045/2014 set at 25 years for CSP plants.[1307]

[1302] EPA 2013, p 105199 (**R-0048EN**).
[1303] (**C-0388**) (**R-0093**) For a detailed account of RD 413/2014, see paras. 258 to 267 of this Decision.
[1304] (**C-0383**) (**R-0229**) For a detailed account of MO IET/1045/2014, see paras. 268 to 270 of this Decision.
[1305] RD 413/2014, Second Additional Provision (**R-0093EN**).
[1306] 300 basis points above the average yield of 4.398% on Spanish ten-year government bonds, Annex III of MO IET/1045/2014.
[1307] MO IET/0145/2014, Article 5 (1) (**R-0229EN**).

1036. This Tribunal finds unconvincing the Respondent's argument that the new remuneration regime retains the same characteristics of the remuneration regime relied on by the Claimant at the time of its investment. The Tribunal finds that the new regime fundamentally changed the essential elements of the previous feed-in remuneration regime in a number of important aspects.

(i) First and foremost, it introduced concepts of "*standard facility*", "*standard revenue*", "*standard operating costs*" and "*standard value of investment*" built upon the hypothetical situation of an "*efficient and well-managed company*". The regulator has a discretion to decide what the standard facility would be, without regard to the particular situation of an individual installation concerned which might have different cost of investment, operating costs and revenues.

(ii) Second, a "*reasonable rate of return by reference to the standard facility*" refers to the minimum level necessary to cover the costs that allow for the facilities to compete equally with the rest of technologies in the market. In this regard, in the view of the Tribunal, while the concept of the "*reasonable rate of return*" in EPA 1997 was meant to function as a floor, the same words in the EPA 2013 are meant to function as a cap.

(iii) Third, the parameters of the new remuneration regime may be revised every six years, adding further uncertainty to the investors.

(iv) Fourth, the determination of a reasonable return lies with the Spanish authorities, and the return so determined reflects a fictional value. The new regime does not offer any rationale how the reasonable rate relates to the average yield in the secondary market of 10-year Spanish treasury bonds and how the appropriate differential to be added thereto would be determined. No rational explanation was given for those new elements in the determination of the remuneration. This is a stark contrast to the RD 661/2007 regime which stipulated specific numbers for the regulated tariff, premium, upper and lower limits per each category of renewable producers under the Special Regime, with a mechanism for annual updates using the CPI as an index.

(v) Fifth, the rights to choose between the FiT and the FiP options were eliminated.

(vi) Finally, the new regime introduced a concept of regulatory useful life for CSP facilities of 25 years. Thus, there will be no incentives after 25 years.

1037. Arguing that the 2005-2010 Energy Plan already included the definition of the installation types[1308] and defined those standard installations according to the same parameters in terms of capacity, CAPEX, OPEX, equivalent operating hours, sales service life and reactive power that are used in the 2014 ministerial order to define the standard installations,[1309] the Respondent contends that the standard facilities in the Disputed Measures, far from constituting an overhaul of the system and a radical change without precedents, are just an improvement of the same methodology responsive to the evolution experienced by the Sector.[1310] The Tribunal does not find this contention convincing. RD 661/2007 did not include all those parameters, while the Disputed Measures do.

1038. In this connection, the Tribunal finds CNE's comments in September 2013 on the proposal of a new Royal Decree implementing RD-L 9/2013 insightful on the nature of, and potential difficulties arising from, the proposed new system. It stated that:

> *"This is a new model, with no counterpart in the EU, and it shall be implemented by a ministerial order setting some parameters hard to specify and quantify, especially for existing facilities."*
>
> *"The new methodology incorporates periodic reviews of the specific remuneration in order to guarantee the so-called reasonable profitability, avoiding sub-remunerations and over-remunerations too; however, it gives rise to great uncertainties regarding its application to the approximately 60.000 already existing plants, since its implementation depends on certain standard parameters which will be defined in the royal decree's enacting order."* [1311]

1039. The same CNE report commented on the financial consequences of the new measures to existing facilities which are at the heart of the disputes involving Spanish renewable cases arising from the Disputed Measures as follows:

[1308] Tr. Day 1, 136:3-5; Resp. Opening, slide 37.
[1309] Tr. Day 1, 136: 9-16.
[1310] Resp. PHB, para. 42.
[1311] CNE Report 18/2013, pp.4-5 (**C-0408t**).

> *"Furthermore, when it comes to the existing facilities, the referred formulation implies the application of a financial remuneration rate to previous cash flows (based on the average income and operating costs standards defined for each typical installation) that might be different to the one considered at the time when the investment decisions that gave rise to such flows were adopted."*[1312]

1040. The Tribunal does not find convincing the Respondent's argument that its commitments were properly encompassed by the concept of a reasonable rate of return which is a dynamic concept. The Tribunal appreciates that the reasonable rate of return is a dynamic concept taking into consideration the circumstances current at the time of its determination. Thus, the outcome of the determination by the Respondent of the reasonable rate of return using the pre-set parameters could be different each time the calculation is to be made. However, such a concept needs to be reconciled with what the Respondent provided under Articles 36 and 44(3) of RD 661/2007 and Article 4 of RD 1614/2010. The Claimant relied on what the Respondent determined as reasonable when it enacted RD 661/2007, i.e., the specific numbers offered by the Respondent in Article 36 of RD 661/2007 to be annually updated with the CPI index under the framework of RD 661/2007, backed by the grandfathering promises in Article 44(3). The Respondent represented to potential investors that it would continue to apply them irrespective of the review and revisions envisioned in RD 661/2007 to existing facilities. Had RD 661/2007 not incorporated the grandfathering clause (as was the case of the initial draft), the Respondent could have legitimately claimed that it was free to apply such dynamic concept to existing facilities on the general theory of the hierarchy of rules under the Spanish legal system. However, in view of the specific commitments and assurances of the legal stability made by the Respondent, this Tribunal considers that the concept of a reasonable return in legislation adopted from July 2013, as argued by the Respondent, finds no basis in Article 10(1) of the ECT.

1041. The tribunal in *Cube Infrastructure v. Spain* did not accept Spain's argument that RD 661/2007 and the accompanying press release represented that a "*reasonable return*" and that no more would be guaranteed and maintained. It observed that the plain meaning of Article 44(3) of RD 661/2007 stood in the way of reading it as referring to a "*reasonable*

[1312] *Ibid*., p.6.

return" as understood by Spain, but conversely there was no indication that increases resulting from the annual updating of tariffs, premiums and supplements in accordance with Article 44(1) of RD 661/2007 could be withheld or reduced if it was considered that a particular plant was earning more than a reasonable return, or that this might result from the four-yearly revisions of the tariffs indicated in Article 44(3) of RD 661/2007.[1313]

1042. The *Antin* tribunal was not persuaded, based on the evidence, that the methodology for determining the "*reasonable return*" under the new regime complied with the requirements of the ECT and that it was sufficiently aligned to the representations previously made by Spain regarding the stability of the legal and economic regime applicable to renewable projects in order to induce investments in the CSP sector.[1314] This Tribunal shares the view of the *Antin* tribunal when it observed that:

> *"the issue at hand is not whether the New Regime provides a "reasonable return", but rather how such "reasonable return" is determined. To comply with the stability and predictability requirements under the ECT, the methodology for determining the payment due to CSP installations must be based on identifiable criteria."*[1315]

1043. The tribunal in *NextEra v. Spain* also expressed the view that the concept of a reasonable return as understood by Spain was inconsistent with the assurances given by Spain. It stated that:

> *"the assurances made by the Spanish authorities were not about a reasonable return; they were about the regulatory certainty and stability that NextEra could expect. The denial of legitimate expectation is based on the failure to provide that certainty and security by changing fundamentally the regime under which remuneration was to be calculated."*[1316]

1044. The tribunal in *Novenergia v. Spain* also found the concepts of "*reasonable rate of return*" and "*economic sustainability*" unconvincing, as they were still "*generally vague and insufficiently defined*" when the investors invested. The tribunal observed that the precise

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[1313] *Cube* Decision, para. 287.
[1314] *Id.*
[1315] *Antin* Award, para. 563.
[1316] *NextEra* Award and Decision, para. 600.

content was given to these principles through introduction of Law 15/2012 and RD-L 9/2013 long after the investor had made its investment.[1317]

1045. The Respondent contends that it has exercised its regulatory power within the limits of the law, ensuring the maintenance of the essential elements of the regulation and in a proportionate manner to tackle the tariff deficit, which is a legitimate public purpose. The Tribunal has no doubt that the Respondent has legitimate concern to tackle the structural tariff deficit in the electricity sector which, in the Respondent's view, presented the risk of the bankruptcy of the system itself. Having said that, this Tribunal points to the acknowledgement of the Respondent in the preamble of EPA 2013 mentioned above (see para. 1032 *supra*) that the structural tariff deficit was "*owing to energy policy decisions*" of the Respondent. In this regard, the Tribunal is of the opinion that the Respondent, as a sovereign state, is free to take reform measures as it sees appropriate and fit to its new policy direction, but, as a Contracting Party of the ECT, it should bear the legal consequences if the measures so taken are without due regard to the stability promises and assurances the State had given investors to attract investment. This Tribunal views that the Respondent attempted to solve the tariff deficit in disregard of its earlier commitments and assurances given to existing investors, including JGC. Therefore, the Tribunal determines that this defense argument advanced by the Respondent against its liability does not hold up under the ECT, with its focus on international law as the applicable law.

1046. This Tribunal agrees with the view expressed by the tribunal in *Cube Infrastructure* that the problems which eventually emerged for Spain arose in the first place from the assurances given earlier than from the subsequent remedial actions. The *Cube Infrastructure* tribunal rightly observed that:

> "The Tribunal finds nothing inherently improper in the Respondent's conduct: it is the pursuit of that course of conduct in the face of earlier assurances that gives rise to the breach of the ECT".[1318]

[1317] *Novenergia* Award, para. 673.
[1318] *Cube* Decision, para. 430.

1047. The Respondent submits that the concept of reasonable rate of return is a balancing point between the guarantees of fair remuneration for operators for their investment and an equally fair allocation to electricity consumers of the costs that can be attributed to the electricity system (see para. 768 *supra*). This Tribunal does not agree with the Respondent's view that Spain's commitments are properly encompassed by the concept of a reasonable return. This concept in itself is not problematic. Rather, it is a concept that needed to be filled with content and was, in fact, made more precise by RD 661/2007. The problem stems from the fact that subsequent laws and royal decrees radically departed from the main features of this specification of a reasonable rate of return. Accepting the Respondent's argument would allow revision of the remuneration regime by the Government without distinct criteria which may not be compatible with the regime adopted and guaranteed earlier.

1048. In this regard, the Tribunal considers that the Respondent's test of balancing rational public policy interests and the reasonableness or proportionality of the measures taken[1319] fails to give due regard to the interests of existing plants which were promised grandfathering from future revisions of tariffs by the Respondent by the explicit provisions in both RD 661/2007 and RD 1614/2010 as well as other official and informal stability assurances, and thus had legitimate expectations that the system would not change so radically so as to become a completely new paradigm.

1049. As stated earlier in para. 653 above, the Respondent argues that as any prudent investor would know, in accordance with the basic principle of hierarchy of norms and the democratic principles embedded in the Spanish Constitution, "*no Government democratically elected can be prevented from amending a regulation adopted by a previous Government no longer in power*". This Tribunal finds this argument misleading and incompatible with the object and purpose of the ECT. This Tribunal is of the opinion that the *leitmotif* of the ECT is to protect long-term investors in the energy sector from such possibilities, and thereby to promote investment in the energy sector. Certainly, a democratically elected government has the right to amend or modify a regulation adopted

[1319] Resp. Closing, slide 81.

by a previous government in the pursuit of legitimate public policy goals. However, where commitments to and assurances of legal stability were given by the previous government to attract investments, this right is subject to the limitations a Contracting Party of the ECT has accepted.

1050. In order for the Respondent's argument to be convincing, it should be able to demonstrate specific circumstances evidencing the Claimant's knowledge of such possibilities at the time of its investment beyond the general knowledge or information on the hierarchy of norms. In this regard, the Tribunal is sympathetic with the Claimant's submission that investors are legitimately entitled to believe that the regulatory framework will remain stable and consistent over time, particularly when investing in a state like Spain, a reputable member of the European Union and the OECD, with "*political, socioeconomic, cultural and historical conditions*" of seriousness and reliability as an investment-friendly State.[1320] This Tribunal does not find any evidence on the record of this proceeding establishing that the Claimant had specific knowledge of a general system overhaul when they invested.

1051. In this connection, the Tribunal notes that the Respondent has deliberately chosen not to invoke the rules on a state of necessity[1321] as recognized in international law and stated in Article 25 of the ILC Rules on State Responsibility. The application of these rules in favour of Spain would have required a showing that a state of necessity existed, that Spain had not contributed to such a situation and that Spain had no other means to address the situation effectively than by the employment of the disputed means. Therefore, the Tribunal does not find it necessary for it to examine whether Spain had other means to address the tariff deficit problems.

1052. In this regard, this Tribunal agrees with the tribunal in *Cube Infrastructure* when it observed that:

> *"It is true that Article 44.3 RD 661/2007 did not specifically and explicitly exclude the possibility of its repeal by a later law: but, as the Press Release and RD 661/2007 itself stated, retroactive alteration of the regime applicable to existing facilities registered under the Special Regime was excluded, and there is no reason to view that representation as being subject to the implied qualification that it*

[1320] Cl. Mem., para. 1155; see para. 622 of this Decision.
[1321] Tr. Day 1, 173:14-19.

> *would remain effective only until the State exercises its undoubted legislative power to override it. If it were otherwise, it would be practically impossible for a State ever to give an undertaking upon which anyone could rely, or for legitimate expectations ever to arise. Certainly, situations of necessity may arise which, as a matter of international law, would excuse non-compliance with certain undertakings: but the Respondent did not raise the defence of necessity in this case."*[1322]

1053. This Tribunal accepts the Claimant's argument that these changes, beginning with RD 9/2013, fundamentally altered the remuneration regime on which the Claimant relied at the time of its investment into the Solacor Plants in 2010. The incentives accorded to the Claimant in 2014 were fundamentally different in nature, based on different assumptions, calculations and outcomes. Accordingly, the Tribunal concludes that the Respondent overturned the remuneration regime granted to the Claimant and in effect eliminated essential characteristics of the remuneration regime under RD 661/2007 and RD 1614/2010 as they existed in 2010.

1054. The relevant rules in the sentences 1 and 2 of Article 10(1) of the ECT require the creation of stable conditions and FET discussed earlier, and the Respondent has failed to honor these commitments. In the first phase, the Respondent had decided in 2007 to offer special benefits to investors in the renewable sector, in particular the CSP subsector, after previous attempts to induce investors turned out to be inadequate. In the second phase, the Respondent sought to withdraw from its offer under deteriorating economic and financial circumstances, notwithstanding that the investors had relied on the Respondent's commitments and assurances of legal stability and had sunk their resources into the projects concerned.

1055. The Claimant asserts that these changes implemented by the Disputed Measures have had significant harmful effects on the Solacor Plants and thus on the Claimant's investment. The quantification of the damages incurred by the Claimant will be addressed in the next Section.

1056. In conclusion, given the facts of the case and the fundamental changes of the legal regime subsequent to the time of the Claimant's investments, this Tribunal has concluded that the

[1322] *Cube* Decision, para. 289.

Claimant has established that the Respondent has not acted in accordance with the stability obligation and the duty to respect the legitimate expectations of investors pursuant to Article 10(1) of the ECT.

1057. The great majority of earlier decisions that have dealt with disputes relating to Spanish CSP technology found that the post-July 2013 Disputed Measures amounted to a breach of Article 10(1) of the ECT.

1058. *Antin v. Spain*: The tribunal in *Antin v. Spain* found that Spain breached its obligations under Article 10(1) of the ECT by dismantling all the features of the regime provided for under RD 661/2007 through RD-L 9/2013, EPA 2013 and MO IET/1045/2014.[1323]

1059. *Masdar v. Spain*: The *Masdar* tribunal concluded that "*the Claimant had legitimate expectations that benefits granted by RD 661/2007 would remain unaltered*"[1324] and that "*by reason of the loss of the RD661/2007 regime and the rights accrued to the Claimant thereunder pursuant to the Disputed Measures, the Tribunal finds that the Respondent is in breach of its fair and equitable treatment obligations pursuant to Article 10(1) of the ECT.*"[1325]

1060. *NextEra v. Spain*: The tribunal in *NextEra v. Spain* shared the same view in that the measures taken in 2013 and 2014 "*completely changes the remuneration mechanism applicable to date*." It stated that:

> *"While individually these changes might not have constituted a denial of fair and equitable treatment, collectively the economic regime under Regulatory Framework III [RD-L 9/2013, EPA 2013 and MO IET/1045/2014, etc.] is substantially different from that under Regulatory Framework I [RD 661/2007, RD-L 6/2009 and RD 1614/2010]. As the CNE put it, Regulatory Framework III "completed changes the remuneration mechanism applicable to date." "*[1326] *"[t]he changes went beyond anything that might have been reasonably expected by the Claimants when they undertook their investment."*[1327]

[1323] See *Antin* Award, para. 560.
[1324] *Masdar* Award, para. 521.
[1325] *Ibid*., para. 522.
[1326] *NextEra* Decision and Award, para. 598.
[1327] *Ibid*., para. 599.

1061. _RREEF v. Spain_: The tribunal in *RREEF v. Spain* took different views. The tribunal found that Spain acted in breach of its obligation to respect the principle of stability because there was an obvious element of retroactivity in the new regime introduced by the measures in 2013-2014 (the effect of claw-back past remuneration), although the new regime applied to future investments.[1328] However, the *RREEF* tribunal considered that the investors' legitimate expectation was limited to a "*reasonable*" rate of return and held that Spain be held responsible for a breach of its obligation to insure a reasonable return to the investors and must pay to them a compensation amounting to the difference between their actual return and the reasonable return as calculated by the Tribunal.[1329]

1062. _InfraRed v. Spain_: In the *InfraRed v. Spain* case, the tribunal concluded that the July 2, 2010 Agreement, RD 1614/2010 and the exchange of letters of waiver and acceptance "*did give rise to a legitimate expectation that CSP plants registered on the Pre-allocation Register would be shielded from subsequent regulatory changes to three specific elements* [future revisions of the tariffs, premiums and lower and upper limits]" of the original regulatory regime and that this expectation was violated by Spain.[1330] The *InfraRed* tribunal's interpretation of the scope of Spain's commitment appears to be based upon a literal interpretation of the text of what formed the basis of the Claimant's legitimate expectation, in particular Article 4 of RD 1614.

1063. _Novenergia v. Spain_: The tribunal in *Novenergia* found that Spain had radically and unexpectedly transformed the legal and business environment in 2014 and the manner in which the Kingdom of Spain adopted the measures including and subsequent to RD-L 9/2013 fell outside the acceptable range of legislative and regulatory behaviour.[1331] It also observed that the measures taken in 2013 and 2014 could not be justified by the police powers doctrine.[1332]

1064. _SolEs v. Spain_: The tribunal in *SolEs v. Spain* came to the same conclusion that the measures in RD-L 9/2013 and subsequent regulations "*changed the basic features of the regulatory*

[1328] *RREEF* Decision, paras. 325-330.
[1329] *Ibid*., paras. 399 and 589.
[1330] *InfraRed* Award, paras. 410 and 418.
[1331] *Novenergia* Award, para. 695.
[1332] *Ibid*., para. 732.

regime that was in place when the Claimant made its investment, exceeding the changes that the Claimant could have reasonably anticipated at that time."[1333]

(3) Judicial Economy

1065. As the Tribunal has concluded that Spain has failed to honor its obligations to provide stable conditions and to respect legitimate investor expectations under Article 10 (1) of the ECT, in the exercise of judicial economy the Tribunal does not consider it necessary to examine the Claimant's additional claims regarding the breach of other obligations under Article 10(1), i.e., transparency, MCPS, non-impairment and the umbrella clause. The amount of damages to be awarded to the Claimant would not be altered, whatever the outcome regarding the further allegations would be. Further, given the Tribunal's conclusion on the liability, the Tribunal does not consider it necessary to examine the Claimant's alternative claim under the "*Reasonable Rate of Return*" theory.

1066. For the avoidance of doubt, the Tribunal confirms that it has considered the totality of the Parties' submissions and arguments and that it has rejected the Parties' submissions and arguments which are not compatible with the conclusion of this Decision, whether explicitly stated or not.

(4) Decision on the Claimant's application for negative inference

1067. In its letter of March 14, 2018, the Claimant stated that save for the Request No. 55, the Respondent has not fully complied with the Tribunals' order of the document production in PO No.2 and has unduly retained documents and information which were detrimental to its case and that accordingly, it requested that the Tribunal draw adverse inferences from the Respondent's conduct. The Respondent objected thereto in its letter of March 19, 2018.

1068. In the letter of March 22, 2018, the Tribunal wrote to the Parties informing the Tribunal's determination that given the then current stage of the proceedings, it deemed it premature to make any decision on drawing adverse inferences from the Respondent's conduct, and thus reserved the decision until later, if and when the Tribunal deems appropriate.

[1333] *SolEs,* Award, para. 462.

1069. Having reviewed the record presented in this proceeding and having determined that the Respondent is liable for the breach of Article 10(1) of the ECT, the Tribunal views that this matter has become moot and accordingly does not consider it necessary to make any decision on the Claimant's request for drawing adverse inferences from the Respondent's conduct.

(5) Decision on the Respondent's application for negative inference

1070. Finally, the Tribunal has reviewed the Respondent's Request for the Application of Negative Inferences, dated September 18, 2018 and the Claimant's observations thereon dated September 20, 2018. Apparently, the Respondent's request was prompted by the words "*the final report"* mentioned by Mr. Endo in the second day of the Hearing. Asserting that the existence of an additional final report within the Due Diligence process other than the previously produced by the Claimant was clearly established, the Respondent requested the Tribunal to conclude that at the time of investment the only due diligences reviewed by the Claimant were the ones submitted by Lovells, Garrigues and Clifford Chance. In response, the Claimant explains that Mr. Endo in fact was referring to the power-point slides entitled "*Outline of the Project*" included in exhibit (R-0374), which is the Claimant's internal document assessing, among others, legal consequences as to who should assume legal risks, and as such this exhibit does not properly qualify as a legal due diligence. The Claimant also confirms that, in the course of its due diligence, it had access to and assessed the reports prepared by Lovells (C-0339, C-0569), Garrigues (C-0632 and C-0633), the draft report prepared by Clifford Chance (C-0574) as well as the legal opinions and conclusions that NEXI, the Lenders and Abengoa had received from different sources and at different moments before JGC made its investment.

1071. The Tribunal considers the Claimant's explanation credible. In response to the Respondent's question on the second day of the Hearing, Mr. Endo, while admitting that he did not know exactly, referred to "*the final report from the people who directly and actually carried out the due diligence*"[1334]. In view of his testimony a few minutes later saying that "*the team, the people who reviewed all those due diligence reports from*

[1334] Tr. Day 2 [Endo] 18:15-16.

consultants, made the judgement that none of these reports and consultants raised a red flag",[1335] it is quite obvious that Mr. Endo referred to the report from the internal team, not from outside counsel or consultants which have not been produced on the record of this case. Moreover, the Claimant does not claim that it has relied on any outside counsel's or consultant's due diligence report other than those on the record of these proceedings. Accordingly, the Tribunal does not consider it necessary to make any decision on this request.

VII. DAMAGES

A. APPLICABLE LAW

1072. The Claimant submits that because the ECT does not contain any reference to the consequences that stem from the breach of Article 10(1) of the ECT by a Contracting Party, absent any primary rule in this respect, it is necessary for the Tribunal to apply the rules of customary international law as reflected in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission of the United Nations ("**ILC Draft Articles**").[1336]

1073. The Claimant claims that in accordance with Article 2 of the ILC Draft Articles, (i) the Disputed Measures are attributable as the actions and omissions of the Respondent and constitute breaches of various standards of protection of Article 10(1) of the ECT, and (ii) the Respondent has committed an internationally wrongful act, which entails its international responsibility (Article 1 of the ILC Draft Articles) that involves the legal consequences set out at Articles 28 *et seq.* of the ILC Draft Articles.[1337]

1074. The Claimant does not seek restitution out of the forms of reparation set out in Article 34 of the ILC Draft Articles. The Claimant requests that this Tribunal order the Respondent

[1335] *Ibid.*, [Endo] 20:3-6.
[1336] Cl. Mem., paras. 1389-1391.
[1337] *Ibid.*, paras. 939-954.

to pay compensation for the damages caused to the Claimant's investment[1338] pursuant to Article 36 of the ILC Draft Articles which provides that:

> *1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*
>
> *2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.*

1075. Citing the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case,[1339] the Claimant submits that when a State commits an internationally wrongful act either by action or omission, it is obligated to compensate the aggrieved party so as to put it in the same position as it would be had the internationally wrongful act not been committed.[1340] In this regard, the Claimant claims that full compensation in this case is viewed as putting the Claimant into a position that would have existed but for the Respondent's breach of the ECT.

1076. The Claimant also requests that this Tribunal order payment of interest by the Respondent pursuant to Article 38 of the ILC Draft Articles.[1341]

1077. While denying that it has breached its obligations under the ECT, the Respondent does not contest, in principle, the application of the ILC Draft Articles to the attribution of actions and omissions and the legal consequences, if and when the existence of the alleged breach is found.[1342]

1078. Having reviewed the respective submissions of the Parties, the Tribunal agrees with the Claimant in that absent any primary rule in respect of the consequence of a breach of Article 10(1) of the ECT, the Tribunal has to apply the rules of the customary international law as reflected in the ILC Draft Articles.

[1338] *Ibid*., para. 957.
[1339] *Chorzów Factory Case (Germany v. Poland)*, Judgment on the merits, PCIJ Series A, No. 17, September 13, 1928 (**CL-0141**).
[1340] Cl. Mem, paras. 1393-1397.
[1341] *Ibid*., para. 958.
[1342] Resp. C-Mem., paras. 1543-1546. The Respondent cites Commentary 7 to Article 36 of the ILC Draft Articles in its defense (see para.1111 *infra*, and the Claimant's rebuttal in para. 1093 of this Decision).

1079. Accordingly, the Tribunal determines that (i) the Disputed Measures are attributable as the actions and omissions of the Respondent; (ii) the Respondent's breach of Article 10(1) of the ECT constitutes an internationally wrongful act for the purpose of the ILC Draft Articles and (iii) the legal consequences of the Respondent's breach of the ECT shall be determined in accordance with the full reparation principle embedded in the ILC Draft Articles. As the Claimant does not seek restitution, the Tribunal considers that Articles 31, 36 and 38 of the ILC Draft Articles are applicable in determining the compensation to be awarded to the Claimant, as full reparation for the injury caused by the Respondent's breach of Article 10(1) of the ECT. The compensation shall be on the basis of full reparation for the injury caused by the Respondent's breach of Article 10(1) including any damage caused thereby. The compensation shall cover "*any financially assessable damage including loss of profits insofar as it is established*",[1343] together with interest thereon in accordance with Article 38 of the ILC Draft Articles.

B. THE PARTIES' POSITIONS ON THE FRAMEWORK OF DAMAGE CLAIMS

1080. The Parties' view on the existence and magnitude of the damages are far apart from each other's. Specifically, they disagree on almost all issues critical in the assessment of the Claimants' compensatory damages such as the conceptual framework of damage assessment, the date of valuation, the method of valuation and the assumptions and parameters to be used in the valuation, the effect of the 7% TVPEE in the damage estimation and the resulting outcome of the damage assessment. The Tribunal will first review the Parties' respective framework of damages estimation below. Thereafter, the Tribunal will look into the issues of disagreement in the calculation of damages in further detail.

(1) The Claimant's position

1081. The basic tenet of the Claimant's case is that it is entitled to be put in the position it would have been in "*but for*" the multiple breaches of the ECT committed by the Respondent by having implemented the Disputed Measures.[1344]

[1343] ILC Draft Articles, Article 36(2).
[1344] Cl. Reply, para. 657.

1082. Based on this proposition, the Claimant's primary damage claim seeks the difference between (i) the fair market value ("**FMV**") of the Claimant's equity in Solacor SPVs which in turn each own Solacor 1 and Solacor 2 (for both sold and held shares) under a scenario where the Respondent's breaches had not occurred ("**But-For scenario**"), and (ii) the actual value of those investments as a result of the Respondent's Disputed Measures ("**Actual scenario**"), applying the discounted cash flow ("**DCF**") valuation methodology.[1345]

1083. The Claimant instructed Compass Lexecon to assess damages at the date of award ("**DoA**"). Accordingly, Compass Lexecon used March 31, 2016 as a proxy date for the DoA in its first report,[1346] and updated it to September 30, 2017 in its second report[1347], using all available information up to the respective proxy date for the DoA.[1348]

1084. In reliance on the Compass Lexecon, the Claimant claims that as of September 30, 2017 (the proxy date), over the lifetime (35 years from 2013 through 2047) of the Solacor Plants, the difference between the But-For cash flows and those representing the Actual scenario with the Disputed Measures in place, shows 43% revenue drop, and 37% cash flow drop.[1349] The accumulated cash flow loss of the Solacor Plants would amount to EUR 647 million.[1350] The impact of the Disputed Measures on the Claimant's investment amounts to 70 to 73% equity loss, depending upon the valuation method.[1351]

1085. In reliance on Compass Lexecon's calculation in its second expert report,[1352] the Claimant seeks compensation in the amount of EUR 103.5 million, as the damages that have been caused by the Disputed Measures valued as of the DoA using September 30, 2017 as the proxy date, including pre-award interests to the proxy date. The claimed compensation

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[1345] *Ibid.*, para. 658.
[1346] Compass Lexecon First Expert Report (**CER-0001**) ("**CER-CL1**").
[1347] Compass Lexecon Second Expert Report, para. 3.3 (**CER-0002**) ("**CER-CL2**").
[1348] Cl. Reply, para. 661. For the details of the updated information, see footnote 979 of Cl. Reply, referring to paragraph 3.3 of **CER-0002**.
[1349] Cl. Opening, slides 215-216, referring to (**CER-0002**), Compass Lexecon's Valuation Model (**CLEX-199**), from Tab FCFF&FCFE; Tr. Day 1, 93:14-24.
[1350] *Ibid.*, slide 217, referring to (**CER-0002**), Compass Lexecon's Valuation Model (**CLEX-199**), from Tab FCFF&FCFE.
[1351] *Ibid.*, slide 218, referring to Impact of Disputed Measures on CSP Plants' Equity and Enterprise Value (**CER-0002**), para. 3.14, from Table 5.
[1352] CER-CL2.

would amount to 105.2 million if the pre-award interests were updated to January 2018 (the valuation made as of the DoA will be referred to the "**DoA valuation**").[1353]

1086. The damages claimed by the Claimant based on the DoA valuation of Compass Lexecon are composed of past damages and current damages.[1354]

(i) Past damages are damages the Claimant incurred (i) from January 1, 2013 (when Law 15/2012 and RD-L 2/2013 took effect) until July 13, 2013 (when RD-L 9/2013 took effect) by RF#2 measures, and (ii) from July 13, 2013 until the valuation date (September 30, 2017 as the proxy date for the DoA) by RF#3 measures. Total past damages amount to EUR 19.4 million.[1355]

Past damages to the Claimant's held shares and sold shares are identical, each being equal to 13% of the difference in the cash flows of Solacor Plants under the But-for scenario and under the Actual scenario from January 1, 2013 until the date of valuation.

(ii) Current damages are damages the Claimant will incur as a result of the application of the new remuneration regime from the date of valuation until the end of the Solacor Plants' useful life (35 years of operation until 2047).[1356] With respect to the current damages, Compass Lexecon presented two different figures: (i) under the DCF method, the current damages amount to EUR 84.1 million in total (EUR 41.2 million for the held shares and EUR 42.9 million for the sold shares);[1357] and (ii) under the transaction method, the current damages amount to EUR 85. 8 million (EUR 42.9 million to each of the held shares and the sold shares).[1358]

[1353] Cl. PHB, paras. 144 and 176 (iii); CER-CL2, para. 2.6, Table 1: Total damages to JGC.
[1354] Cl. PHB, para. 154.
[1355] *Ibid*., para. 152, Cl. Opening, slide 225.
[1356] Cl. Opening, slide 225.
[1357] Compass Lexecon explained that under the DCF approach, it computed this value by applying the DCF approach in assessing the current damages for held shares, but applying the transaction value approach in estimating damages to sold shares. Footnote to Table 1, CER-CL2.
[1358] Under the transaction method, Compass Lexecon computed this value by applying the transaction value of the Claimant's sale of 13% shares to Abengoa Group in January 2016 for both held and sold shares.

(iii) In total, valued as of the proxy date of 30 September 2017, the damages amount to EUR 103.5 million under the DCF method, while under the transaction method, the damages amount is EUR 105.2 million. These damages amount increased from EUR 105.2 million to EUR 106.9 million if updated with the claimed pre-award interest to 31 January 2018. Among those two updated numbers, the Claimant claims EUR 105.2 million.[1359]

1087. At the instruction of the Claimant, Compass Lexecon performed an alternative damage estimation in its second expert report, assuming that the date of valuation is June 21, 2014 (the date of breach) ("**DoB valuation**")[1360] when the last of the Disputed Measures became effective.[1361]

1088. In its DoB valuation, Compass Lexecon applied the DCF method for both the But-for scenario and the Actual scenario. In the DoB valuation, Compass Lexecon presented:

(i) Past damages: EUR 7.1 million at the DoB, calculated as the difference in the 26% of cash flows of Solacor Plants between January 1, 2013 and the DoB in the But-for (EUR 20.7 million) and Actual scenarios capitalized to the DoB at the cost of equity at the DoB (EUR 13.6 million)[1362] (from January 1, 2013 (when Law 15/2012 and RD-L 2/2013 took effect) until July 13, 2013 (when RD-L 9/2013 took effect) by RF#2 measures, and from July 13, 2013 until June 20, 2014 by RF#3 measures).

(ii) Current damages: EUR 71.2 million at the DoB, calculated as the But-for value of 26% of Solacor Plants (EUR 85.2 million) minus the Actual value of 26% of Solacor Plants (EUR 14.0 million).[1363]

[1359] Cl. Opening, slide 224, referring to (**CER-0002**), para. 2.6, Table 1 and para. 3.21. In its first expert report (**CER-0001**), Compass Lexecon's calculation of damages as of the date of valuation (then March 31, 2016) was EUR 93.5 million under the DCF approach and EUR 88.8 million under the transaction method. Section 9.3 of Compass Lexecon's first expert report (**CER-0001**). Out of these two figures, the Claimant claimed EUR 93.5 million based on the DCF method. Cl. Mem, para. 1409.
[1360] CER-CL2, para. H.1.
[1361] While the Claimant submitted Compass Lexecon's second report which included the DoB valuation in Annex H (Damages estimation at the date of breach) together with its Reply of January 31, 2018, it has not referred to or discussed the DoB in its submissions, notwithstanding the objection raised by the Respondent to the use of the date of award as the valuation date.
[1362] *Ibid.*, para. H.13. Table 34.
[1363] *Ibid.*, para. H.12. Table 33.

(iii) Accordingly, the total damages to the Claimant at the DoB amounts to EUR 78.3 million.[1364] According to Compass Lexecon, total damages to the Claimant at the DoB including pre-award interest to January 31, 2018 amounts to EUR 99.7 million.[1365]

1089. In connection with the DoB valuation, Compass Lexecon clarified that as the valuation was conducted using June 21, 2014 as the date of valuation, it had used all available information up to, and expectations as of, this date.[1366] In line with this position, Compass Lexecon did not take into account in its DoB valuation the sale by the Claimant of a half of its stake in the Solacor Plants (13% of a total of stake of 26%) or the price received by the Claimant for such stake as this sale did not occur until January 7, 2016. Therefore, the DCF method was used in valuing the Claimant's 26% interest in the Solacor Plants both in the But-for and the Actual scenarios.[1367]

1090. Both the DoA and the DoB valuations of Compass Lexecon are based on the assumption that 7% TVPEE is considered as one of the unlawful Disputed Measures and that the useful life of the Solacor Plants are 35 years.

1091. The Claimant explains that after the year 2037, the 25th year of operation, there will no longer be any cash flows under the new regime (Actual scenario) because it is no longer economically viable to continue operating the Solacor Plants. The Claimant claims that, in the But-for scenario under the RD 661/2007 regime, the Solacor Plants would have continued in operation for 10 more years because it were economically viable to do so.[1368]

1092. The Claimant rebuts the Respondent's various arguments criticizing the Claimant's position on damage assessment. In response to the Respondent's contention that the Disputed Measures continue to provide 82% of the Solacor Plants' revenues, the Claimant contends that the relative ratio of revenues coming from incentives remaining the same

[1364] *Ibid.*, para. H.14. Table 35.
[1365] *Ibid.*, para. H.15, Table 36.
[1366] *Ibid.*, para. H.3.
[1367] *Ibid.*, para. H.7.
[1368] Tr. Day 1, 93:25 – 94:12, citing Cl. Opening, slide 216.

does not mean that there is no impact because there has been an overall reduction of the payments to the Solacor Plants.[1369]

1093. The Claimant submits that the Respondent's argument based on the fact that the Solacor Plants remain profitable and annually declare dividends to shareholders is at odds with the very essence of the full reparation principle.[1370] The Claimant contends that the general reference to an "*equitable and acceptable outcome*" in the Commentary 7 to the ILC Draft Articles invoked by the Respondent cannot lead, as the Respondent seems to suggest (see para. 1111 *infra*), to reduce compensation just because the impaired investment is still viable after the internationally wrongful act.

1094. The Claimant argues that internal rate of return ("**IRR**") analysis of Econ One, the Respondent's expert, in assessing the economic impact of the Disputed Measures, is conceptually and methodologically flawed.[1371] The Claimant submits that it is based on the Respondent's argument on the issue of liability that what was guaranteed by the remuneration regime relied on by the Claimant was a reasonable rate of return.[1372] Further, the Claimant argues that Econ One's calculations "*underestimate the reasonable rate of return of Solacor Project and overestimate their rates of return with and without the Disputed Measures*".[1373]

1095. The Claimant contends untenable and disingenuous the Respondent's claim that after the Disputed Measures, the Solacor Plants would be making 13.7% post-tax return in the new regime designed for 7.4% pre-tax system.[1374] The Claimant claims that a correct IRR analysis of the Solacor Plants would result in7.7% post-tax in the But-for scenario and 4.3% post-tax in the Actual scenario after the Disputed Measures.[1375] The Claimant states that to

[1369] Tr. Day 1, 95:9-25.
[1370] Cl. PHB, para. 142.
[1371] Cl. Reply, Section 3.4.
[1372] *Ibid*., para. 670.
[1373] Cl. PHB, para. 145.
[1374] Tr. Day 1, 97:1-2, Cl. Opening, slide 220.
[1375] Cl. Opening, slide 220; Cl. PHB, para. 145.

entice investments in the CSP sector, the Respondent foresaw returns between 7.6-11% post tax if opting for the FiP option.[1376]

1096. While the Claimant's primary case is to seek damages in the amount of EUR 105.2 million calculated under the DoA valuation (updated with pre-award interests to January 2018), it presents a subsidiary calculation in the amount of EUR 161 million for the sake of an argument (to be referred to "**the Claimant's Subsidiary calculation**"). This subsidiary calculation is premised on the scenario that the Tribunal determines that the Claimant is only entitled to a reasonable rate of return as argued by the Respondent. According to the Claimant, the difference between the profitability ranging 8% (FiT) to 9.5% (FiP) post-tax IRR offered by RD 661/2007 and 7.398% pre-tax (5.5% post-tax) offered under the new regulatory regime with the Disputed Measures in place, in Compass Lexecon's calculation, amounts to EUR 161 million.[1377]

(2) The Respondent's position

1097. The Respondent submits that the Claimant bears the burden of proving its losses for its claim to succeed, but that the alleged damages have not been even minimally proven.[1378] The Respondent states that if the loss is not proven, the claims must be rejected, even if liability is established.[1379] The Respondent cites *Gemplus v. Mexico* which observed that:

> *Burden of Proof: Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.*[1380]

1098. The Respondent submits that[1381]:

> *"The best proof of Claimant's baseless claim on damages is Claimant's own expert's admission at the Hearing that the plants are profitable, they receive a*

[1376] Cl. Opening, slide 220; Cl. PHB, para. 145.
[1377] C. Reply, paras. 703-710, Cl. Opening, slide 234. For details, see Second CER-CL2, Section 8.
[1378] Resp. C-Mem., paras. 52 and 1557; Resp. Rej., para. 1957; Tr. Day 1, 198:22-23.
[1379] Tr. Day 1, 198:14-19, citing Resp. Opening, slide 183.
[1380] *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, June 16, 2010 (**RL-0075EN**) ("***Gemplus* Award**"), para.12-56, cited in Resp. C-Mem., para. 1558.
[1381] Resp. PHB, para. 101, citing Mr. Padilla's testimony at Tr. Day 5:208:8-11 and Tr. Day 5:134:5-6. The Tribunal notes that the reference to Tr. Day 5:135-136 in footnote 226 of para. 101 of Resp. PHB meant to refer to Mr. Padilla's testimony at Tr. Day 4:135:5-6 made in the context of illiquidity discount.

significant proportion of their revenues through regulatory support, and a 50% of the share of JGC was sold at a positive value, stressing particularly that these plants have healthy, steady and largely regulated cash flows."

1099. The Respondent contends that the calculation of damages by the Claimant and its expert, Compass Lexecon, is totally and absolutely speculative as the claim is based on illusionary scenarios which cannot be maintained over the extensive time horizon of 35 years.[1382]

1100. The Respondent asserts that the Claimant's claim is a speculative claim using a speculative method, speculative assumption and baseless elements. The Respondent argues that the Claimant and its expert's valuation model attempts to predict data such as the price of the pool (depending on the price of crude) and energy demand. Because of this, the projection of the valuation parameters is hypothetical and illusory.[1383] The Respondent further argues that the extensive time horizon, together with the fact that there is no guarantee that the remuneration is frozen in the present form (always ensuring a reasonable return), makes the calculation of damages speculative.[1384]

1101. The Respondent reiterates its argument that the reasonable rate of return principle, which, it claims, is the cornerstone of the regulatory regime, should apply to the damage assessment. It asserts that this principle has been recognized by both the Spanish Supreme Court and international tribunals such as the *Charanne* and *Isolux* tribunals.[1385] The Respondent asserts that it would be most enlightening for the Tribunal to consider the reasoning of the *Isolux* award, which endorsed use of the IRR to measure the profitability of facilities.[1386]

1102. Econ One argues that the correct way to establish whether the Measures have had an economic impact on the Solacor Plants is to determine whether the return that the Solacor Projects can be expected to yield after the enactment of the Disputed Measures is lower than the reasonable return for renewable energy projects.[1387]

[1382] Resp. C-Mem., para. 1550; Resp. Rej., para 1954; Resp. PHB, paras. 98-99.
[1383] Resp. Rej., para. 1956.
[1384] *Ibid*., para. 1957.
[1385] Tr. Day 1, 194:4-17.
[1386] Resp. PHB, para. 104; Resp. Opening, slide 184, citing *Isolux award*, paras. 842 and 844 **(RL-0077)**.
[1387] First Report of Econ One Research, Inc., December 2, 2016 ("**RER-EO1**"), para. 92; Second Report of Econ One Research, Inc., April 20, 2018 ("**RER-EO2**"), para. 98; Econ One, Presentation, slide 22.

1103. Further, the Respondent quotes the European Commission which, after analysing a representative number of standard facilities, stated that Spain's "*aid does not exceed what is required to recover the initial investment costs and the relevant operational costs, plus a margin of reasonable return, based on the past and estimated costs and market prices (7.503% before tax for new facilities and 7.398% for existing facilities)*".[1388]

1104. According to Econ One, the reasonable rate of return since the 2000s has been around 7%[1389] and the IRR of the Solacor Plants after the enactment of the Disputed Measures in the Actual scenario is 13.7% post-tax.[1390] Econ One submits that because the IRR of Solacor Project in the Actual Scenario with the Disputed Measures in place is higher than the reasonable rate of return for renewable energy projects, it concludes that the Disputed Measures have not had a negative impact on the Solacor Plants.[1391]

1105. In reliance on the calculation of Econ One, the Respondent disputes that the Solacor Plants suffered any damages. The Respondent contends that "*these plants are profitable today, with the disputed measures in place*" and if the correct valuation approach is applied, "*there is no damages whatsoever*."[1392] The Respondent argues that the Solacor Plants have an EBITDA[1393] of almost EUR 40 million per year and each Solacor Plant gives more than EUR 2 million to the shareholders.[1394] The Respondent further argues that the costs of the Solacor Plants have been inflated by around EUR 100 million by JGC's partner, Abengoa.[1395]

1106. The Respondent argues that the Claimant's 13% stake in each of Solacor 1 and Solacor 2 is yielding at 13.7% IRR post-tax, but the Claimant is asking for around 24% IRR in this arbitration.[1396] The Respondent explains that Econ One arrived at 13.7% post-tax IRR by comparing the initial investment, the cash flows generated and the enterprise value of the

[1388] European Commission Decision on Support for Electricity generation from renewable energy sources, cogeneration and waste (S.A.40348 (2015/NN) (RL-0091), para. 120; Tr. Day 1, 200:1-8.
[1389] Econ One, Presentation, slide 23; RER-EO2, paras. 102-110.
[1390] Econ One, Presentation, slide 24; RER-EO2, paras 125-135.
[1391] RER-EO2, para. 138.
[1392] Tr. Day 1, 190:24 – 191:2.
[1393] EBITDA refers to Earnings Before Interests and Taxes, Depreciation and Amortization.
[1394] Tr. Day 1, 200:9-19, citing Resp. Opening, slide 186.
[1395] Tr. Day 1, 200:20-201:15.
[1396] Tr. Day 1, 192:4-14; Tr. Day 6, 80:5-12.

Solacor Plants using 2016 transaction value (the price the Claimant received in its sale of 13% interest to Abengoa Group).[1397]

1107. The Respondent discredits the Claimant's subsidiary calculation by arguing that it is "no more than a clumsy DCF exercise in reverse engineering in which the parameters chosen are tailored with the sole objective of giving a higher result than that of the main claim".[1398] The Respondent views that the Claimant's subsidiary calculation exercise is simply frivolous.[1399]

1108. Econ One further criticizes Compass Lexecon's reasonable rate of return calculation as conceptually flawed in that it assumed that the remuneration regime prevailing at a specific point in time would remain fixed in perpetuity.[1400] According to Econ One, it calculated a sensitivity to the Solacor Plants' IRR based on the information contained in the Solacor Plants' financial statements and found that the post-tax IRR is 8.5% and is still above the reasonable rate of return for renewable energy projects in Spain.[1401]

1109. Econ One also argues that the initial investment costs of the Solacor Plants were higher than average costs of similar plants, thus average costs of similar plants (EUR 437.8 million) rather than the actual CAPEX of EUR 545.8 million should be used in the IRR calculation. Similarly, the actual O&M costs did not reflect the arm's length transaction because Abengoa was the O&M provider. Accordingly, those costs need to be replaced by the average costs paid by comparable plants.[1402]

1110. The Respondent rejects the Claimant's assertion that with the Disputed Measures in place, 7.4% pre-tax was translated into 5.2%[1403] post-tax. The Respondent considers that it is wrong because it used the statutory or nominal tax rate of 25%, while the effective tax rate applicable to CSP plants was most of the time under 10%.[1404] In this connection, the

[1397] Resp. Opening, slide 190, referring to RER-EO 2, Table 4.
[1398] Resp. PHB, para. 119.
[1399] *Id.*
[1400] RER-EO2, Section V.
[1401] *Ibid.*, para. 154 and Table 6.
[1402] Econ One, Presentation, slide 25; RER-EO1, paras. 58-76.
[1403] While the Respondent stated "5.2%" at the first day of the Hearing, the correct number stated by the Claimant is 5.5%. See Cl., Opening, slide 236.
[1404] Tr. Day 1, 202:18–203:6.

Respondent states that Econ One has proven that the difference between the pre-tax and post-tax rates of return is minimal, since CSP plants are not expected to pay taxes until the last years of their useful life, showing, thus, that Compass Lexecon´s attempt to equate the 7.4% pre-tax of the supportive scheme in the new regime in place with a 5.5% post-tax is not representative of renewable projects because it does not consider the effect of the tax deduction, which these projects typically enjoy.[1405]

1111. Further, the Respondent argues that the Solacor Plants receive a significant proportion of their revenues through regulatory support and thus have healthy, steady and largely regulated cash flows.[1406] According to the Respondent, the Solacor Plants are subsidised at 82%, meaning that out of every EUR 100 that the Solacor Plants get EUR 82 come from public subsidies paid by the Spanish citizens.[1407] Thus, invoking paragraph 7 to the commentary to Article 36 of the ILC Draft Articles, the Respondent contends that what the Claimant claims as damages is not an "*equitable and acceptable outcome*".[1408] The paragraph 7 to the commentary invoked by the Respondent states, in pertinent part, that:

> *As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon … a concern to reach an equitable and acceptable outcome.*

1112. The Respondent asserts that the Claimant sold 13% out of 26% interest in Solacor SPVs at a profit, "*thanks to the disputed measures*."[1409]

1113. In reliance on Econ One' calculation, the Respondent submits that if a DCF methodology rather than IRR method is employed with appropriate corrections, it will arrive at the same conclusion that the Disputed Measures pose no damage whatsoever.[1410]

1114. In this connection, Econ One criticized Compass Lexecon's DCF analysis, and contended that various assumptions used in Compass Lexecon's calculation needed to be corrected.[1411]

[1405] Resp. PHB, para. 105.
[1406] Resp. Closing, slides 103-104, quoting Mr Padilla, Tr. Day 5, 135:5-6 and 208:8-11.
[1407] Tr. Day 1, 192:19-22.
[1408] Tr. Day 6, 76:1-77:7.
[1409] Tr. Day 1, 191:22-25.
[1410] Tr. Day 1, 191:4-7; 212:1-10.
[1411] RER-EO1, Section VI (Compass Lexecon's Economic Analysis); RER-EO2, Section VI (Compass Lexecon's Updated Economic Impact Analysis).

Econ One presented its own subsidiary DCF analysis applying corrections it deemed appropriate to the DoA valuation conducted by Compass Lexecon in its first expert report using the DCF method.[1412] According to Econ One's calculation, the total economic impact of the Disputed Measures on the Solacor Plants is minus EUR 57.8 million,[1413] i.e., the Disputed Measures have increased the value of the Claimant's interest in the Solacor Plants by EUR 57.8 million.

1115. Accordingly, Econ One concluded that its subsidiary calculation which reflected its corrections to Compass Lexecon's DCF calculation showed that the Disputed Measures had not had any negative effect on the value of the Claimant's shareholding interest in Solacor 1 and Solacor 2.[1414]

(3) The Tribunal's analysis

1116. In line with full reparation principle laid out in the ILC Draft Articles, the Tribunal accepts in principle the Claimant's damages claim framework seeking the difference between (i) the fair market value of the Claimant's equity in Solacor 1 and Solacor 2 (for both sold and held shares) under the But-For scenario, and (ii) the actual value of those investments as a result of the Respondent's unlawful Disputed Measures (Actual scenario),[1415] applying the discounted cash flow valuation methodology.

1117. On the basis of the principle set for above, the Tribunal agrees with the Respondent submission that the Claimant has the burden to prove the damages it claims. The Claimant does not dispute this point.

1118. The Tribunal considers that the purpose of damage compensation is to eliminate the consequences of the Respondent's breach of Article 10(1) of the ECT whether or not the Solacor Plants remain profitable after the Disputed Measures. In this regard, the Tribunal finds that the alleged admission of the Claimant's expert referred to by the Respondent as

[1412] RER-EO1, VI. L. (Subsidiary DCF Calculation of Economic Impact Based on Compass Lexecon's Analysis); RER-EO2, Section VI.L. (Updated Subsidiary Calculation of Economic Impact Based on Compass Lexecon's Analysis). The Tribunal notes that Econ One had not made its own subsidiary DCF calculation against Compass Lexecon's DCF calculation as of the DoB.
[1413] RER-EO2, para. 306, Table 7.
[1414] RER-EO1, para. 237and Table 7; RER-EO2, para. 306 and Table 7.
[1415] Cl. Reply, para. 658.

the best proof of the Claimant's "*baseless claim*" (see para. 1098 *supra*) is apparently quoted out of context. The full quotation of Dr. Padilla's testimony is as follows:

> *"First, we have been told that the plants are profitable; that they receive a significant proportion of their revenues through regulatory support and that JGC sold 13% of its shares at a positive value. I want to emphasise that these statements, which may have some advocacy value, however provide no useful information as regard the calculation of damages in this case. This is so because they omit that the plants could be more profitable but for the disputed measures; they omit that the level of support would be more appropriate without the disputed measures; and they omit that the value of the shares that were sold could be higher but for the disputed measures."* [Emphasis added]

1119. In the same vein, the Tribunal does not find relevant in the determination of the amount of compensation to be awarded to the Claimant the Respondent's quotation of the decision of the European Commission stating that Spain's aid does not exceed what is required to recover the initial investment costs and the relevant operational costs, plus a margin of reasonable return, based on the past and estimated costs and market prices.

1120. In its liability determination, the Tribunal has already rejected the Respondent's submission that what was guaranteed to the Claimant was the reasonable rate of return. Therefore, the Tribunal considers that Econ One's IRR analysis of the economic impact of the Disputed Measures on the Solacor Plants[1416] based on the assumption contradictory to the determination of this Tribunal on liability is not an appropriate starting point in the determination of the amount of damages.

1121. The Tribunal further notes that in calculating the expected IRR of the Solacor Plants, Econ One used an investment value of EUR 407 million based on the data on the average of thermosolar plants instead of using the actual investment value of the Solacor Plants (EUR 518 million) because it believed that the actual investment value was too high.[1417] For the purpose of the damage calculation for this arbitration, the Tribunal is of the view that the assessment should be made specific to the Claimant's investment into the Solacor Plants,

[1416] RER-EO1, V (Economic Impact of the Measures on the CSP Plants); RER-EO2, IV (Economic Impact of the Measures on the CSP Plants).
[1417] CER-CL2, para. 2.22; RER-EO1, para 69.

not on the basis of the standard or average of CSP plants in terms of investment, cost, O&M costs, etc.

1122. The Tribunal also finds unconvincing the conclusion of Econ One that the IRR in the Actual scenario with the Disputed Measures in place is higher than the reasonable rate of return set by the new regime (7.398%). The Tribunal does not consider it credible that in a system designed to give 7.398% rate of return to renewable energy plants with the Disputed Measures in place, the Solacor Plants could be able to achieve 13.7% post-tax IRR.

1123. In the same vein, the Tribunal does not consider the outcome of the Respondent's subsidiary calculation credible which shows that the Disputed Measures have increased the value of the Claimant's interest in the Solacor Plants by EUR 57.8 million. This outcome casts doubts on the appropriateness of certain assumptions Econ One applied in the calculation, and accordingly on the appropriateness of the corrections argued by Econ One to be made to the Claimant's DCF valuation.

1124. For these reasons, the Tribunal does not consider it necessary to further review the merits of the economic impact calculations (IRR calculation) presented by the Respondent as well as the Claimant's subsidiary calculation which are based on propositions inconsistent with the Tribunal's determination on the liability. Accordingly, the Tribunal will focus its review on the appropriateness of the Claimant's primary DCF valuation and whether the corrections to the Claimant's DCF valuation advocated by Econ One (including the APV method) are appropriate and justified later in this decision.

C. DATE OF VALUATION

1125. The Parties disagree with respect to the threshold issue of the date of valuation.

(1) The Claimant's position

1126. The Claimant submits that under settled international law, to ensure full reparation, the Claimant is entitled to choose between a valuation as of the date of injury (i.e., the date of breach (*ex-ante* valuation)) and that as of the date of the Tribunal's Award (*ex-post*

valuation), whichever is higher.[1418] The Claimant opts for the DoA valuation in calculating damages.

1127. In support of its position, the Claimant cites the award in *Siemens v. Argentina* which stated that:

> *The Tribunal has to apply customary international law. Accordingly, the value of the investment to be compensated is the value it has now, as of the date of this Award, unless such value is lower than that at the date of expropriation, in which event the earlier value would be awarded.*[1419]

1128. The Claimant also cites *Yukos Universal Limited (Isle of Man) v. The Russian Federation*[1420], *ADC v. Hungary*[1421], *El Paso v. Argentina*[1422] and the *Chorzów Factory Case* in support of its position.[1423]

1129. The Claimant points out that the tribunal in *Novenergia* adopted the approach following the DoA valuation.[1424] The Claimant also asserts that the Respondent in *Masdar v. Spain* took this position.[1425]

1130. The Claimant further submits that in line with the *Novenergia* tribunal, the *NextEra* and *OperaFund* tribunals held that the choice of a date of award (*ex-post*) valuation was consistent with the settled international law principles and should be accorded.[1426] The Claimant adds that the tribunal in *NextEra* upheld the use of a DoA valuation to award damages to the claimants as of June 30, 2016,[1427] and that the *OperaFund* tribunal recognized that "[c]*laimants are entitled to damages valued as of the date of injury or as*

[1418] Cl. Reply, para. 660. Cl. Opening, slides 226-227.
[1419] *Siemens A.G. v. Argentine Republic*, ICSID Case No ARB/02/8, Award, January 17, 2007, para. 360 (**CL-170**) ("***Siemens* Award**"), cited by the Claimant in Tr. Day 1, 98:20-99:10 and Cl. Opening, slide 226. Cl. PHB, para. 148.
[1420] *Yukos* Award, para. 1769 **(CL-0039)**.
[1421] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16), Award, October 2, 2006, para. 497 (CL-0115) ("***ADC* Award**").
[1422] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15), Award, October 31, 2011, para. 476 (**CL-0003**).
[1423] Cl. Reply, footnote 978.
[1424] Cl. Opening, slide 227, citing *Novenergia* Award, paras. 814 and 838.
[1425] Tr. Day 1, 99:1-19; Cl. Opening., slide 227; CPHB, para 148.
[1426] Cl. New Case Submission, para. 136.
[1427] *NextEra* Decision, paras. 604, 609 and 652 **(CL-0206).**

of the date of the Tribunal's award, whichever is higher"[1428], although the claimants in *OperaFund* opted for a DoB valuation as of June 2014.[1429]

1131. Compass Lexecon stated that it was instructed to quantify damages as of March 31, 2016 as a proxy date for the date of award in its first expert report.[1430] At the instruction of the Claimant, Compass Lexecon updated this damages estimate as of September 30, 2017 as a new proxy date in its second expert report.[1431] In addition, at the instruction of the Claimant, Compass Lexecon also performed a damages estimation assuming that the date of valuation is June 21, 2014, the date when MO IET/1045/2014, the last of the Disputed Measures, became effective, and presented the results of this estimation in the second expert report.[1432]

(2) The Respondent's position

1132. The Respondent argues that the date of award is a procedural date that is unrelated to the dispute *per se*. The damage really suffered does not depend on the time taken to resolve the dispute. The date of the award has no connection with the measure nor with the damage effectively suffered, whereas the date of the measure is an essential element. Therefore, in Respondent's view, the DoA would harm the principle of causality, enshrined in Articles 31(Reparation) and 36(Compensation) of the ILC Draft Articles.[1433]

1133. Pointing out that the difference between the calculations of Compass Lexecon's first and second reports amounts to more than EUR 20 million, all due to the change of the proxy date for the DoA chosen as the date of valuation, the Respondent argues that using an *ex-post* date such as the DoA is arbitrary and totally speculative.[1434] The Respondent further asserts that the Claimant's use of the DoA as the valuation date has "*no other intention and no other result than to artificially increase damages…*"[1435]

[1428] *OperaFund* Award, para. 683 (**CL-0211**).
[1429] Cl. New Case Submission, para. 137.
[1430] CER-CL1, para. 1.8.
[1431] CER-CL2, para. 1.4.
[1432] *Ibid*., Annex H, para. H.1.
[1433] Resp. Rej., para. 2010.
[1434] Tr. Day 6, 77:12-21; Resp. Rej., para. 2004. Resp. PHB, para. 115.
[1435] Resp. PHB, para. 115.

1134. The Respondent submits that in order to comply with the principles of causality, legal certainty, material justice and full reparation, the only date that should be taken is the date of the measure, i.e. an *ex ante* date.[1436] The Respondent further submits that it is a fact that the value of an asset fluctuates constantly over time. In long-term projects and investments, the fact of incorporating some additional years of information does not improve the quality or certainty of the predictions when there are still years or even decades left in the project, during which the conditions may be reversed.[1437]

1135. Arguing that practically all the case law applied an *ex-ante* date except for the cases cited by the Claimant (*Siemens*, *Yukos* and *ADC*),[1438] the Respondent contends that the date of valuation should be an *ex-ante* date, i.e., the date of breach. In this regard, the Respondent states that the Disputed Measures were enacted in 2012, 2013 and 2014, but the point is that they started in 2012.[1439]

1136. The Respondent claims that other Spanish cases involving CSP plants such as *Eiser*, *Masdar* and *Antin* cases all adopted the date of the breach as the date of valuation.[1440] The Respondent points out that the *Masdar* tribunal finds June 20, 2014, the claimant's valuation date, appropriate for the purpose of evaluating the impact of the disputed measures on claimant's investment in that case.[1441]

(3) The Tribunal analysis

1137. The date of valuation determines the point in time relative to which the fair market value ("**FMV**") of an asset is assessed and thus the choice of the valuation date is crucial, especially when applying a DCF method, because it generally limits information to take into account to that available at that date[1442] and accordingly important assumptions to be used in the DCF method could be different depending on the timing of the valuation.

[1436] Resp. Rej., para. 2013.
[1437] *Ibid.*, para. 2012.
[1438] *Ibid.*, para. 2003. See footnote 1545 for the lists of arbitral precedents which, the Respondent submits, applied *ex-ante* date as the date of valuation.
[1439] Tr. Day 1, 195:6-21.
[1440] Resp. Closing, slide 109; Tr. Day 6, 78:2-5.
[1441] *Masdar* Award, para. 608.
[1442] *Ibid.*, para. 601.

1138. Having considered the Parties' respective submissions and arbitral precedents, the Tribunal agrees with the Respondent that a predominant majority of tribunals in international arbitration cases have applied the date of breach as the date of valuation. Apparently, the cases cited by the Claimant represents a minority view. Further the Tribunal also notes that the tribunals in *Antin*[1443] and *Masdar*[1444] determined the date of breach appropriate for the purpose of evaluating the impact of the Disputed Measures on the claimant's investments.

1139. The Claimant asserts that the tribunal in *NextEra* upheld the use of a date of award as the valuation date in awarding damages to the claimants as of June 30, 2016 (see para. 1130 *supra*). However, the Tribunal notes that the respondent in the *NextEra* case "*did not raise any objection to the 30 June 2016 valuation date*"[1445] and accordingly the *NextEra* tribunal used that date for its analysis. In this case, the Respondent objects to the use of the DoA as the valuation date. Therefore, the Tribunal does not consider that the *NextEra* case supports the Claimant's argument in this regard.

1140. The Tribunal further notes that the cases cited by the Claimant such as *ADC*, *Siemens* and *Yukos* involved the investors' expropriation claim, and thus could be distinguished from this case where the Claimant's case is not based on an expropriation claim, but on the breach of FET standard in Article 10(1) of the ECT.

1141. In view of the current state of international arbitral precedents, the Tribunal does not find a compelling reason to deviate from the majority of arbitral precedents which has accepted the DoB as the valuation date in this case. In the Tribunal's view, neither the Claimant nor Compass Lexecon has presented convincing reasons to support their argument in the specific context of this dispute. The Tribunal is sympathetic with the Respondent's criticism against the DoA valuation in that more than EUR 20 million difference between the result of the DCF damages estimation in the first and second report of the Claimant's expert is solely due to the different proxy dates for the DoA. Accordingly, the Tribunal decides that the date of valuation is June 21, 2014 when MO IET/1045, the last of the Disputed Measures which defined the parameters of the new regime, went into effect. In

[1443] *Antin* Award, paras. 666-667, 734.
[1444] *Masdar* Award, para. 608.
[1445] *NextEra* Decision, para. 652.

the Tribunal's view, this date offers a reasonable point in time for valuation, which could result in a consistent and objective outcome in this case, without being affected by the date of the award.

1142. In view of the determination that the date of the valuation is the DoB which in the Tribunal's view, is June 21, 2014, the Tribunal will narrow down its review to the appropriateness of the Compass Lexecon's DoB calculation against the corrections argued by the Respondent and Econ One in the following paragraphs.

D. VALUATION METHOD

1143. As briefly explained in the previous section, the Parties and their valuation experts disagree on the appropriate method of calculating damages.

(1) The Claimant's position

1144. The Claimant submits that the DCF method, used by its expert, Compass Lexecon, is the most appropriate method in the valuation of the Claimant's damages in this arbitration because the DCF method is the appropriate valuation methodology to estimate the value of a "*going concern*"[1446] and is dominant to assess the fair market value of income-generating assets, such as the Solacor Plants. It is widely used in the economic and financial analysis of businesses and in the valuation of damages in the context of international arbitration.[1447] The Claimant claims that the tribunals in other Spanish renewable cases such as such as *Masdar*,[1448] *Antin*,[1449] *Eiser*,[1450] and *Novenergia*[1451] adopted the DCF method rather than the asset based valuation method proposed by the Respondent.[1452]

1145. The DoB valuation of Compass Lexecon used the DCF methodology without considering the transaction value of the 13% interest of JGC sold to Abengoa group in January 2016 as

[1446] Cl. Reply, para 673(a)-(f), CER-CL2, paras. 7.18-7.23.
[1447] Cl., Opening, slide 228 citing CER-CL1, paras. 5.13-5.14; CER-CL2, para. 7.6.
[1448] (**CL-0175**), paras. 564-587.
[1449] (**CL-0182**), paras. 677-691.
[1450] (**CL-0149**), para. 441.
[1451] (**CL-0173**).
[1452] Cl. Opening, slide 228.

the valuation is based upon the information available as of the date of breach, June 21, 2014.[1453]

1146. The Claimant argues that the Solacor Plants are going concerns and have sufficient track records of more than 6 years of operation to allow the calculation of expected returns under the DCF method.[1454] The Claimant points out that the value of JGC's investment in the Solacor Plants comes from the cash flow generation capabilities of them, rather than the historical expenditure prior to those investments. The Claimant further asserts that the DCF analysis allows to assess the fair market value of the investment in the But-for and Actual scenarios and to isolate the effect of each Disputed Measure.[1455]

1147. The Claimant submits that the DCF analysis is particularly suited to value companies whose revenues are defined by law or regulation as in the present case because the resulting cash flows are stable and more predictable than those of unregulated business, and there are no volatile or unpredictable items affecting cash flows. The Claimant further submits that the DCF analysis allows the value of specific variables (such as prices or taxes) to be isolated, and, therefore, is the optimal method to assess the effect on value of the adverse measures enacted by the Respondent since the introduction of the Disputed Measures and into the future.[1456]

1148. Compass Lexecon asserts that the DCF method is especially suited to value damages in the present case for the following reasons: (i) the DCF, being a forward-looking method that assesses value based on anticipated future cash flows, is particularly appropriate for renewable energy projects, whose value comes from their expected future energy production rather than the amount of money historically invested; (ii) the DCF method is based on fundamental principles of economics and finance, and leading authors in the financial field have supported its application as the preferred valuation methodology for revenue producing assets (such as the Solacor Plants); (iii) the DCF method is well adapted to value companies whose projected revenues are fully or partly defined by contract, law,

[1453] CER-CL2, paras. H.3 and H.7.
[1454] Cl. PHB, para. 143. The Tribunal notes that this statement relates to the Claimant's DoA valuation.
[1455] Cl. Opening, slide 228.
[1456] Cl. Reply, para. 673.

or regulation, and thus quite stable and predictable, as in the case of the Solacor Plants; and (iv) the DCF method is particularly well suited to value companies whose future investment and operating and maintenance costs are relatively certain as in the case of the Solacor Plants, which have no significant investment needs going forward and have operating and maintenance costs that are relatively straightforward to predict and subject to relatively little uncertainty.[1457]

1149. Compass Lexecon disagrees with the Respondent's argument of the existence of certain circumstances in the present case "*that demonstrate both the inadmissibility and the impossibility of applying the DCF method*" (see 1158 *infra*).[1458] In response, Compass Lexecon contends that[1459]: (i) there is ample evidence of the use of the DCF method in the valuation of capital intensive electricity utilities; (ii) while the volatility of the wholesale electricity price affects cash flows, it does so to a limited extent. The DCF method is widely used to value conventional generators which face much higher revenue volatility; (iii) the greater uncertainty of cash flows far into the future is reflected within the DCF methodology by the higher discount rate applied to these amounts; (iv) when returns are correctly measured, there is no evidence that the Solacor Plants achieve unreasonable or disproportionate returns in the But-for or in the Actual scenarios; and (v) the Solacor Plants have been operating for more than five years.

1150. The Claimant states that the damage estimate that it has presented in this arbitration is premised on the conservative assumption that the remuneration under the target return of 7.398% pre-tax would continue after the first regulatory period. The Claimant expects that after six years, the target return would be reduced when the next revision would be made. Thus, it claims that the damage estimates presented by the Claimant are conservatively underestimated.[1460] In this regard, Compass Lexecon confirmed that it was asked to assume in its calculations that the target return applicable under the new regime to set the regulated payments for the Solacor Plants at 7.398% remain unchanged in 2020.[1461]

[1457] CER-CL2, paras. 7.8-7.12.
[1458] Resp. C-Mem., para. 1566.
[1459] CER-CL2, para. 7.15.
[1460] Tr. D1. 92:25-93:13, citing Cl. Opening, slide 214.
[1461] CER-CL2, paras. 1.4 and H.8.

1151. In response to the Respondent's argument that *"when you have an investment that has been constructed in 2012, and you are valuing the impact of measures adopted in 2012, the investment cost is a mandatory reference*",[1462] the Claimant contends, in reliance on the testimony of its expert, Dr. Padilla of Compass Lexecon,[1463] that equating investment costs and value would be a serious mistake.[1464]

1152. In reliance on Compass Lexecon, the Claimant argues that the DCF method is more appropriate than Econ One's suggested APV (adjusted present value method) to estimate damages. According to the Claimant, the DCF and the APV, which Compass Lexecon states is a variant of the DCF method, yield similar results with the same valuation assumptions.[1465]

1153. In response to the Respondent's criticism that the "*sanity check*" of the DCF has not been carried out in a consistent way by the Claimant's expert,[1466] Compass Lexecon stated in its second expert report that it used the transaction value approach as a sanity check for its valuations in the Actual scenario, but there were no appropriate transactions to use for it to conduct a sanity check of its valuation in the But-for scenario.[1467] In its presentation at the Hearing, Compass Lexecon argued that its But-for value is consistent with third party estimated multiples before the Disputed Measures by comparing Abengoa's valuation of a 50MW CSP plant as of June 2011 (EUR 344 million) and Compass Lexecon's average But-for valuation of the Solacor Plants as of June 2014 (EUR 374 million).[1468] It further stated that the Actual DCF value is consistent with transaction value and third party multiples post Measures.[1469]

[1462] Tr., Day 1, 204:2-5.
[1463] Tr. Day 5, [Padilla] 20:9-17.
[1464] Cl. Closing, slide 23; Cl. PHB, para. 161.
[1465] Cl. Reply, para. 678; CER-CL2, para. 7.41 and Table 15.
[1466] Resp. PHB, para. 113.
[1467] CER-CL2, paras. 7.16 and 7.17.
[1468] Compass Lexecon, Presentation on Quantum, slide 6; Tr. Day 4 [García] 129:4-130:5.
[1469] *Ibid*., slide 7; Tr. Day 4 [García] 130:6-21.

(2) The Respondent's position

1154. The Respondent argues that the DCF method is most inappropriate in the circumstances of this case, looking particularly at the lack of sufficient track record of the Solacor Plants.

1155. The Respondent emphasizes that the DCF is a valuation method inconsistent with the definition of the Spanish regulatory framework, in which a reasonable return is the only guarantee to producers and the State always retains its regulatory power. In the Respondent's view, the DCF model of Compass Lexecon is based on the assumption of a frozen RD 661/2007 for more than three decades.[1470]

1156. The Respondent states that the DCF method has been rejected by tribunals in investment arbitration cases many times on the grounds such as the lack of sufficiently long performance record, failure to establish future profitability of the investment, lack of sufficient finances to complete and operate the investment and the large disparity in the amount actually invested and the fair market value claimed, which, the Respondent asserts, are the case in this arbitration.[1471]

1157. In support of its position, the Respondent cites the opinions of Dr. Ripinsky and Professor Marboe stressing the advantages of asset-based methods as less speculative and simpler to apply.[1472]

1158. The Respondent asserts that in the present case, there are certain circumstances that demonstrate both the inadmissibility and the impossibility of applying the DCF method as follows:[1473] (i) the fact that it is a capital-intensive business, with a significant asset base. Practically all of its costs are investment costs in tangible infrastructures and there are no relevant intangibles to value; (ii) the high dependence on cash flows of volatile and unpredictable exogenous items, such as the price of the pool, among others; (iii) the long term in which predictions are projected; (iv) the disproportion between the alleged investments (and the assumed risk) and the claimed amount, evidenced by the obtained

[1470] Resp. PHB, para. 116.
[1471] Tr. Day 1, 203:11-21, referring to Resp. Opening, slide 192.
[1472] Resp. Rej., paras. 1968-1969.
[1473] Resp. C-Mem., para. 1566.

returns; and (v) the lack of sufficient financial history to support a minimally sound projected cash flow future.

1159. The Respondent relies on the award in *Rusoro v. Venezuela* which observed that "*DCF is not a friar's balm which cures all ailments*." One of the criteria for a DCF approach to work properly listed by the *Rusoro* tribunal is that the enterprise has an established historical record of financial performance, which, the Respondent argues, is lacking in this case.[1474]

1160. The Respondent further cites the observation of the tribunal in *Rusoro*[1475] pointing out risks involved in the DCF analysis as follows:

> *"Small adjustments in the estimation can yield significant divergences in the results. For this reason, valuations made through a DCF analysis must in any case be subjected to a "sanity check" against other valuation methodologies."*[1476]

1161. In this regard, the Respondent argues that this "*sanity check*" of the DCF has not been carried out in a consistent way by the Claimant's expert.[1477]

1162. The Respondent asserts that rather than just adopting the DCF method, other valuation methods need to be looked for. The Respondent contends that before turning to an illusionary and speculative DCF exercise, the Claimant's experts could have just looked into real market transactions giving good indications for the fair market value of the Claimant's investment before and after the Disputed Measures and showing that no damages can be claimed in these proceedings.[1478]

1163. In this regard, the Respondent argues that "when you have an investment that has been constructed in 2012, and you are valuing the impact of measures adopted in 2012, the investment cost is a mandatory reference."[1479] Further, the Respondent criticises Compass Lexecon's use of the DCF method in total disregard of other available objective references,

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[1474] Tr. Day 1, 204:6-16, citing *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016 (**RL-0076**) ("***Rusoro* Award**"); Resp. PHB, para. 112.
[1475] Resp. PHB, para 112.
[1476] *Rusoro* Award, para. 760 (**RL-0076**).
[1477] Resp. PHB, para. 113.
[1478] *Ibid*., para. 107.
[1479] Tr., Day 1, 204:2-5.

such as 2014 transaction value (Abengoa Yield's acquisition of the Solacor companies), and 2016 transaction value (the Claimant's sales of 13% stake to Abengoa group) [1480] and 2018 transaction value (Abengoa Yield's sales of shares to Algonquin).[1481]

1164. In particular, the Respondent argues that Compass Lexecon could have used EUR 34 million, which is the uncontested figure of what the Claimant invested in the Solacor Plants in their But-for valuation, or could have also relied on a fair, sound and arm's length market valuation for their "*Actual*" world valuation, taking into account the Claimant's own transaction closed on January 7, 2016 when it sold 50% of its share in Solacor 1 and Solacor 2 to Abengoa.[1482]

1165. Citing the Table 33 of Compass Lexecon's second expert report which shows the But-for value of the Claimant's investment as of June 21, 2014 as EUR 85.2 million, the Respondent's counsel casts a serious doubt on the Compass Lexecon's DCF method at the Hearing in the following words:

> *Q. So what you are telling in this table is that the €34 million that this Claimant put into the plants should be translated just two years later in €85.2 million to calculate damages, right?*[1483]

1166. The Respondent contends that if the Tribunal looks at actual, real and market-generated values in transactions made by the Claimant itself, no damages can be claimed in this arbitration. In the Respondent's view, this is consistent with the result of Econ One's estimation that the Solacor Plants continue to remain profitable at a rate of 13,7% and thus no damages can be found.[1484]

[1480] The Respondent elaborates that (i) on November 18, 2014 Abengoa Yield acquired 74% shareholding interest in the Solacor SPVs from Abengoa Solar and (ii) on January 7, 2016, Atlantica Yield, formerly Abengoa Yield, purchased an additional 13% shareholding interest from JGC for EUR 17.3 million. See Resp. Opening, slides 180-181. Abengoa Yield was created by Abengoa on December 17, 2013 "*to serve as the primary vehicle through which Abengoa ... owns, manages and acquires renewable energy... and other contracted revenue-generating assets in operation*." Abengoa Yield changed its name to Atlantica Yield on January 7, 2016. Resp., C-M, paras. 571-574.

[1481] Tr. Day 1, 196:22-197:8. According to the press release of Abengoa of November 1, 2017, Abengoa sold 25% of Atlantica Yield to Algonquin. See EO-141.

[1482] Resp. PHB, para. 108. This sale to Abengoa group was through Carpio Solar Inversiones, S.A., which is a shareholder in both Solacor SPVs. Resp. C-M, paras. 576-577.

[1483] Tr. Day 5:20:4-8; Resp. Closing, slide 111. Similar question was raised again in Tr. Day 5:20-18-23.

[1484] Resp. PHB, para. 109.

1167. Pointing out that the EBITDA figures from Compass Lexecon show an annual EBITDA of almost EUR 40 million,[1485] the Respondent stresses that both the Solacor Plants and thus, the Claimant's investment are profitable.[1486]

(3) The Tribunal's analysis

1168. The Tribunal agrees with the *Masdar* tribunal that arbitral tribunals enjoy a wide margin of discretion in adopting valuation methods to quantify the compensation due to the injured party.[1487] Arbitral tribunals have adopted either the DCF method or the asset-based method depending on the particular circumstances of the case.

1169. Having reviewed the submissions of the Parties and the evidence on the record including the respective expert reports and testimony of the experts at the Hearing, this Tribunal is of the opinion that the DCF method employed by Compass Lexecon is appropriate in estimating the damage the Claimant incurred in this case. In this regard, the Tribunal agrees with the tribunals in *Masdar v. Spain*,[1488] *Antin v. Spain*[1489] and *Novenergia v. Spain.*[1490]

1170. The Tribunal agrees with Compass Lexecon that the DCF method is widely used in the economic and financial analysis of businesses and in the valuation of damages in the context of international commercial and investment arbitration.[1491] The business model of the Solacor Plants is relatively simple in that it produces electricity primarily using sunlight and its sales of electricity thus produced are guaranteed by the regulation. The price is also set by the regulation. Therefore, the value of the Claimant's investment in the Solacor Plants arise from their capabilities to generate cash flow for the future, rather than the historical expenditure or investment made to construct those Plants. Therefore, the Tribunal considers that the DCF method, which measures the value of a project or a company based on the free cash flows that the project or a company are expected to generate in the future is the most appropriate method in this case. In this regard, the Tribunal finds the Claimant's

[1485] Tr. Day 1, 200:9-15.
[1486] Tr. Day 1, 200:19.
[1487] *Masdar* Award, para. 578.
[1488] (**CL-0175**), paras. 564-587.
[1489] (**CL-0182**), paras. 677-691.
[1490] (**CL-0173**).
[1491] CER-CL1, paras. 5.14 and 5.15.

submission convincing in that the DCF analysis is particularly suited to value going concerns whose revenues are defined by law or regulation as in the present case, as the resulting cash flows are stable and more predictable than those of unregulated business, and there are no volatile or unpredictable items affecting cash flows.

1171. While as of the date of breach, the Solacor Plants' operational record is relatively short, the Tribunal is of the view that this factor should not affect the appropriateness of the use of the DCF methodology as the revenues of the Solacor Plants were expected to be stable and predictable because those were regulated by the regulatory regime both in the But-for (based on the continuing application of the regime defined by RD 661/2007 and RD 1614/2010 as determined by the Tribunal on liability) and Actual scenarios with the Disputed Measures in place.

1172. The Tribunal agrees with the observation of the *Rusoro* tribunal cited by the Respondent that "*DCF is not a friar's balm which cures all ailments*." However, the Tribunal does not find the various arguments of the Respondent and its expert against the use of the DCF method in this case convincing. The Tribunal sees no compelling reason not to use the DCF valuation method in this case because it requires estimates and predictions over a long horizon of time. The Tribunal agrees with the *Masdar* tribunal that "*[d]amages can very well be calculated on the basis of estimates as long as the underlying assumptions can be rationally justified*."[1492]

E. IMPACT OF TVPEE IN DAMAGE ESTIMATION

(1) The Claimant's position

1173. The Claimant's damage framework is based on the proposition that the imposition of 7% TVPEE constitutes a breach of the Article 10(1) of the ECT and that the impact of 7% TVPEE was phased out in July 2013 when the Disputed Measures under RF#3 were implemented.

[1492] *Masdar* Award, para. 585.

1174. The Parties disagree as to how to deal with the impact of the 7% in the damage estimation. The Claimant argues that the effect of the TVPEE is temporary, while the Respondent contends that it is permanent.

1175. At the instruction of the Claimant, Compass Lexecon also conducted sensitivity test to its DoB valuation on the assumption that 7% TVPEE on electricity revenues is not one of the Disputed Measures for the purpose of estimating damages. Compass Lexecon's second report presents that under such assumption, the DoB value is EUR 62.4 million. The DoB value is EUR 78.3 million if 7% TVPEE is considered as one of the unlawful Disputed Measures.[1493]

1176. The Claimant asserts that in the event that the Tribunal rejects its jurisdiction over TVPEE, the stand-alone impact of TVPEE should be limited to the time period from January 2013 to July 2013 because the Disputed Measures under RF#2 were phased out in July 2013 and that the Disputed Measures under RF#3 have been applied from July 2013 onwards.[1494] The Claimant claims that the tribunals in *Eiser*, *Novenergia* and *Antin* took this position.[1495]

1177. The Claimant argues that at the instruction of the Respondent, Dr Flores calculated damages according to a hypothetical scenario whereby the RF#2 measures would be operating throughout the regulatory life of the Solacor Plants.[1496]

1178. The Claimant contends that while the Respondent argues that the TVPEE was permanent, it takes a position that the new regime under RF#3 neutralized the economic effect of the TVPEE from July 2013. Therefore, the Claimant claims that the economic impact of the TVPEE should be limited to the months of January to July 2013.[1497] The Claimant submits that either because the TVPEE is to be considered temporary (as the Claimant argues) or permanent but neutralized in July 2013 (as the Respondent states), the common conclusion

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[1493] CER-CL2, paras. H.16 and H.17; Table 37.
[1494] Cl. PHB, para. 169.
[1495] Cl. PHB, para 169. the Claimant refers to *Eiser* Award, para. 459 (**CL-0149**); *Novenergia* Award, footnote 629 (**CL-0173**); and *Antin* Award, para. 668 (**CL-0182**).
[1496] Tr. Day 1, 106:21 – 107:7.
[1497] Cl. PHB, para. 169, referring to Resp. C-Mem., para. 771.

is that the TVPEE should have no impact on damages from July 2013 until the end of the Solacor Plants' lifetime (i.e., Current Damages).

1179. The Claimant submits that the majority of tribunals that have found Spain liable under the ECT supports the Claimant's position on this issue.[1498]

1180. According to the Claimant,[1499] the *Masdar* tribunal considered that the December 2012-February 2013 Measures for which the tribunal had jurisdiction were unlawful; however, the tribunal considered that it did not have jurisdiction over TVPEE and thereby deducted its impact from damages claimed as it had been calculated by the parties in that case.[1500]

(2) The Respondent's position

1181. The Respondent argues that in case this Tribunal were to consider that the first disputed measures are lawful, it should be extremely careful not to erroneously deduct the impact of those measures from the total amount claimed in this case. It claims that such measures are still in force and therefore are not temporary and would have their own separate impact.[1501] The Respondent quotes Dr. Padilla's testimony on the fourth day of the Hearing which reads as follows:

> *"The 7% tax as of today is in place ..."*[1502]

1182. At the instruction of the Respondent, Econ One conducted a sensitivity analysis to Compass Lexecon's DoA valuation in its second expert report. According to its analysis, the effect the TVPEE on the Compass Lexecon's DoA valuation amounts to EUR 22.2 million. Thus, if the TVPEE is excluded from the DoA valuation, Compass Lexecon's DoA value (EUR 105.2 million) would be wiped out by EUR 22.2 million, 21% reduction of Compass Lexecon's DOA valuation.[1503]

[1498] *Ibid*., para. 171.
[1499] *Id*.
[1500] *Masdar* Award, para. 621.
[1501] Resp. Closing, para. 120.
[1502] Tr. Day 4 [Padilla] 161:7-9.
[1503] RER-EO2, Annex E, para. 342, Table 9 (Sensitivity Analysis to Compass Lexecon's Damages Analysis).

(3) The Tribunal's analysis

1183. Earlier in this Decision (see Section V *supra*), this Tribunal has determined that it lacks jurisdiction over the TVPEE issue. While the Tribunal lacks jurisdiction on 7% TVPEE, the Tribunal considers that it can look into the issue of carving out the impact of 7% TVPEE solely for the purpose of damage estimation. The Tribunal is of the view that the Parties made respective submissions and arguments on the same footing.

1184. Having reviewed the Parties' submissions, the report of the experts and the evidence on the record of these proceedings, the Tribunal takes note that both experts are in agreement that 7% tax has been in place until today, i.e., the 7% TVPEE was not temporary just until July 2013. Therefore, whether the effect of 7% TVPEE has been neutralized or not in the Actual scenario, the Tribunal is of the opinion that the impact of the 7% TVPEE should be deducted from the calculation of the value in the But-for scenario beyond July 2013.

1185. The Tribunal notes the Respondent statement that the impact of the TVPEE on producers of renewable energies has been neutralized since the TVPEE is one of the costs that are paid to the producers through the specific remuneration they receive.[1504] The Claimant does not dispute that the impact of the TVPEE has been neutralized in the Actual scenario. Accordingly, the Tribunal is of the view that the impact of TVPEE need not be deducted from the calculation of the value in the Actual scenario.

F. CORRECTIONS TO COMPASS LEXECON'S DCF METHOD

1186. Having accepted the DCF method as appropriate in this, the Tribunal will now turn to the question as to whether Compass Lexecon's application of the DCF methodology is appropriate and the assumptions and projections used in employing the DCF method are justified in reaching a fair outcome, taking into account the relative strength of the Claimant's and its expert's reasoning for using a particular assumption or projections against the criticism of the Respondent and its expert against them and making certain corrections thereto.

[1504] Resp. C-Mem., para. 771.

1187. In reliance on Econ One's subsidiary calculation, the Respondent contends that even if the DCF method is employed, if correct parameters were applied in lieu of those adopted by Compass Lexecon, there would be no damages to the Claimant's investment caused by the Disputed Measures.[1505] The Respondent and its expert identified ten items of differences in methodologies and parameters between the approaches of Compass Lexecon and Econ One. Recognizing that valuation is not an exact science, the Tribunal will now review the Parties' respective submissions on each of the correction items advanced by the Respondent and Econ One below to be made to Compass Lexecon's DoA calculation.

1188. The Tribunal is mindful that Econ One's subsidiary calculation was directed against the Compass Lexecon's DoA valuation (with the proxy date of September 30, 2017), and thus the corrections it advocated were discussed mainly on the assumption that such correction should be made to this DoA valuation of Compass Lexecon[1506]. The Tribunal considers that some of the correction items such as useful life, FiT or FiP options, regulatory risks, minority discount and treatment of 7% TVPEE could equally apply to Compass Lexecon's DoB calculation. The Tribunal will deal with other correction issues which could vary depending on a particular timing of valuation (such as illiquidity risks, interest forecast, etc.) on a conceptual level as a matter of principle and will provide directions to the Parties and their respective experts to submit inputs in the specific context of the DoB valuation of Compass Lexecon.

(1) Relevance of the Transaction Value

1189. The Claimant sold 13% of its equity interests in two Solacor SPVs on January 7, 2016 and currently holds the remaining 13% of equity interests.[1507] Notwithstanding this sale, the Claimant submits that it retained its claim against the Respondent in relation to the sold shares in the Share Purchase Agreements.[1508] The Respondent does not dispute this.

[1505] Tr. Day 1, 205:20 – 206:1, citing Resp. Opening, slide 195.
[1506] See RER-EO2, Section VI; Dr. Flores, Presentation, slide 30; Resp., Opening, slide 195.
[1507] The share sales agreements were entered into by JGC and Abengoa group companies on June 30, 2015 and executed on January 7, 2016.
[1508] Cl. PHB, para. 155(i), referring to Article 2.3 of (**C-0026**) and (**C-0027**).

1190. In its DoB valuation, Compass Lexecon did not consider the effect of the 13% sales of shares by JGC to Abengoa in January 2016 because Compass Lexecon only took into account information available on the date of valuation, June 21, 2014. Thus, in its DoB valuation, Compass Lexecon adopted the DCF approach in estimating the values of the Claimant's 26% interest in the Solacor SPVs both in the But-for scenario and the Actual scenario without distinction between the sold shares and the held shares.[1509]

1191. According to Compass Lexecon's calculation employing the DCF method, as at the DoB, as for the current damages, the But-for value of the Claimant's 26% interest in the Solacor Plants is EUR 85.2 million, and the Actual value is EUR 14 million. Thus, the current damages at the DoB (the difference between the value in the But-for and the Actual scenario) amounts to EUR 71.2 million.[1510] The past damages for Claimant's 26% interest at the DoB is EUR 7.1 million (the difference between EUR 20.7 in the But-for scenario and EUR 13.6 in the Actual scenario).[1511] In total, the damages to the Claimant's 26% interest amounts to EUR 78.3 million.[1512]

1192. The Claimant submits that the sale of 13% of its stake in the Solacor Project in January 2016 was not made at any profit and that the price for this 13% would have been higher but for the Disputed Measures.[1513]

1193. The Claimant further submits that, there is no duplicity in its claim for damages.[1514] The Claimant claims that at the date of sale, the But-for value of the 13% stake was EUR 58.8 million, but, this stake was sold at EUR 17.3 million. In support of its position, the Claimant quotes testimony of Dr. Garcia at the Hearing:

> *"For the sold shares, because of the losses to the cash flows to equity which occurred prior to the date of sale and the reduction of value of the shares at the*

[1509] In view of the sale of 13% interest, the Claimant and Compass Lexecon present two separate approaches to calculate the damages in the updated DoA valuation of Compass Lexecon's second report. See, Cl. Opening, slide 229 referring to CER-CL1, para. 2.26, Table 1; CER-CL2, para. 3.12, Table 3. In the DoA valuation, Compass Lexecon adopts the transaction method to a limited extent in estimating the Acutual scenario of the sold shares and presents alternative estimation using the DCF and the transaction method in estimating the Actual scenario of the held shares.
[1510] CER-CL2, para. H.12 and Table 33.
[1511] *Ibid.*, para. H.13 and Table 34.
[1512] *Ibid.*, para. H.14 and Table 35.
[1513] Cl. PHB, para. 155(ii).
[1514] *Ibid.*, para. 155(iii).

> *date of sale. But for the measures, the shares would have been more valuable. Damages to the held shares occur because of the reduction to the cash flows to the equity that have already occurred and the future reductions in the cash flows to equity, which will impact these held shares."*[1515]

1194. The Respondent disagrees. The Respondent contends that there were a number of transaction values which could be taken into account in damages estimation, but Compass Lexecon discarded all of them, and used a totally subjective and speculative DCF. It argues that if there was a transaction value, that transaction value representing reality should be used for both But-for and the Actual scenarios. The Respondent argues that this is a main flaw of the Claimant's quantum case.[1516]

1195. In Respondent's view, in addition to the Claimant's investment costs of EUR 34 million, there could be a number of transaction values to consider in the valuation such as the transaction in June 2014 of the IPO to Abengoa Yield, the price of the Claimant's sold shares which was agreed in June 2015, the transaction in November 2015 of the same plants to Abengoa Yield, and the transactions in 2018 to Algonquin.[1517]

1196. Dr. Flores of Econ One argued that there is no need to do a DCF analysis that requires projecting production prices, operating costs, maintenance, taxation, etc. in the Actual scenario as all the value that remains in the future is encapsulated by the transaction price at a point in time when someone sold a stake in the company.[1518]

1197. In reliance on the opinion of Econ One, the Respondent submits that the transaction that occurred in January 2016 is the best indicator of the value of the Claimant's interests in the Solacor Plants.[1519] The Respondent contends that Compass Lexecon's DCF valuation need to be corrected using the value of this transaction to determine the fair market value of the Solacor Plants in the Actual scenario for both held and sold shares.[1520] Econ One's

[1515] Tr. Day 4, [García] 125:13-21, quoted in Cl. Closing, slide 18.
[1516] Tr. Day 6, 79:4-13.
[1517] Resp. Opening, slide 181; Tr. Day 5 [Antuna] 12:13-16.
[1518] Tr. Day 5, 88:17-25.
[1519] Resp. Rej., para. 1998, referring to RER-EO2, para. 305.
[1520] Resp. PHB, para. 117(i).

subsidiary valuation adopted the value of the transaction to determine the fair market value in the Actual Scenario for both held and sold shares.[1521]

1198. Specifically, referring to Table 33 (Current damages to JGC at the DoB) of Compass Lexecon's second expert report,[1522] the Respondent criticises that the Claimant's investment in the amount of EUR 34 million in 2012 is converted into EUR 85.2 million (including interest) in damages in just two years. Specifically, the Respondent points out that Compass Lexecon's DCF method produced EUR 14 million for the value of 26% stake at the DoB in the Actual scenario, and thus the total damages amount to EUR 71.2 million. The Respondent argues that if the transaction value in the 2016 (EUR 17.3 million for 13% of shares in the Solacor Plants) was used, the value in the Actual scenario would be EUR 34.6 million, and the total amount of damages would be reduced accordingly.

1199. The Respondent also claims that EUR 34 million that the Claimant put into the construction of the plants could also be taken into account in damages estimation.[1523]

1200. Having reviewed the Parties' submissions and the evidence on the record, this Tribunal agrees, in principle, with the position taken by Compass Lexecon in its DoB valuation that it could only take into account the information available at the time of valuation as it is an *ex-ante* valuation as of the date of breach. Thus, the Tribunal is of the opinion that the value of the transactions which were consummated after the date of breach (June 21, 2014) is not, in principle, relevant in the DoB valuation. Having said this, the Tribunal nevertheless considers that the sales price the Claimant received for the sold shares in January 2016 could be relevant in the assessment of damages if the price the Claimant actually received was higher than the value of the sold shares used in the damages estimation as of the DoB valuation.

1201. Mr. Miyamoto's evidence is that EUR 17.3 million, the transaction price reached between the Claimant and Abengoa Group for 13% stake in the Solacor Plants was the price equal

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[1521] RER-EO2, para. 305.
[1522] Resp. Closing, slide 110, referring to Table 33, CER-CL2.
[1523] Tr. Day 5 19:18-19; RER-EO2, para. 179.

to the Claimant's initial equity injection and did not reflect a true market value at the time of the transaction due to the Claimant's bargaining power. In his own words,

> *"...we requested the Abengoa Group to purchase the half of JGC's equity at the initial equity investment price while the Damaging Measures were already in effect."*[1524]
>
> *"Contrary to Spain's thesis, this was not a regular transaction but the result of a negotiation process between both parties, where JGC held a considerable bargaining power... The agreed price per one share was the price equal to JGC's initial equity injection despite the negative impact of the regulatory change. Thus, the price shall not be interpreted as a true market value at that time, but the price higher than the market price because of the bargaining power at JGC."*[1525]

1202. The Tribunal finds that his testimony is credible in that the price for 13% shares of the Solacor Plants was equal to the Claimant's equity injection for the 13% interest and thus did not reflect the true market value at the time of the agreement or consummation of the transfer.[1526]

1203. According to Compass Lexecon, the value of the Claimant's 13% interest in the Solacor Plants in the Actual Scenario as of the DoB based on the future cash flows amounted to EUR 7 million. The Tribunal considers that given the very purpose of damages compensation it is fair to reflect the difference between what the Claimant was actually paid (EUR 17.3 million) as adjusted from January 7, 2016 to the DoB and the value estimation for the sold shares in the Actual scenario (EUR 7 million) to be reflected in the damages calculation as the Claimant could in fact be viewed as mitigating damages. This means that the transaction value of EUR 17.3 million (to be adjusted to the DoB) is to be used in lieu of the DCF value of the sold shares in the Actual scenario in Table 33 of Compass Lexecon's second report. However, the Tribunal accepts the Claimant's argument that the payment obtained by the Claimant from the sale of its shares may not be an adequate basis to estimate the value of the held shares as the price received by the

[1524] CWS-TM-t, para. 76.
[1525] CWS-TM 2(t), para. 35.
[1526] Compass Lexecon stated that Abengoa faced financial difficulties during 2015 which culminated in the company seeking creditor protection in November 2015 and thus it is likely that the Claimant was in a favourable bargaining position to extract an extra payment above the market value of the shares analogous to a control premium in exchange for its agreement to the amendments. CER-CL2, para. 5.27 and footnote 149.

Claimant for the sold shares contained a certain premium over the fair market value of said plants.[1527]

1204. The Tribunal notes Dr. Padilla's statement at the Hearing that the calculation of the difference mentioned above was a new calculation he needed to perform. In response to the Respondent's counsel's question whether the transaction value would be lower than EUR 34.6 million at June 2014, Dr. Padilla responded that:

> *"Well, we haven't done that calculation, and therefore this will be a new calculation that we would need to perform in order to understand whether the transaction value would be higher. ... I'm aware now of differences in the interest rate, but there may be other differences that we would need to factor in. So I'm in no position to produce those calculations at this stage."*[1528]

1205. In conclusion, this Tribunal determines that the 2016 transaction price (EUR 17.3 million) for the Claimant's 13% be used as the value of the sold shares in the Actual scenario after making an adjustment from January 7, 2016 to the DoB as set forth in para. 1203 above.

(2) Revenue options: FiP with 15% gas generation or FiT with 12% gas generation

1206. In estimating revenues of the Solacor Plants, Compass Lexecon used pool price plus premium with 15% gas generation, while Econ One's subsidiary valuation used the FiT option with 12% gas generation.

1207. The Claimant asserts that the estimation of damages must be made on the basis of the FiP option granted under Article 24 of RD 661/2007 for the But-for scenario, as such option was the one the Claimant expected to apply during the lifetime of the Solacor Plants.

1208. The Claimant argues that Mr. Miyamoto distinguished between the base-case model in connection with the senior loan agreements and the Claimant's internal calculations of return. Whereas the banks' base-case was calculated under the FiT in a conservative manner to check Solacor SPVs' capacity to repay the senior loans,[1529] the Claimant did use the FiP to calculate its revenues.[1530]

[1527] Cl., Reply, para. 668.
[1528] Tr. Day 5 [Padilla] 17:9-17.
[1529] Tr. Day 2 [Miyamoto] 71:10-11.
[1530] Cl. PHB, para. 146. Tr. Day 2 [Miyamoto] 82:1-8.

1209. The Claimant asserts that Compass Lexecon confirmed that the FiP option was more profitable for the Solacor Plants than the FiT option,[1531] as empirically seen in Compass Lexecon's reasonable pool price projections,[1532] and therefore, any diligent investor would have chosen the FiP option.[1533]

1210. Compass Lexecon states that unless average annual wholesale prices were to drop to unprecedented and extreme lows (inconsistent with current expectations), the FiP option would always yield higher revenues than the FiT option. Thus, it would be irrational for the Solacor Plants to opt for the FiT option instead of the FiP option.[1534]

1211. Compass Lexecon claims that its pool price forecast is in line with the government forecast and third-party forecasts.[1535]

1212. Criticizing that Compass Lexecon's FiP assumption is flawed, Econ One submits that the FiT option is appropriate to project revenues for the Solacor Plants in the But-for scenario.[1536] Relying on Econ One's opinion, the Respondent asserts that the FiT option should be used instead of the FiP option to project revenues.[1537]

1213. Econ One points out that the FiP option depends on the change in the CPI as well as the change in market pool prices, which vary throughout the year. By contrast, the FiT forecast depends only on the CPI. Therefore, in Econ One's view, the FiT forecasts are less risky and should be used to forecast the Solacor Projects' future revenues.[1538]

1214. Econ One also contends that Compass Lexecon cannot forecast with certainty that its price predictions will always match the market price. At any point in time, the true market value can be higher or lower than Compass Lexecon's expected prices.[1539]

[1531] Compass Lexecon, Quantum Presentation, slide 9; Tr. Day 4, 131:3-132:5.
[1532] Tr. Day 5 [García] 52:15-24; CLEX-204.
[1533] Cl. PHB, para. 147.
[1534] CER-CL2, para. 2.27.
[1535] Compass Lexecon, Quantum Presentation, slide 9.
[1536] RER-EO2, para. 182.
[1537] Resp. PHB, para. 117(ii).
[1538] RER-EO2, para. 183.
[1539] *Ibid*., para. 186.

1215. In cross-examining the Claimant's expert, the Respondent counsel cited the *Masdar* award, which considered the pool price plus premium as "overly speculative".[1540]

1216. Econ One points out that the base case of the Senior Credit Facility Agreements for Solacor 1 and Solacor 2, prepared in August 2010, calculated revenues of the Solacor Plants based on the FiT option instead of the FiP option.[1541] Econ One adds that Compass Lexecon's claim that the production projections in the bank financing model were developed to present a forecast under adverse circumstances[1542] is based solely on Mr. Miyamoto's "understanding" of the lenders' motivations when preparing their financial models, but neither Compass Lexecon nor Mr. Miyamoto provide documents supporting their claim.[1543]

1217. Having reviewed the respective submissions of the Parties and their experts, the majority of the Tribunal is not convinced that the Respondent and its expert substantiated circumstances or bases to deny the Claimant's choice of the FiP option in forecasting the revenues in the But-for scenario.

1218. The Respondent's key arguments are two-fold: (i) the Claimant used the FiT option in its bank-case model and the Claimant failed to present any evidence that it used the FiP option in its internal financial models; and (ii) the FiP option involves higher uncertainties than the FiT option in projecting such revenues, in particular due to the difficulty in projecting market price over long periods of time.

1219. Earlier in this Decision (para. 1025 *supra*) the majority of this Tribunal has determined that the Claimant had a legitimate expectation of the continuing application of the RD 661/2007 regime which included the right to choose between the FiT option and the FiP option with a right to use back-up gas as permitted under the original regime. Therefore, the majority of Tribunal is of the view that in principle it is the Claimant's choice to choose between the two options whichever is more favourable at its own discretion.

1540 Tr. Day 5, 28:25-29:3.
1541 RER-EO1, para. 157.
1542 CER-CL2, para. 7.25.
1543 RER-EO2, para. 187, referring to CWS-TM2 (t), para. 16.

1220. In this regard, the majority of the Tribunal finds Dr. García's testimony convincing. Showing various forecasts of pool prices, including those of the Government of Spain and the third-party (Roland Berger)[1544], Dr. García of Compass Lexecon testified at the Hearing that:

> *"if we were to assume that the plants opt for the feed-in tariff, we either have to assume that the plants are irrational or that they have an irrational expectation about pool prices, and that's not reasonable."*[1545]

1221. The majority of the Tribunal finds Compass Lexecon's argument convincing in that projections included in the loan agreement are not appropriate to derive forecasts of revenues in connection with the valuation at the date of valuation.[1546] The purpose of the projections in the base-case of the project finance loan agreement was to assess whether the Solacor Plants would be able to meet their debt obligations with the project finance lenders from the lenders' perspective, and therefore could be more conservative than the projections made by investors and the operators who are geared to maximize profits. The majority of the Tribunal notes that the Board of Directors' resolution of the Claimant dated July 28, 2010 stated that the expected IRR of the project is around 10%.[1547] The majority of the Tribunal considers that this internal expectation of the IRR of the project is consistent with the Claimant's position that its internal expectation is to use the FiP option.

1222. The majority of this Tribunal is of the view that estimation of damages to be incurred in the future as of the date of valuation necessarily involves assumptions and projections over a long period of time, as in this case, such as interest rates, WACC, and other risks. In that sense, the projection of the pool price is no exception. The majority of the Tribunal agrees that the projection based on the FiP would involve more uncertainty and volatility as compared to the FiT option. However, the difference between the FiP and the FiT options in terms of uncertainty or risks is more of a relative degree. In this regard, the majority of the Tribunal finds persuasive Compass Lexecon's explanation that the volatility of the wholesale electricity price (the pool price) affects cash flows, but it does so to a limited

[1544] Compass Lexecon, Quantum Presentation, slide 9.
[1545] Tr. Day 4 [Garcia] 132:1-5.
[1546] CER-CL2, Section 4.5.
[1547] C-0346t, item 1(10).

extent, and that conventional generators face much higher revenue volatility and yet the DCF method is widely used to value them.[1548]

1223. Therefore, as long as the Claimant opts for the FiP option which is endorsed by its expert, unless an exceptional circumstance other than the general criticism of relative uncertainty is substantiated, the majority of this Tribunal does not find it justified to deny the Claimant's choice of the FiP for damages estimation purposes.

1224. The majority of the Tribunal considers that the Respondent or its expert have not substantiated the existence of such exceptional circumstances. Accordingly, the majority of this Tribunal accepts Compass Lexecon's damages estimation on the assumption of the FiP option with 15% gas generation (first one year with the FiT option with 15% gas in accordance with Article 3(1) and (3) of RD 1614/2010) and does not accept the correction claimed by Econ One, i.e., the FiT option with 12% gas generation.

(3) Production projections

1225. The Claimant submits that Compass Lexecon's DCF model used the electricity production forecast, which is one of technical inputs to the damage calculation, provided and checked by its expert, Fichtner, a leading expert in CSP technology.[1549]

1226. Compass Lexecon stated that it used the production forecast provided by Atlantica Yield (Compass Lexecon understands that it was derived by Abengoa) in its first expert report, but it was instructed by the Claimant to use the production forecast in the expert report prepared by Mr. Kretschmann of Fichtner ("**Fichtner Report**") in its second expert report.[1550]

1227. According to Compass Lexecon, the production forecast in the Fichtner Report is lower than Abengoa's production projections both in the Actual and the But-for scenarios and

[1548] CER-CL2, para. 7.15.
[1549] Cl. Opening, slide 232; Cl. PHB, para 156, referring to Mr. Kretschmann's expert report (**CER-0003**).
[1550] CER-CL2, para. 2.3.

therefore the overall effect of using Fichtner's forecast instead of Atlantica Yield's is to reduce the Claimant's damage estimate by approximately 6%.[1551]

1228. Compass Lexecon notes that the production forecast provided by the Fichtner Report envisages lower availability and hence lower production every six years due to major overhauls every six years. The reduction in the production in that year is 3%. Spread over a period of six years it is equivalent to a 0.5% reduction in yearly production forecast.[1552]

1229. The Claimant states that the Fichtner Report provided independent production forecasts for two scenarios: 15% gas in the But-for scenario and the minimum gas share use in the Actual scenario.[1553] Mr Kretschmann confirmed that he was so instructed.[1554]

1230. The Claimant claims that the soundness of conclusions and methodology of the Fichtner Report remained completely unrebutted by the Respondent at the Hearing.[1555]

1231. The Respondent contends that the use of the projected revenues of the bank base-case instead of the illusory and tailored data made up by the expert from Fichtner, whose prediction model set up in his computer proved to be completely divorced from reality of the CSP plants during the Hearing.[1556] The Respondent points out that the Solacor Plants had never been operating under the FiP option.[1557]

1232. Having reviewed the Parties' submissions, the Fichtner Report and the evidence in the record of these proceedings, this Tribunal finds the Fichtner Report and the testimony of Mr Kretschmann credible.

1233. At the Hearing Mr. Kretschmann confirmed the statement in the Fichtner report that Fichtner was Germany's biggest independent engineering company having been active in the CSP area for more than 30 years, and that he himself had worked in CSP field more

[1551] *Ibid.*, para. 3.4, Table 2 (Production forecast comparison for year 2017, MWh).
[1552] *Ibid.*, para. 3.4, notes to Table 2.
[1553] Cl. PHB, para. 157, referring to Tr. Day 3 [Kretschmann] 199:12-200:15: CER-0003, paras. 83-90.
[1554] Tr. Day 3 [Kretschmann] 210:5-8.
[1555] Cl. PHB, para. 157, referring to Tr. Day 3, 201:22-218:25.
[1556] Resp. PHB, para. 111(ii).
[1557] Tr. Day 6, 67:10-11; Resp. Closing, slide 65.

than 10 years at Fichtner.[1558] Mr. Kretschmann testified that Fitchner was instructed (i) to assess the historical plant performance data of the two Solacor Plants, (ii) to model the Solacor Plants using its own software tools and expertise in this field at two scenarios (an FiP option with 15% gas share, and minimum gas firing, with gas used for technically essential purposes) and (iii) to compare between Fichtner's own production forecast and the historical plant performance. Mr. Kretschmann clarified at the Hearing that Fichtner did a detailed assessment of the plant information so that the physics of the Solacor Plants might be incorporated into its software tools and gathered all this information and had set up the model accordingly.[1559]

1234. Mr. Kretschmann further testified that (i) the actual plant performance during the three-year guaranteed period had been substantially higher compared to the original guaranteed production period and that by comparing the adjusted annual net generation figures with the Fichtner's projection figures, they were very close in line to one another;[1560] (ii) the result of his simulation would remain same if it were done in June 2014 in response to the questions posed by the Respondent's counsel at the Hearing;[1561] and (iii) the differences between the FiT option and the FiP option was irrelevant for the purpose of his estimating production forecasts because if he set a limit gas share, the software calculates the production using gas up to the set limit.[1562]

1235. In view of the Fichtner report and the testimony of Mr. Kretschmann at the Hearing, the Tribunal is not persuaded by the Respondent's argument casting doubts on the soundness of the methodology and conclusions in the Fichtner Report. Accordingly, the Tribunal accepts the production forecast of the Fichtner Report to be used in the damage estimation.

(4) Lifetime (Useful life) of the Solacor Plants

1236. The Claimant submits that under RD 661/2007 it expected to operate the Solacor Plants as long as the values under RD 661/2007 allow the Solacor Plants' economic viability. The

[1558] Tr. Day 3, 194:18-195:13; Fichtner Presentation, slides 4-5.
[1559] Tr. Day 3, 219:14-21.
[1560] Tr. Day 3, 193:22-194:5; 201:12-17.
[1561] Tr. Day 3, 216:7-20.
[1562] Tr. Day 3, 219:23-220:10.

Claimant claims that its technical experts, Diseprosa, had solidly proven that the Solacor Plants could operate for 35 years.[1563] Accordingly, the Claimant claims that its legitimate entitlement is to operate the Solacor 1 and Solacor 2 Plants until their 35th year of operation and obtain returns from 35 years of operation, and therefore the timeline of the damages assessment should be 35 years in the But-for scenario.[1564] The Claimant argues that available empirical experience shows that the Solacor Plants will at least exceed 32 years of operation like SEGS III plant in California which started operation in 1985.[1565]

1237. Diseprosa,[1566] the Claimant's expert, states that it is technically feasible for the Solacor 1 and Solacor 2 Plants to continue reliably operating for 35 years since commissioning, provided that (i) the O&M Contracts are renovated for another 15 years under the same conditions (the reinvestments due to corrective maintenance, when needed, are accomplished by the Operator (Abengoa Solar); and (ii) the Owner (each of Solacor SPVs owning Solacor 1 and Solacor 2) reinvests between years 25 and 35 an additional amount equal to 5% (in the best case scenario) and 9% (in the worst case scenario) of the EPC Contracts price.[1567]

1238. In its first expert report, Compass Lexecon assumed that the Solacor Plants could produce for a period of 35 years without the need for significant additional investment beyond the required ongoing operation and maintenance based upon the Diseprosa report of 2014[1568] provided by Abengoa. Accordingly, in its calculations the investment component was zero in both the But-for and Actual scenarios.[1569]

1239. In its second report, Compass Lexecon stated that it included additional CAPEX in the amount of 7% of the EPC cost (the middle of the 5% to 9% cost range suggested in

[1563] Cl. PHB, para 162.
[1564] Cl. Opening, slide 230; Tr. Day 4, [García] 100:4-21.
[1565] Cl. Closing, slide 31.
[1566] Mr. Castillo Jiménez stated that in March 2018 Diseprosa transferred its consultancy and technical advisory Division to OCA, including personnel, references and contracts. Presentation of Mr. Castillo Jiménez at the Hearing, slide 2. In this Decision, the Tribunal will continue to refer the Claimant's expert on useful life of Solacor Plants as "Diseprosa" for consistency and convenience.
[1567] Diseprosa, Solacor 1&2 Solar Thermal Plants: Analysis of the plants and their expected lifetime, January 29, 2018 (CLEX-219) ("**2018 Diseprosa Report**"), p. 49.
[1568] Diseprosa, Report on the expected useful life of thermosolar plants without storage, May 16, 2014 (**CLEX-061**) as cited in footnote 158 of CER-CL1.
[1569] CER-CL1, paras. 6.5 and 6.49.

Diseprosa's report) in the But-for scenario as being required for the Solacor Plants to operate reliably for 35 years to reflect the conclusions of the expert report by Mr. Castillo Jimenez of Diseprosa filed in the present case ("**2018 Diseprosa report**").[1570] Compass Lexecon stated that it was economically optimal for the Solacor Plants to operate for 35 years under the But-for scenario as the additional cash flows obtained outweigh the additional investment.[1571] Compass Lexecon's DoB valuation is based on this assumption.[1572]

1240. The Claimant maintains that it has presented evidence that establishes the soundness of Compass Lexecon's assumption (in the But-for scenario) of a useful life of the Plants of 35 years for the purposes of calculating damages.[1573] The Claimant argues that Mr. Castillo Jimenez of Diseprosa categorically opined that the Solacor Plants could operate reliably up to 35 years by undertaking a reasonable (i.e., not significant) reinvestment. This re-investment, contrary to opinion of Dr. Servert, the Respondent's expert, has been actually calculated by Diseprosa: between 5–9% of the Solacor Project's EPC price (of which Compass Lexecon has considered 7%).[1574] These figures take into consideration the distribution of responsibilities between the Owner and the Operator under the O&M Contracts and the reduction of market prices in spare parts that would be needed at the Solacor Plants (at least, *minus* 30% since 2010).[1575]

1241. The Claimant also points out that Mr. Miyamoto confirmed at the Hearing that the Claimant's assumption of years of operation of the core components of the Plants "*with adequate maintenance efforts and adequate repair investment*" would be "*35 to even 40 years*."[1576]

1242. The Claimant argues that it has also presented as an empirical evidence the technical useful life of the nine SEGS plants, CSP plants installed in California using parabolic trough (PT) technology. The Claimants asserts that SEGS plants have operated reliably for more than

[1570] CER-CL2, para. 3.5.
[1571] CER-CL2, para. 7.35.
[1572] *Ibid*., para. H.8
[1573] Cl., Opening, slide 230; Cl. PHB, para. 168.
[1574] Cl. PHB, para. 166, referring to Castillo Jiménez's Presentation at the Hearing, slide 21.
[1575] *Ibid*., para. 166, referring to Cl. Closing, slide 30.
[1576] *Ibid*., para. 167 (iv), referring to Mr. Miyamoto's testimony at the Hearing, Tr. D3, 85:21-86:15.

32 years (in particular, SEGS III would reach its 33rd year of operation by the end of September 2019).[1577] The Claimant submits that based on the empirical evidence, the Tribunal should grant damages for, at least, 33 years.[1578] The Claimant cites other sources such as KPMG report of 2012 and interview article of a Mr. Henry Prize, the operations manager of SEGS plants.[1579]

1243. The Claimant further submits that there exist a number of additional references on the record that in its view corroborate the Claimant's position on the Solacor Plants' useful life of 35 years.[1580] For instance, referring to Mr. Castillo's testimony at the Hearing,[1581] the Claimant argues that the expected useful life of new CSP plants in Dubai amounts to 35 years. The Claimant quotes an interview of a Mr. Henry Price, the operation manager with SEGS plants in support of its position stating that "*the lifespan of a well-designed CSP plant can reach 40, even 50 years, being on par with a thermal power station…*".[1582]

1244. The Respondent submits that the useful life of the Solacor Plants is a maximum of 25 years[1583], in reliance on the opinion of Dr. Servert who concluded that the expected technical lifetime of the Solacor 1 and Solacor 2 Plants would be, in the best case from 20 to 25 years.[1584]

1245. Dr. Servert observed that the concept of technical useful life referred to the number of years a CSP plant could be operated reliably without the need for significant additional investment.[1585]

1246. Dr. Servert opined that based on the information he reviewed, the Solacor 1 and Solacor 2 Plants were designed to have a technical life of 25 years (as specified in the EPC Contracts and as it was the common practice in the CSP Industry). He stated that no proof of extended

[1577] Cl. Closing, slide 28; Tr. Day 4 [Castillo] 3:21-4:19.
[1578] Cl. PHB, paras. 163-165.
[1579] Cl. Closing, slide 29.
[1580] Cl. PHB, para. 167.
[1581] Tr. Day 4, 12:15-19.
[1582] Cl., PHB, para. 167 (iii), referring to Report from CSPPLAZA, "After 30 years, SEGS I & II Officially Decommissioned" (**C-0717**).
[1583] Resp. Rej., para. 1979.
[1584] Dr. Servert expert opinion, p.11 and 32.
[1585] *Ibid*., p.5.

operational lifetime beyond the standard design (25 years) had been found in the provided documents. He noted that there was no substantiation that construction was properly done, and that the duration of the O&M contracts was 20 years.[1586]

1247. Dr. Servert contended that eventually any power plant could extend its operational lifetime, after its technical useful life had expired, but for a solar power plant, this implied major retrofitting and investment in key components. Dr. Servert's opinion is that the estimated reinvestment needed to operate CSP-parabolic trough plant beyond 25 years is 75% plus/minus 6%.[1587] According to Dr. Servert, SEGS plants in California, the only commercial example of CSP plants that have been in operation for more than 25 years have indeed required major re-investment and substantial modifications to continue operation after 17-22 years. He added that SEGS 1 and SEGS 2 had been dismantled and replaced by PV plants when they had reached 30 years.[1588] Dr. Servert concluded that "*the operational track record of SEGS plants shows that their useful technical life was between 17 and 22 years and that significant additional investments were required for them to continue to operate reliably after that period*."[1589] Dr. Servert pointed out that Diseprosa concluded in 2014 that the Solacor Plants lifetime was 25 years.[1590]

1248. Dr. Servert further stated that there were several concerns related to the lifetime of key components such as the solar field and steam generator system. Several technical issues had been identified that could shorten the expected lifetime of these plants.[1591] He concluded that the technical exhibits reviewed showed that the expected technical lifetime of Solacor 1 and Solacor 2 power plants would be, in the best case from 20-25 years.[1592]

1249. Having reviewed the Parties' submissions, experts' reports and the evidence on the record, this Tribunal is not convinced that the Claimant has substantiated its claim that the useful life of the Solacor Plants is beyond 25 years.

[1586] *Id*.
[1587] Dr. Servert Expert Opinion, p.29.
[1588] *Id*.
[1589] *Ibid*. p.12.
[1590] *Ibid*., p.29, referring to *JSRC-10(eng)-DISEPROSA-2014-ESP.pdf p.1 (referring to p.25).*
[1591] *Ibid*., p.32.
[1592] *Id*.

1250. The Tribunal is of the view that the starting point of an enquiry should be the reference life provided for in the EPC contracts for Solacor 1 and Solacor 2. The EPC contracts for Solacor 1 and Solacor 2, provides, in pertinent part, as follows:

> *"The infrastructure, and each of its elements of equipment and systems, will be designed for a useful life of at least 25 years. The Contractor must deliver documents so demonstrating."*[1593]
>
> *"The entire Installation, including all equipment and systems, shall be designed for a useful Life of at least 25 years. The contractor shall deliver documents to accredit this."*[1594]
>
> *"The structures shall operate properly in outdoors conditions for 25 years."*[1595]

1251. The Tribunal considers that the EPC contracts reflected the outcome of the negotiation between the investors and the construction contracts as to the standard of the contractors' performance. As such, the Tribunal is of the view that the design life in the EPC contracts is one of the most important factors in assessing the useful life of the Solacor Plants and estimating the reinvestment requirement to make them operate reliably beyond the design life. The 2018 Diseprosa report stated that it had reviewed the EPC contracts,[1596] but no reference to the design life in the EPC contracts is found in the 2018 Diseprosa's report, although it addressed the lifetime and degradation of the main components.[1597]

1252. The Tribunal finds Dr. Servert's expert report and testimony at the Hearing credible. The Tribunal is not persuaded by Diseprosa's opinion that it is technically feasible for the Solacor 1 and Solacor 2 Plants to continue reliably operating for 35 years since commissioning, provided reinvestment is made between years 25 and 35 in an additional amount equal to 5% (in the best case scenario) and 9% (in the worst case scenario) of the EPC contracts price.

1253. Given the relatively short track record of CSP plants, the Tribunal understands the difficulty to find comparable empirical evidence showing the lifetime of CSP plants in Spain. Having said this, the Tribunal finds it difficult to accept the cases of CSP plants in

[1593] JSRC-03-EPC Solacor 1.pdf pg. 7 (pdf pg.- 128) & JSRC-04-EPC Solacor 2.pdf pg. 7 (pdf pg.- 127).
[1594] JSRC-03-EPC Solacor 1.pdf pg. 12 (pdf pg. 65) & JSRC-04-EPC Solacor 2.pdf pg. 12 (pdf pg. 65).
[1595] JSRC-03-EPC Solacor 1.pdf pg. 15 (pdf pg. 68) & JSRC-04-EPC Solacor 2.pdf pg. 15 (pdf pg. 68).
[1596] 2018 Diseprosa, Report, para. 5.1.
[1597] 2018 Diseprosa, Report, para. 6.4.

California or Dubai as a basis to accept the useful life of the Solacor Plants in Spain beyond 25 years, the design life in their EPC contracts. In the Tribunal's view, due to the nature of the CSP plants, the severity of weather conditions could be an important factor in determining the useful life of major components of CSP plants, and the amount required for proper O&M as well as reinvestment. The Tribunal considers that no evidence has been presented persuasively to show that the conditions of the Solacor Plants are comparable to the CSP plants operating in California. Accordingly, the Tribunal determines that the useful life of the Solacor Plants should not be considered to exceed 25 years for the purpose of valuation of the Claimant's damages.

(5) Regulatory risk adjustment

1254. The Respondent criticizes that Compass Lexecon applied no regulatory risk premium at all in its DCF valuation and submits that an annual 10% regulatory risk adjustment must be applied in reliance on Econ One's opinion. The Respondent asserts that in this case, the regulatory risk premium need to be considered in addition to the country risk premium in applying the DCF method because the issues involve subsidies in a sector with highly regulatory pressure.[1598] The Respondent contends that a frozen royal decree for 35 years is an unreasonable expectation.

1255. Econ One stated in its first expert report that it modelled the regulatory risk applying an annual 10% probability that the regulatory support assumed in Compass Lexecon's But-for scenario would be eliminated over time.[1599] Econ One maintained the same position in its second report.[1600] According to Econ One, a 10% probability of regulatory revisions in the But-for scenario is equivalent to assuming that in about 20 years, the CSP plants would lose any further regulatory support.[1601]

1256. The Respondent further argues that after the Disputed Measures, the regulatory risk has decreased substantially due to the elimination of the tariff deficit and the new system being

[1598] Tr. Day 1, 204:17-205:1.
[1599] RER-EO1, paras. 195 and 217; Resp. PHB, para. 117(iv).
[1600] RER-EO2, paras. 252-262.
[1601] *Ibid.*, para. 261.

sustainable and predictable.[1602] Econ One also took a position that with the Disputed Measures in place which reduced the tariff deficit in the Spanish electricity system, the risk of future changes to the regulatory regime has been substantially reduced.[1603] Dr. Flores cites the materials from Fitch Ratings, Moody's Investor Service, etc. in support of his position.[1604]

1257. The Claimant contends that there is no factual basis that under RD 661/2007 investors suffer annually regulatory risks of 10% discount on the investment value as argued by Econ One.[1605] The Claimant argues that the Respondent artificially reduces the Claimant's But-for value under the assumption that it would actually violate the ECT. The Claimant submits that this contention (i.e., applying a higher regulatory discount in the But-for scenario than in the Actual) has been rejected in every single case where the Respondent has been found liable and therefore must be rejected in this case too.[1606]

1258. Compass Lexecon views that the regulatory risk refers to the risk of unanticipated changes in regulation which could impact project returns.[1607] Compass Lexecon explains that regulatory risk may be "*systematic*" risk when the probability of regulatory change is correlated with general market conditions. Alternatively, regulatory risk may be "*unsystematic*", that is, unrelated to general market conditions (this is also referred to as diversifiable risk).[1608]

1259. Compass Lexecon stated that in its damages model the regulatory risk was captured, as was standard practice, in the discount rate used to discount the cash flows of the Solacor Plants, i.e., the weighted average of cost of capital ("**WACC**"). Specifically, Compass Lexecon stated that the systemic regulatory risk was captured through the beta parameter in its estimated WACC, while the un-systemic regulatory risk was also captured in its estimated WACC through the so called "*country risk premium*". Compass Lexecon added that its WACC estimate used the yield of Spanish sovereign bonds to calculate the risk-free rate

[1602] Tr. Day 1, 207:16 – 208:22; Resp. Opening, slides 198-199.
[1603] RER-EO1, para. 211.
[1604] Dr. Flores, Presentation, slides 36 and 37, referring to RER-EO2, paras 238-251.
[1605] Cl. Closing, slide 81.
[1606] Cl. PHB, para. 158.
[1607] CER-CL2, para. 7.47.
[1608] *Ibid*., para. 7.48.

and that the difference between the yield in Spanish sovereign bonds and German sovereign bonds was referred to as the "country risk premium".[1609]

1260. Compass Lexecon contends that the regulatory risk adjustment proposed by Econ One, an annual 10% probability that regulated payments will be eliminated, is unfounded and arbitrary,[1610] as it is not derived from any objective methodology.[1611]

1261. The Claimant asserts that Compass Lexecon's calculation should be adopted because its discount rate (unrebutted by Econ One) already captures the regulatory risk (industry and country specific risks faced by renewable plants in Spain in its WACC estimation).[1612] The Claimant points out that in view of the fact that the Spanish Government has provided different values to what the reasonable rate of return is going to be from 2020 onwards, Compass Lexecon observed that there was indeed significantly higher regulatory risk in the Actual scenario.[1613]

1262. Having reviewed the Parties' submissions, the experts' reports and the evidence on the record, the Tribunal does not find the approach taken by the Respondent and Econ One convincing. The Tribunal considers that Econ One's model of the regulatory risk (applying an annual 10% probability that the regulatory support assumed in Compass Lexecon's But-for scenario would be eliminated over time) is not consistent with the Tribunal's determination on the liability of the Respondent arising from the breach of Article 10(1) of the ECT. In the But-for scenario, the assumption should be that the Respondent continues to keep the remuneration regime under RD 661/2007 as amended by RD 1614/2010 for the Solacor Plants as promised. The Tribunal does not find either that Dr Flores's annual 10% reduction probability is supported by any objective evidence or criteria.

1263. The Tribunal does not agree either with Econ One's view that with the Disputed Measures in place, the risk of future changes to the regulatory regime has been substantially reduced. Econ One's view could be correct for investors who do not have the benefit of the

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[1609] CER-CL2, paras. 7.49 and 7.50.
[1610] *Ibid.*, para. 7.46.
[1611] *Ibid.*, para. 7.56.
[1612] Cl. PHB, para 159, referring to Tr. Day 4 [García] 132:6-134:19; Compass Lexecon Quantum Presentation, slide 10-11.
[1613] *Id.*, referring to Tr. Day 4, [García] 139:23-140:5.

grandfathering clause under RD 661/2007 and RD 1614/2010. The same could be said on the views expressed by Fitch Ratings, etc. cited by the Respondent.

1264. The Disputed Measures clearly indicate that there will be a periodic review and revision of the remuneration at the discretion of Spain without offering any grandfathering clause to existing installations. Accordingly, the Tribunal views that it is a factor which increases uncertainty rather than reducing the future risks. In this regard, in the Tribunal's view, the regulatory risk, if any, would be greater in the Actual scenario than the But-for scenario from the perspective of the Solacor Plants which have legitimate expectations of the continuing application of the RD 661/2007 regime protected by the ECT.

1265. In conclusion, the Tribunal determines not to accept the Econ One's proposed approach on the regulatory risk. The Tribunal finds Compass Lexecon's approach reasonable and appropriate on this issue.

(6) Discount for illiquidity

1266. Compass Lexecon did not apply any illiquidity discount in its valuation. Compass Lexecon considered that it was incorrect to include an illiquidity discount in either the But-for scenario or the Actual scenario.[1614] Econ One applied an illiquidity discount of 26.28% in the But-for value of the Solacor Plants.[1615] Econ One stated that it did not apply an illiquidity discount in the Actual scenario because it would have already been reflected in the transaction price it used in valuing the Claimant's interest in the Solacor Plants.[1616] However, in the updated subsidiary DCF calculations in its second expert report, Econ One applied an illiquidity discount of 26% in the But-for scenario, and 18% in the Actual scenario.[1617] In reliance on Econ One's report, the Respondent submits that a discount for illiquidity should apply to the But-for scenario at 26% and at 18% to the Actual scenario.[1618]

[1614] CER-CL2, para. 7.68.
[1615] RER-EO1, para. 225. It stated that Econ One used a model developed by Longstaff in estimating an illiquidity discount of 26.28%.
[1616] RER-EO2, para. 291.
[1617] Econ One, Presentation, slide 46, citing RER-EO2, Section IV: EO-124. Tabs "Econ One Switches" and "Live Version".
[1618] Resp. Opening, slide 195.

1267. Econ One asserted that the market for renewable energy assets in Spain had become more liquid after the enactment of the Disputed Measures,[1619] and therefore an adjustment was required in the But-for scenario to account for the difference in liquidity when compared to the Actual scenario.[1620] The Respondent also argues that thanks to the Disputed Measures the number of transactions for renewable energy plants in Spain has increased and therefore, after the Disputed Measures the Claimant's investment was a more liquid (or less non-liquid) asset.[1621] Accordingly, the discount for lack of liquidity has to be lower in the Actual scenario than in the But-for scenario.[1622]

1268. The Respondent further asserts that in other arbitration cases against Spain, even claimants' experts applied an illiquidity discount because CSP plants are physical assets.[1623]

1269. In reliance on Econ One's opinion, the Respondent criticizes Compass Lexecon in that (i) it did not apply a discount for the lack of liquidity of the assets and (ii) it did not differentiate the liquidity that the investment in the But-for scenario had compared to the Actual one.[1624]

1270. Econ One argues that the illiquidity discount is necessary because Compass Lexecon's discount rate is based on data for publicly traded companies, whereas the Solacor Plants are illiquid physical assets.[1625]

1271. Compass Lexecon considers that the application of an illiquidity discount is unwarranted and that Econ One's calculation of the said discount is flawed.[1626]

1272. Compass Lexecon contends that the illiquidity discount is not appropriate in this case for three reasons: (i) the Solacor Plants have healthy, steady, largely regulated cash flows; (ii) potential buyers of the Claimant's stake in the Solacor Plants would be publicly traded; and (iii) potential buyers of the Claimant's stake in the Solacor Plants would have a hold

[1619] RER-EO1, para. 221.
[1620] *Id.*
[1621] Resp. Rej., para. 1993.
[1622] *Ibid.*, para. 1994.
[1623] Tr. Day 1, 206:21 – 207:4.
[1624] Resp. Rej., para. 1995.
[1625] RER-EO2, para. 264; Econ One, Presentation, slide 41.
[1626] CER-CL2, para. 7.63.

to maturity strategy.[1627] Compass Lexecon further asserts that the illiquidity discount proposed by Econ One is inconsistent with regulatory practice. It argues that most assets in the energy sector are not traded directly as individual assets, but as part of wider portfolios owned by publicly traded corporations.[1628]

1273. Compass Lexecon cited the tribunal in *ADC v. Hungary* which observed that "an illiquidity discount is usually associated with privately held companies that have erratic or volatile cash flows" and that "regulated entities… do not typically attract an illiquidity discount because of the relatively stable cash flows associated with them."[1629]

1274. Compass Lexecon disagrees with Econ One's view that the market for renewable assets located in Spain became more liquid. It contends that contrary to Econ One's claim, the number of transactions did not increase following the adoption of the Disputed Measures. It points out that many of the transactions that took place after the adoption of the Disputed Measures involved purchases by funds specialized in distressed assets.[1630] Compass Lexecon argues that if an illiquidity discount is to be applied, it would also have to be applied to the Actual scenario too.[1631]

1275. Compass Lexecon considers that the approach followed by Econ One to calculate the illiquidity discount in this case is bound to overestimate such a discount. Pointing out that Econ One derived 26.3% illiquidity discount from a calculation based on option theory, referred to as the Longstaff model, Compass Lexecon asserts that this approach provides an "upper bound" to the illiquidity discount and thus necessarily overestimates it.[1632]

1276. The Claimant further contends that the illiquidity discount of 26% is aimed at disguising an unjustified reduction to the actual damaging effect of the Disputed Measures. The 26%

[1627] Compass Lexecon, Quantum Presentation, slide 12; CER-CL2, para. 7.65.
[1628] CER-CL2, para. 7.67.
[1629] *Id*., citing *ADC award,* para. 512.
[1630] CER-CL2, paras. 7.69-7.70.
[1631] *Ibid*., para. 7.71.
[1632] *Ibid*., para. 7.73.

arbitrary illiquidity discount that the Respondent proposes unjustifiably wipes out more than one quarter of the value of the Solacor Plants.[1633]

1277. Econ One rebuts that it applied the illiquidity discount based on the Longstaff method in line with studies on private companies and other industry sources. Econ One contends that Longstaff concluded that "*[i]n fact the empirical evidence suggests that the upper bound may actually be a close approximation to the observed discounts for lack of marketability*."[1634]

1278. Econ One referred to other sources which indicate the level of illiquidity discounts as ranging from 20% or higher, 10% to 30% (in steps of 5%) and between 20-30% and argues that its calculation of an 26.3% discount in But-for scenario was in the range of typical discounts.[1635] Econ One did not offer an explanation of the source of its 18% to apply to the Actual scenario in its subsidiary DCF valuation other than Dr. Flores' referring in his presentation at the Hearing to Brattle group's opinion quoted in *Eiser* award which reads as follows:

> *"The 18% discount [for lack of liquidity] reflects recent public research in corporate finance concerning the effects of liquidity."*[1636]

1279. Dr. Flores added that he thought "18% is too low in a but-for world and my modelling shows that it should be 26%."[1637]

1280. Having reviewed the Parties' submissions, the experts' opinion and the evidence on the record of these proceedings, this Tribunal agrees with Econ One in that the illiquidity discount should be applied because the Claimants' equity interests in Solacor SPVs represent the values of the Solacor Plants which are apparently illiquid physical assets.

1281. As Econ One aptly put it, liquidity refers to the ability to readily convert an asset, business, business ownership interest, or security into cash without significant loss of the

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[1633] Cl. PHB, para. 160, referring to Tr. Day 5 [Padilla] 44:9-11; Tr. Day 5 [García] 54:7-55:19; Tr. Day 4 [García] 134:20-136:2; Compass Lexecon, Quantum Presentation, slides 12-13.
[1634] RER-EO2, para. 283, citing F. A. Longstaff, "How much can marketability affect security values?" Journal of Finance, Vol. 50 (1995), p.1774.
[1635] RER-EO2, para. 291.
[1636] Tr. Day 5, 94:24-95:1, quoting *Eiser award*, para. 246.
[1637] *Ibid*., 95:6-8.

principal.[1638] The Tribunal agrees that an illiquid asset would trade at a lower price than an otherwise similar liquid asset.[1639] The Tribunal considers that Compass Lexecon's reasoning in contending that an illiquidity discount is unwarranted in this case is unconvincing.

1282. Both Compass Lexecon and Econ One used the same figure showing the number of renewable asset sales in Spain from 2007 through 2016 (Figure 12 in Compass Lexecon's second expert report[1640] and Figure 18 in Econ One's second expert report[1641]), but they do not agree on the interpretation of the figures.

1283. Focusing on the increase of the number of transactions from 2014, Econ One claims that the evidence shows that, after the enactment of the Disputed Measures, the market for renewable energy assets in Spain have become more liquid and there has been a general increase in interest by international investors in pursuing investments in the energy sector in Spain, including renewable energy.[1642] To the contrary, Compass Lexecon argues that the number of transactions did not increase following the adoption of the Disputed Measures and that many of the transactions that took place after the adoption of the Disputed Measures involved purchases by funds specialised in distressed assets, reflecting the adverse impact of the Disputed Measures on the economic stability of the renewable energy assets in Spain.[1643]

1284. Having reviewed the Figure 12 (Compass Lexecon's second report) and Figure 18 (Econ One's second report), the Tribunal is not convinced that the market became more liquid than before due to the Disputed Measures as argued by Econ One. The Tribunal finds Compass Lexecon's explanation is consistent with the statistics shown by the Figure 12/Figure 18 relied on by Econ One. To the eyes of the Tribunal, the number of the transactions between 2008 through 2012 (before the Disputed Measures) looks comparable to the numbers in 2016. The sharp decrease of the transactions in 2013 and 2014 could be

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[1638] RER-EO1, para. 219.
[1639] *Ibid*., para. 220, citing EO-79 (Aswath Damodaran, "Damodaran on Valuation," 2nd ed. (John Wiley & Sons, Inc., 2006), p. 508.)
[1640] CER-CL2, p.91. (Source: CLEX-204).
[1641] RER-EO2, p.100.
[1642] *Ibid*., para. 280.
[1643] CER-CL2, para. 7.70.

the consequences of the Disputed Measures, and apparently the number of transactions grew back to the 2011-2012 level starting in 2015 when the details of the implementation of the Disputed Measures were settled. Therefore, this Tribunal considers that application of a higher illiquidity discount to the But-for scenario than that applied to the Actual scenario is not warranted, in particular in view of the Tribunal's determination that the valuation should be made as of the date of breach, June 2014.

1285. With respect to the appropriate illiquidity discount rate, this Tribunal notes that the sources relied on by the Respondent range from 10% to 30%. In the absence of a specific figure argued for by the Claimant, the Tribunal considers that the 18% illiquidity discount applied to the Actual scenario by Econ One is appropriate for both But-for and Actual scenarios.

1286. The Tribunal has already determined that the transaction value of the Claimant's sale of its 13% interest be used for the sold shares in the Actual scenario (see para. 1205 *supra*). Accordingly, the Tribunal considers that it is not appropriate to apply the illiquidity discount to the value of the sold shares in the Actual scenario. In conclusion, the Tribunal determines that 18% illiquidity discount should be applied to the But-for and the Actual scenarios (in the Actual case, only to the valuation of the held shares).

(7) Discount for lack of control (Minority discount)

1287. Compass Lexecon did not apply any discount for lack of control (minority discount) in its DoB valuation. Econ One applied 25% discount to the Claimant's shareholding interest in the Solacor Plants in the But-for scenario given that the Claimant is a minority shareholder. Econ One did not apply any minority discount in the Actual scenario.[1644]

1288. Econ One explains that a discount for lack of control refers to an "*amount or percentage deducted from the pro rata share of value of 100 percent (100%) of an equity interest in a business to reflect the absence of some or all of the powers of control.*"[1645] When this discount is applied to a minority interest, it is sometimes referred to as a minority

[1644] RER-EO2, para. 303.
[1645] RER-EO1, para. 231 referring to Shannon P. Pratt, "Business Valuation: Discounts and Premiums", 2nd edition (John Wiley & Sons, Inc., 2009) (EO-86), p.16; RER-EO2, para. 293.

discount.[1646] Pointing out that Compass Lexecon's damages model captured the value of an entire business, Econ One argues that the value of the Claimant's minority interest in the Solacor Plants is less than the pro rata share of its interest in those Plants because the Claimant is a minority shareholder.[1647]

1289. Econ One determined a 25% discount based upon the data from Mergerstat/BVR Control Premium Study.[1648] According to this study published in 2009 quoted by Econ One, between 1999 and 2008, "*the acquisition control price premium offered over the past 10 years translate to discounts for lack of control of approximately 20 to 30 percent*."[1649] Econ One referred to another study that found minority discounts range from 15 to 60 percent.[1650]

1290. In reliance on Econ One's report, the Respondent claims that Econ One's application of 25% discount is in line with the usual discounts for lack of control[1651] and thus a discount for lack of control of 25% should be applied.[1652]

1291. The Claimant contends that the discount for alleged lack of control (25%) is unwarranted and must not be applied. The Claimant maintains that the minority discount does not apply because the Claimant has the power under the shareholders' agreements to veto the most significant business decisions that the Solacor Plants can make such as expenditures, lending and borrowing money.[1653]

1292. Compass Lexecon also contends that Econ One's application of the minority discount in this case is unwarranted and Econ One's calculation of such discount is flawed.[1654]

[1646] RER-EO2, para. 293.
[1647] *Ibid*, para. 295.
[1648] RER-EO1, para. 234. The Mergerstat/BVR Control Premium Study is referred to Shannon P. Pratt, "Business Valuation: Discounts and Premiums," 2nd Edition (John Wiley & Sons, Inc., 2009), p.41 *et. seq*.
[1649] RER-EO1, para. 232 referring to Robert P. Schweihs, "The Combined Discount" in Willamette Insights Journal, Winter 2010 (EO-87), p.56, which in turn refers to Mergerstat Review 2009 (Santa Monica, CA: FactSet Mergerstat, LLC, 2009).
[1650] RER-EO1, para. 233 referring to James F. Hopson and William J. Sheeby, "Valuation of minority discounts in closely-held companies", The National Public Accountant, December 1, 1993 EO-84), p.6 of PDF.
[1651] Tr. Day 1, 207:5-15.
[1652] Resp. PHB, para. 117(viii).
[1653] Cl. PHB, para. 160.
[1654] CER-CL2, para. 7.74.

1293. Compass Lexecon argues that there are two reasons for which a majority or control stake in a company may be worth more than a minority stake: (i) efficiency in control where the value created is reflected in a control premium which the potential purchaser is willing to pay for a controlling stake; and (ii) value diversion which results in a control premium for the controlling shareholders having a right to be exercised to the economic benefit of those in control, and a minority discount for minority shareholders.[1655] Compass Lexecon criticises that while Econ One justified its minority discount on value diversion grounds, it failed to explain how the controlling shareholder (Atlantica Yield) could manage to transfer a greater proportion of the value of the Solacor Plants than its shareholding given that it is under the scrutiny of a sophisticated investor with a significant shareholding (and therefore with incentives to monitor the management of the Solacor Plants). Compass Lexecon argues that any presumption to this effect is even more questionable in view of the particular protections given to JGC under the relevant shareholders agreements, under which, among other protections, any significant expenditure by management requires approval of the Claimant.[1656] It adds that the Claimant has experience with minority shareholdings in power plants and monitors the functioning of its minority shareholdings to avoid any undue transfer from the Solacor Plants to the majority shareholder.

1294. Compass Lexecon asserts that Econ One's minority discount rate was based on control premiums observed in the US stock market over the 1999-2008 period and that those control premiums reflected the fact that the acquiring investor perceived that the target company was worth more than the price at which it was traded. Therefore, Compass Lexecon contends that the control premium data used by Econ One is unrelated and thus irrelevant to the lack of control effect it purported to capture.[1657]

1295. In response to Compass Lexecon's argument that the shareholders agreements provide the Claimant protections that may limit possible disadvantages from a lack of outright control, Econ One contends that Compass Lexecon's analysis is incomplete. Econ One contends that while the shareholder agreements grant the Claimant certain benefits, it does not

[1655] *Ibid*., para. 7.75.
[1656] *Ibid*., para. 7.76.
[1657] CER-CL2, paras. 7.79 and 7.80.

entirely eliminate the risk of having a minority share.[1658] Econ One adds that the minority discount is needed to reflect the absence of some or all of the powers of control.[1659]

1296. Having reviewed the Parties' submissions, the experts' opinion and the evidence on the record of this proceedings, this Tribunal is in principle sympathetic with Econ One's assertion that a minority discount be applied in valuing a minority interest, but the Tribunal considers that the discount could be applicable only if the particular circumstances of the case warrant.

1297. As Econ One pointed out, Compass Lexecon's damages model captured the value of an entire business and calculated the value of the Claimant's minority equity interests in proportion to its equity interest of the whole value of Solacor SPVs without taking into account the fact that the Claimant is a minority shareholder. However, the Tribunal considers that the Respondent and Econ One have failed to substantiate the justification for the application of the minority interest and the level of appropriate discount rate in the context of this case. Econ One's reasoning to apply a 25% minority discount is on the basis that the Claimant is a minority shareholder in Solacor SPVs and the available studies, apparently on the U.S. market in 1993 and 2009, show that the range could be between 20 to 30% in the 2009 study and 15% to 60% in the 1993 study (see para. 1289 and the footnotes). One of the reference sources cited by Econ One offers a list of examples of some of the common prerogatives of ownership control such as election of directors and appointment of management, acquisition or liquidation of assets, making acquisitions, change of the articles of incorporation and bylaws, to name a few.[1660] However, the Tribunal does not find any evidence or submission that Econ One has conducted an assessment of the extent of the Claimant's rights under the shareholders agreements and presented specific basis for justifying 25% discount which would reduce 25% of the valuation.

[1658] RER-EO2, para. 298.
[1659] RER-EO1, para.231 referring to EO-86, p.16; RER-EO2, para. 298.
[1660] EO-87, Robert P. Schweihs, "The Combined Discount," Willamette Insights Journal, Winter 2010, p.53.

1298. This Tribunal recalls Dr. Flores' testimony to questions posed by a member of the Tribunal at the Hearing.

> [Professor Dolzer]
>
> *"My question is the following: would you need to differentiate between the types of shareholder agreements that exist, or can you talk in general about the minority shareholder? I would say that most lawyers would assume that you have to look at the specific arrangements in the specific shareholder agreements to assess what the risks are or not."*[1661]
>
> [Dr Flores]
>
> *"Yes, you are correct…."*[1662]
>
> [Professor Dolzer]
>
> *"But you would still assume that when you say you have to make an assessment, that assessment has to be made in the light of the specific provisions of that particular shareholder agreement?"*[1663]
>
> [Dr Flores]
>
> *"Yes. And barring that, taking an average is the best unbiased estimate of what it is. Which is what I did: I look at a sample of market transactions; some of them have discounts that exceed 30%, some of them are under 20%. But taking 25% is an average assessment of what the discount would be."*[1664]

1299. The Tribunal therefore considers that Econ One's 25% minority discount figure is not based either on studies conducted in the specific context of the Spanish or comparable European renewables energies market close to the date of valuation. The Tribunal doubts the value of the sources relied on by Econ One in arriving 25% as a basis of justifying the application of 25% minority discount to the Claimant's equity interest in Solacor SPVs located in Spain as of June 2014, the date of the valuation.

1300. As already discussed, the Tribunal considers that a minority discount rate has to take into account the particular circumstances of each individual case. In the present context, this requires taking into account that the Claimant only acquired a minority interest in the Solacor SPVs as well as the fact that such acquisition was made on the basis of sophisticated shareholders' agreements, hedging the Claimant against most of the risks

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[1661] Tr. Day 5, 179:3-9.
[1662] Tr. Day 5, 179:10.
[1663] *Ibid*., 180:4-7.
[1664] *Ibid*., 180:8-13.

usually associated with minority shareholding. The Tribunal thus finds that the assumption of a 25% minority discount concerning the Claimant's equity interest needs to be corrected to a more realistic figure which the Tribunal considers to be 5%.

1301. In conclusion, this Tribunal determines that a minority discount of 5% should be applied in the But-for valuation of the Claimant's interests in the Solacor Plants.

(8) O&M cost

1302. Econ One argues that the Solacor Plants appear to have abnormally high operation and maintenance ("**O&M**") costs when compared with those of other CSP projects and that the fact that Abengoa is the provider of O&M services to the Solacor Projects creates an incentive for Abengoa to charge higher O&M costs. Econ One adds that the Solacor Plants are paying more than twice the average industry O&M costs for the services provided by Abengoa.[1665] Econ One argues that Solacor 1 and Solacor 2 have paid on average EUR 5.0 million and EUR 4.8 million per year in O&M costs, respectively, in comparison with the average of EUR 2.3 million per year in the CSP industry.[1666] Accordingly, Econ One maintains that a correction needs to be made to Compass Lexecon's valuation by using the average O&M cost of the industry, not the actual O&M costs paid to Abengoa.[1667]

1303. Compass Lexecon contends that Econ One used cost data from projects which are not comparable to the Solacor Plants to derive its conclusion that O&M cost of the Solacor Plants were higher than those of comparable plants. In particular, Compass Lexecon criticises that most of the projects considered by Econ One are larger than the Solacor Plants, and thus their unit costs are bound to be lower than the unit costs of the Solacor Plants, and that the evidence provided by Econ One is for thermosolar plants outside of Spain, which may not be comparable.[1668]

1304. Compass Lexecon adds that it is generally difficult to compare O&M contracts, as they typically have significantly different scopes across contracts in terms of the scope of

[1665] RER-EO2, paras. 15, 199-200.
[1666] RER-EO1, paras. 71-76; RER-EO2, para. 82.
[1667] RER-EO2, para. 200.
[1668] CER-CL2, para. 4.33.

services they include (for instance, some contracts include the cost of certain parts to be replaced while others do not). Furthermore, in the case of the Solacor Plants, the O&M services provider has incentive payments related to production (providing incentives for the O&M contractor to maximize the production of the Solacor Plants). Compass Lexecon argues that for these reasons and given the absence of appropriate available data on comparable O&M contracts, such a benchmarking exercise cannot be rigorously conducted.[1669]

1305. Compass Lexecon points out that the 2018 Diseprosa Report found that the O&M cost of the Solacor Plants fell within the usual range observed for this type of thermosolar plants. Although Altermia, the technical advisor to the banks that provided the project finance, concluded that the O&M contract costs were in the "*high range*" of O&M contracts for thermosolar plants with no storage in Spain, but it related this to the fact that the contract included incentive payments for production and covered a range of maintenance services.[1670]

1306. In response, Econ One argues that the sources of information it relied on are reliable international sources that Compass Lexecon also used as reference in its reports. Econ One admits that some of the O&M estimates in its analysis were for 100 MW CSP plants, but argues that as Solacor 1 and Solacor 2 have the same O&M provider, Abengoa Solar, and share several expenses, the estimates it used could be comparable.[1671] Econ One argues that the high O&M costs of the Solacor Projects are most likely related to Abengoa's influence.[1672]

1307. Having reviewed the Parties' submissions and experts' report, the majority of the Tribunal is not persuaded that the Respondent or its expert has substantiated its claim that the O&M costs of the Solacor Plants are abnormally high without any justification. The majority of

[1669] *Ibid*., para. 4.34.
[1670] *Ibid*., para. 4.35, referring to Second DISEPROSA Report, p. 22 and Solacor 1 (2010) *Technical Advisor's Report Economic/Financial Section*, p. 176 (**CLEX-065**).
[1671] RER-EO2, paras. 85-87.
[1672] *Ibid*., paras. 89-94.

the Tribunal does not consider that the statement made by Altermia quoted by Econ One[1673] supports Econ One's claim. It states that:

> *"The price of the contract is in the high range of the O&M contracts for solar thermal power plants in Spain without thermal storage since a higher remuneration was agreed in case the production was above the nominal net production."*[1674]

1308. The majority of the Tribunal considers that Altermia's statement quoted above supports Compass Lexecon's contention that it is within the range, although it is on the higher side because incentives are agreed in case the production was above the nominal net production.

1309. Furthermore, in the view of the majority of the Tribunal, the existence of the Claimant as a 26% shareholder and the control of the Lenders who have a long-term interest in keeping an eye on the profitability of the Solacor Plants could also be considered in determining as to whether in fact Abengoa's influence resulted in an abnormal inflation of O&M costs. In addition, the sources of data Econ One relied on include data of plants in the United States which might have operational conditions and practices different from those in Spain.

1310. Accordingly, the majority of the Tribunal determines to deny Respondent's claim that the O&M costs used by Compass Lexecon should be replaced by corrections proposed by Econ One.

(9) Inflation forecast

1311. The inflation forecast which Compass Lexecon relied on is based on two sources: the Consensus Forecast Monthly Survey for the period 2016-2024 and the European Central Bank ("**ECB**")'s long term inflation target of 2% for the period 2025-47.[1675]

1312. Econ One projected a long-term inflation rate at 1.74% using an average of three inflation forecasts: (i) the long-term inflation forecast for Spain from the European Central Bank ("**ECB**") survey of professional forecasters, 1.80%; (ii) the average inflation forecast of the International Monetary Fund ("**IMF**") for Spain in 2020, 1.51%; and (iii) the long-term

[1673] RER-EO2, para. 90.
[1674] Solacor 1 Technical Advisor's Report Economic/Financial Section, p. 176 (**CLEX-065**).
[1675] CER-CL1, para. 6.9; Annex C, para. C-2.

inflation forecast presented by Consensus Economics, 1.90%.[1676] Econ One stated that applying its inflation projections resulted in lower feed-in-tariff price projections than in Compass Lexecon's projection in the But-for scenario.[1677]

1313. Compass Lexecon contends that Econ One's correction to its inflation projections is unfounded. Pointing out that Econ One based its inflation forecast for the post-2024 period on forecasts which apply to different periods of time and none of which refers to the post-2024 period, Compass Lexecon argues that the ECB's inflation target of 2% is a more appropriate forecast for long-term inflation in Spain.[1678]

1314. Econ One rebuts that it is common practice to accept inflation forecasts with five-year time horizons as long-term forecasts and that sources such as the IMF, ECB, U.S. Federal Reserve and Consensus Economics rely on the inflation rate in five years as their estimate of long-term inflation.[1679]

1315. Econ One adds that while the ECB's inflation target refers to a European-wide average, individual countries within the European Union can have different inflation rates deviating from the European-wide average. Econ One also argues that while Compass Lexecon used a single source for inflation, its approach projected a long-term inflation based on the average of three reputable country-specific sources and thus provides a more reliable estimate of the long-term inflation rate in Spain.

1316. Having reviewed the Parties' submissions and the experts' reports, this Tribunal favours Econ One's approach in that its approach projects long-term inflation based on the average of three reputable country-specific sources as compared to a single source for a European-wide average. Accordingly, the Tribunal decides to accept the 1.74% inflation rate proposed by Econ One. This decision notwithstanding, however, in view of the time sensitivity of inflation forecast, the Tribunal invites the Parties and their respective experts to provide new inflation forecast for the purpose of the DCF valuation to be made as of

[1676] RER-EO1, para. 160.
[1677] *Ibid.*, para. 161.
[1678] CER-CL2, paras. 7.29-7,30.
[1679] RER-EO2, para. 192.

June 21, 2014, if they so wish, when they respond to the Tribunal's directions set forth in paragraph 1349 below.

(10) Weighted Average Cost of Capital (WACC) v. Adjusted Present Value (APV) Approach

1317. A discount rate is necessary to bring the future cash flows back to the valuation date to arrive a net present value of the Solacor Plants. Compass Lexecon used the weighted average cost of capital ("**WACC**") approach, which used a weighted average of the cost of equity and the cost of debt as the discount rate in applying the DCF method in calculating the fair market value of the Claimant's interest in the Solacor Plants.[1680] Econ One used a variant of the DCF method called the Adjusted Present Value ("**APV**") approach in its subsidiary valuation. The APV approach uses the cost of equity as the discount rate and accounts for the tax effect of debt in a separate calculation.[1681]

1318. Econ One argues that the DCF valuation which Compass Lexecon relies on is not suitable when leverage is expected to change as is projected for the Solacor Plants. It explains that the APV approach is frequently used to value projects with declining levels of debt over time.[1682]

1319. Compass Lexecon submits that in theory the APV method and the DCF method should both yield consistent valuations as long as the same set of valuation assumptions is used. However, it asserts that the APV method in practice has significant flaws, the most important of which is that most practitioners using the APV model ignore expected bankruptcy costs.

1320. Econ One disagrees. Econ One further submits that it disagrees with the input Compass Lexecon used in its cost of equity calculations. However, Econ One states that Compass Lexecon's second expert report generally agreed with Econ One's[1683] Econ One clarifies that the most significant difference between Econ One's cost of equity and Compass Lexecon's concerns the use of a country risk premium. Econ One argues that it is most

[1680] CER-CL1, para. 2.23.
[1681] RER-EO1, para. 181; RER-EO2, paras. 214 and 305.
[1682] *Ibid.*, para. 191; RER-EO2, para. 215.
[1683] RER-EO2, para. 221.

appropriate to consider the specific risks of the Solacor Plants in the cash flows as it argued in connection with the regulatory risk.[1684]

1321. Compass Lexecon presented an outcome of its valuation using the APV method suggested by Econ One which it claimed showed that the damages estimate with the application of the APV method led to damages higher than those estimated under the DCF method using WACC.[1685]

1322. Having reviewed the expert opinions of Compass Lexecon and Econ One on this matter, the Tribunal does not see a compelling reason not to use Compass Lexecon's WACC approach in this case. Further, the Tribunal is of the view that Compass Lexecon's DCF method using WACC is consistent with the Tribunal's determination on the treatment of the regulatory risk issues (see the Claimant's treatment of the country risk premium in para. 1259 *supra*). Accordingly, the Tribunal determines that no correction is needed to Compass Lexecon's DCF method applied to the DoB valuation.

1323. Except for the corrections determined appropriate by the Tribunal in the foregoing paragraphs, the Tribunal considers that Compass Lexecon's DCF method and its implementation leading to the DoB valuation in its second expert report is reasonable and appropriate in estimating damages to the Claimant's investment in the Solacor Plants.

G. TAX GROSS-UP

1324. The Claimant seeks an award net of taxes and withholdings to comply with, and abide by, the full reparation principle. The Claimant argues that to ensure full reparation in accordance with international law, the compensation must be awarded free of/from taxes and of/from any type of withholding or equivalent. Put differently, the Claimant shall be indemnified of any taxes that might be subsequently imposed.[1686]

1325. The Claimant states that Compass Lexecon's valuations of the Claimant's investments (in the But-for and Actual scenarios) represent the after-tax value of the claims (modelling

[1684] RER-EO2, para. 222.
[1685] CER-CL2, paras. 7.44 and 7.45, Table 15.
[1686] Cl. Reply, para. 699.

Spanish taxation). The Claimant submits that if the Award were to attract a higher tax burden than what would have been imposed on the receipt by the Claimant of (i) dividends or (ii) capital gains in the But-for scenario imposed in Japan where the Claimant is taxed, this would result in additional harm to the Claimant (i.e., additional harm in the amount of the additional tax burden) as a direct result of the Respondent's conduct.[1687]

1326. The Respondent regards the Claimant's claim for tax gross-up as totally frivolous and lacking any basis. The Respondent states that in more than 500 treaty arbitration awards to date, there is no award that granted tax gross-up for taxation in foreign jurisdiction. The Respondent cites *Rusoro v. Venezuela* and *Abengoa v. Mexico* awards in support of its position.[1688]

1327. The Respondent contends that firstly, tax gross-up is banned in Article 21 (1) of the ECT. Secondly, the Claimant has not complied with the burden of proof and the claim for tax gross-up violates the principles of causality and attribution. Lastly, the payment of tax or not on the hypothetical compensation and its specific amount would depend on (i) the acts of another sovereign State; (ii) acts or private decisions of the Claimant or the companies in its business group within the scope of its business freedom. The Respondent submits that Spain is not responsible for any of the above elements.[1689]

1328. Having reviewed the Parties' submissions and the record on this Hearing, this Tribunal is not convinced that the Claimant has substantiated its claim that it will be imposed of any tax liability by its home jurisdiction, Japan. Therefore, this Tribunal decides to deny the Claimant's claim on the tax gross-up.

[1687] *Ibid*., para. 697.
[1688] Tr. Day 1, 211:1-24, citing *Rusoro* Award **(RL-0076)** and *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013 **(RL-0082)**.
[1689] Resp. PHB, para. 124.

H. PRE-AWARD AND POST-AWARD INTEREST

1329. The Claimant seeks both pre-award interest at 4.99% which, it claims, is the cost of equity at the relevant valuation date and post-award interest comprised of a 2% moratorium differential over pre-award interest, compounded monthly.[1690]

1330. The Claimant submits that pre-award interest is applied from the date of valuation[1691] and that the appropriate rate of pre-award interest is the cost of equity, as the cost of equity is the minimum rate that a rational investor would have willingly postponed the collection of part of their dividends, which is what the Claimant has been forced to do with the introduction of the Disputed Measures.[1692]

1331. Compass Lexecon submits that the fundamental principle of any damage assessment is that the compensation being awarded ought to put the damaged party in the same position it would have been absent infringement or breach. Thus, pre-award interest should be calculated at a rate reflecting the cost of capital since that is the opportunity cost for the Claimant of the delay in payment of the awarded damages and given that damages are to equity holders of the Solacor Plants, i.e., the cost of equity.[1693]

1332. Compass Lexecon relies on Sénéchal and Gotanda, and Escher and Krueger who advocated setting pre-judgement interest in line with the opportunity cost of capital for the damaged party.[1694]

1333. Compass Lexecon argues that the risk-free rate considered by Econ One does not comply with full reparation principle because of the uncertainty at the date of valuation that Spain would fully compensate the Claimant for damages at some future date.[1695]

1334. The Claimant contends that the Respondent's defense to avoid post-award interest is untenable. The Claimant argues that the possibility to include moratorium (post award)

[1690] Cl. Opening, slide 241.
[1691] Cl. Reply, para. 688.
[1692] *Ibid*., para. 689; CER-0002, para. 7.85.
[1693] CER-CL2, para.7.82.
[1694] CER-CL2, para. 7.83 citing Sénéchal, T. and Gotanda, J. (2009) *Interest as Damages*. 47 Columbia Journal of Transnational Law 491, p. 526 (**CLEX-186**), and Escher, S. and Krueger, K. (2003) *The Cost of Carry and Prejudgment Interest*. Litigation Economics Review, 6 (1) (**CLEX-221**).
[1695] CER-CL2, para. 7.88

interest, which provides an incentive to pay, is recognized in the ILC Draft Articles, in Commentary (12) of Article 38: "*The power of a court or tribunal to award post-judgment interest is a matter of its procedure*.[1696]

1335. The Claimant submits that arbitral tribunals recognize that the function of post-award interest is to eliminate the Respondent's incentive to delay full payment of the award[1697] and that tribunals have held that they may determine a different, higher, rate to apply to post-award interest than that applied to pre-award interest.[1698]

1336. While the Claimant is not pleading the post-award interest applied in Spain, it asserts that post-award interest is well rooted and routinely applied in Spain.[1699]

1337. The Claimant asserts that the compounded interest is an established practice in investment arbitration in general as well as in Spanish renewable cases and that tribunals in the *Masdar, Eiser, Novenergia* and *Antin* cases have awarded pre-award and post-award interest, compounded monthly.[1700]

1338. The Respondent disagrees. With respect to pre-award interest, the Respondent considers the Claimant's claim as speculative and baseless because the Claimant should not be compensated for risks it did not bear. Thus, the Respondent contends that a "risk-free" rate with a maximum time limit of 5 years instead of a cost of equity should be applied.[1701] The Respondent argues that granting a higher rate (for example, the 10-year bond) would involve excess compensation contrary to the principle of full reparation by compensating for risks that have not been assumed.[1702] In support of its position, the Respondent quotes Mark Kantor who stated that:

> *"Historic earnings must be "brought forward" to the valuation date by means of an interest rate, while future earnings are discounted back to the valuation date by means of a discount rate. The interest rate used for bringing historical amounts forward will clearly not contain the same risk factors as the discount rate used to*

[1696] *Ibid*., para. 692.
[1697] *Ibid*., para. 693.
[1698] *Ibid*., para. 694.
[1699] *Ibid*., para. 695.
[1700] Cl. Opening, slide 242.
[1701] Resp. Rej., para. 2022; Tr. Day 1, 201:6-16, referring to Resp. Opening, slide 202.
[1702] Resp. Rej., para. 2023.

> *present value future amounts. As a practical matter, the interest rate used for the historical amount is often a "risk-free" rate (such as the rate for US Treasuries) or a statutory rate for pre-judgment interest".*[1703]

1339. With respect to post-award interest, the Respondent argues that punitive interest is contrary to the case law and the customary international law, specifically Article 36, Commentary 4 of ILC Articles. The Respondent cites the awards in *Vestey v. Venezuela* and *National Grid v. Argentina* in support of its position.[1704] The Respondent contends that the interest would form an integral part of the reparation and, as such, it has an exclusively compensatory purpose and never to be punitive.[1705]

1340. Regarding the spread, the Respondent argues that it is necessary to consider that the spreads, in the commercial world, are usually proportional to the reference rate. Taking into account the current interest rate scenario, close to zero or even negative, a 2% spread is completely inappropriate and disproportionate.[1706] The Respondent points out that the tribunal in *Eiser* only applied a punitive spread of less than half a point, specifically 0.43%.[1707]

1341. Econ One considers that, should the Tribunal decide to award compensation, calculating pre-award interest using a short-term risk-free rate, such as the six-month or one-year EURIBOR, is consistent with economic theory and practice.[1708]

1342. Given that Article 10 of the ECT does not set out a standard for the calculation of interest for the damages arising from the breach of Article 10, as other tribunals did[1709], the Tribunal looks to the rule set out in Article 13 of the ECT which provides that "[c]*ompensation shall also include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment*."

[1703] *Ibid*., para. 2025, quoting Mark Kantor, (RL-0099 "Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence" Mark Kantor. 2008 Kluwer Law International. (excerpt)), p. 49.
[1704] Resp. Opening, slide 203; Tr. Day 1, 210:17-25, citing *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016 **(RL-0078)** and *National Grid P.L.C. v. Argentina Republi*c, UNCITRAL, Award, November 3, 2008 **(RL-0080)**.
[1705] Resp. Rej., para. 2021.
[1706] *Ibid*., para. 2028.
[1707] *Ibid*., para. 2029.
[1708] RER-EO2, para. 312.
[1709] See *Masdar* Award, para. 661.

1343. There appear two distinctive approaches to determine the pre-award interest among authors in economic literature as Compass Lexecon aptly noted in its first expert report.[1710] Some advocate the use of the injured party's opportunity cost of funds, i.e., the cost of equity, while others favour the use of either the cost of debt of the defendant (in this case the Respondent) or a risk-free rate. As the Respondent is a sovereign state capable of honouring its international obligation, the Tribunal considers that the risk-free rate is an appropriate basis for the pre-award interest. In view of the lapse of time since the date of valuation, the Tribunal is of the view that the Respondent's borrowing rate based on the yield on Spanish 10-year bond as of the date of valuation, compounded monthly, is appropriate in this case. The Tribunal takes note that earlier tribunals including the tribunals in *Antin v. Spain*,[1711] *Novenergia v. Spain*[1712] and *Infra-Red v. Spain*[1713] shared this position.

1344. With respect to post-award interest, the Tribunal will defer its decision until after it has reviewed the specific number of the pre-award interest as determined in the preceding paragraph and determine as to whether such pre-award interest rate could serve as an incentive for the Respondent to pay the award in a timely manner in view of the current rate of the comparable Spanish bond rate. In this regard, the Tribunal directs the Parties to inform the Tribunal of the Spanish 10-year bond yield rates as of June 21, 2014 and as of the date of this Decision as set forth in the Direction in para.1349 *infra*.

1345. The Tribunal determines that both pre-award interest and post-award interest be compounded monthly.

1346. In conclusion, the Tribunal determines to award the Claimant pre-award interest at the Respondent's 10-year bond rate as of June 21, 2014, from the valuation date (June 21, 2014) to the date of the Award, compounded monthly. Post-award interest at a rate to be determined later shall be from the date of Award to the date of payment, also compounded monthly.

[1710] CER-CL1, para. 9.12.
[1711] *Antin* Award, para. 733.
[1712] *Novenergia* Award, para. 846.
[1713] *InfraRed* Award, paras. 601 and 604. The *InfraRed* tribunal ordered pre-award and post-award interest compounded annually.

VIII. DECISIONS OF THE TRIBUNAL AND DIRECTIONS TO THE PARTIES

For the reasons set forth above, the Tribunal decides as follows:

1347. With respect to jurisdiction: The Tribunal decides that the Respondent's jurisdictional objection on questions concerning the 7% TVPEE measures is upheld and that the Tribunal lacks jurisdiction to hear disputes relating to the TVPEE.

1348. With respect to liability: The Tribunal decides that the regulatory changes introduced by the Respondent in RD-L 9/2013, EPA 2013, RD 413/2014, MO IET/1045/2014 and subsequent measures constitute a breach of the Respondent's obligation under Article 10(1) of the ECT. The majority of the Tribunal decides that the regulatory changes introduced under Law 15/2012, RD-L 2/2013 and MO IET/221/2013 (except for the 7% TVPEE) constitute a breach of the Respondent's obligation under Article 10(1) of the ECT.

1349. With respect to damages: Having reviewed the Parties' respective submissions and the experts' reports and testimonies at the Hearing, including the Parties' Post-Hearing Briefs, in order to facilitate the Tribunal's deliberation on the assessment of damages to the Claimant's investment as of the date of breach, the Tribunal determines that:

i) The date of valuation shall be June 21, 2014.

ii) The valuation method shall be the DCF method as employed by Compass Lexecon in conducting the DoB valuation in Annex H in its second expert report, with the following corrections the Tribunal has determined appropriate:

(a) Transaction value for the sold shares in the Actual scenario adjusted to the date of valuation;

(b) Useful life of 25 years;

(c) Illiquidity discount of 18% for both But-for and Actual scenarios;

(d) 5% discount for lack of control (minority discount) for But-for value; and

(e) Projected interest rate at 1.74%, subject to the Tribunal's determination after the Parties' submission, if any.

iii) The impact of TVPEE shall be permanent in the But-for scenario.

iv) The pre-award interest shall be at the rate equivalent to Spanish 10-year bond yield calculated from June 21, 2014 until the date of Award, compounded monthly.

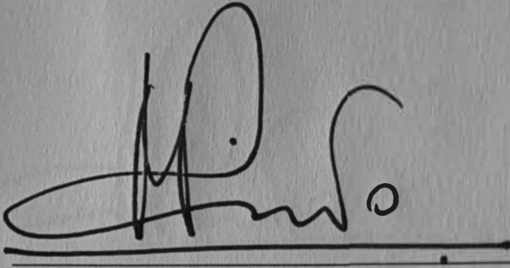
v) The post-award interest rate, which the Tribunal will determine at the time of the Award, shall run from the date of Award until payment of the Award, compounded monthly. The Tribunal directs the Parties to inform the Tribunal of the Spanish 10-year bond yield rates as of June 21, 2014 and as of the date of this Decision.

vi) The tax-gross up claim is denied.

1350. The Tribunal directs the Parties to submit a new DoB calculation as of June 14, 2014 with a brief explanation as to how the outcome has been calculated without any further arguments on the assumptions or variables already determined above by the Tribunal within two months from the date of this Decision.

1351. The Tribunal encourages the valuation experts of both Parties to confer with each other in the process of new calculation as directed by the Tribunal. Should there be any divergence in the respective outcome, each Party's submission of the outcome of such new calculation shall include a brief explanation on such divergence.

1352. The cost shall be in reserve.



Professor Mónica Pinto
Arbitrator
Subject to the attached partial dissenting opinion

Professor Dr. August Reinisch
Arbitrator

Professor Hi-Taek Shin
President of the Tribunal

Professor Mónica Pinto
Arbitrator
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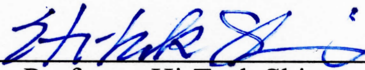

Professor Hi-Taek Shin
President of the Tribunal