



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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**CERTIFICATE**

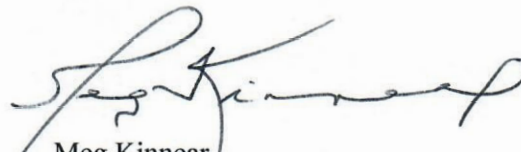
**JGC HOLDINGS CORPORATION (FORMERLY JGC CORPORATION)**

**v.**

**KINGDOM OF SPAIN**

**(ICSID CASE NO. ARB/15/27)**

I hereby certify that the attached documents are true copies of the English and Spanish versions of the Tribunal's Award dated November 9, 2021.



Meg Kinnear  
Secretary-General

Washington, D.C., November 9, 2021



**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**

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**AWARD**

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***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:* November 9, 2021

**REPRESENTATION OF THE PARTIES**

*Representing JGC Holdings Corporation:*

Mr. Alberto Fortún Costea  
Mr. Luis Pérez de Ayala  
Mr. José Ángel Rueda García  
Mr. Borja Álvarez Sanz  
Mr. Antonio María Hierro Viéitez  
Mr. Gustavo Mata Morreo  
Mr. José Ángel Sánchez Villegas  
Ms. Ana Martínez Valls  
Ms. Elisa Salcedo Sanchez

**Cuatrecasas, Gonçalves Pereira**

Almagro, 9  
28010 - Madrid  
Spain

and

Ms. Yoshimi Ohara

**Nagashima Ohno & Tsunematsu**

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Chiyoda-ku  
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Japan

*Representing Kingdom of Spain:*

Ms. Socorro Garrido Moreno  
Mr. José Manuel Gutiérrez Delgado  
Ms. Gabriela Cerdeiras Megías  
Mr. Rafael Gil Nievas  
Ms. Lorena Fatás  
Ms. Ana Fernández-Daza  
Ms. Lourdes Martínez de Victoria  
Ms. Elena Oñoro Sainz  
Mr. Alberto Torró Molés

**Abogacía General del Estado**

Departamento de Arbitrajes  
Internacionales  
c/ Marqués de la Ensenada, 14, 2<sup>a</sup> planta  
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Spain

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**TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS**

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
CSP	Concentrated Solar Power
Decision	The Tribunal's Decision on Jurisdiction, Liability, and Certain Issues of Quantum issued on May 21, 2021
DoB	Date of breach
DoS	Date of sale
ECT	Energy Charter Treaty
Experts	Compass Lexecon and Quadrant Economics together
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
Joint Memorandum	Experts' Joint Memorandum dated July 20, 2021 (filed by the Parties on July 21, 2021), submitted pursuant to the Tribunal's directions in paragraphs 1349-1351 of the Decision
Joint Financial Model or CLEX-201	Experts' Joint Financial Model of July 20, 2021, supporting the calculation shown in the Joint Memorandum
Tribunal	<p>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.</p> <p>The Arbitral Tribunal was reconstituted on April 23, 2020, comprising Prof. Hi-Taek Shin (Korean), President, Prof. Dr. August Reinisch</p>

	(Austrian), appointed by the Claimant following the passing away of Prof. Rudolf Dolzer; and Prof. Mónica Pinto (Argentine).
TVPEE	7% charge on the value of the electric power production introduced by Law 15/2021 of the Respondent

## 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**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “**ICSID Convention**”).
2. The Claimant 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 between January 2012 and June 2014 after the Claimant had made an investment in two concentrated solar power (“**CSP**”) plants in Spain in 2010.

## II. PROCEDURAL HISTORY

6. On May 21, 2021, the Tribunal issued its Decision on Jurisdiction, Liability, and Certain Issues of Quantum (the “**Decision**”). Prof. Mónica Pinto attached a Partial Dissenting Opinion, dated May 21, 2021 (“**Partial Dissent**”). The full text of the Decision, including the Partial Dissent, is hereby made an integral part of this Award. The abbreviations and the terms defined in the Decision continue to hold the same meaning in this Award as defined in the Decision.

7. In the Decision, the Tribunal decided:

*“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.”*

8. The Tribunal then directed the Parties to submit a new DoB calculation as of June 14, 2014 with a brief explanation as to how the outcome had been calculated without any further arguments on the assumptions or variables already determined by the Tribunal in para. 1349 of the Decision within two months from the date of the Decision.<sup>1</sup>

9. The Tribunal encouraged the valuation experts of both Parties to confer with each other in the process of the new calculation as directed by the Tribunal. The Tribunal further directed that, should there be any divergence in the respective outcome, each Party's submission of the outcome of such new calculation should include a brief explanation on such divergence.<sup>2</sup>

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<sup>1</sup> Decision, para. 1350.

<sup>2</sup> *Ibid.*, para. 1351.

10. The Tribunal decided that the cost should be in reserve.<sup>3</sup>
11. The Tribunal refers to section II of the Decision for the prior procedural history, and to section III of the Decision, for the factual background of the case.
12. On July 21, 2021, in compliance with the directions of the Tribunal, the Parties jointly submitted to the Tribunal: (i) the Joint Memorandum of Compass Lexecon and Quadrant Economics, dated July 20, 2021 (“**Joint Memorandum**”), and (ii) the Joint Financial Model (CLEX-201\_With adjustment from the Decision.xlsx) (“**Joint Financial Model**”).<sup>4</sup>
13. On August 4, 2021, the Tribunal invited the Parties to submit updated cost submissions by August 12, 2021.
14. On August 5, 2021, the Respondent requested an extension of the deadline for the filing of the updated cost submission until September 1, 2021. The Claimant filed no objection in such regard. The requested extension was granted by the Tribunal on the same date, noting that the Parties’ updated submissions on costs would be due on September 1, 2021.
15. On August 17, 2021, the Tribunal called the Parties’ attention to a discrepancy found by the Tribunal while reviewing the Joint Memorandum and Joint Financial Model, in the Spanish 10-year bond yield rate as at June 21, 2014, which is to be used as the pre-award interest rate. The Tribunal sought clarification from the Parties as to whether the 2.75% figure used by the Experts was the correct number.
16. On August 20, 2021, the Parties reverted on the Tribunal’s clarification request, and confirmed their agreement, and that of the Experts, that “the Tribunal [should] refer in its Award to the exact figure used in the Experts’ calculations, that is, 2.748%.”
17. On September 1, 2021, the Respondent requested a second extension of the deadline for the filing of its updated Statement of Costs, until September 9, 2021. The requested extension was granted by the Tribunal on the same date. The Tribunal noted that since it

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<sup>3</sup> *Ibid.*, para. 1352.

<sup>4</sup> The Claimant’s email of July 21, 2021, and the Respondent’s email of the same date, confirming its agreement to the Claimant’s email.

was going to be a simultaneous submission, the Claimant would enjoy the same extension of the deadline as the Respondent.

18. On September 9, 2021, the Parties submitted their respective submissions on updated costs.
19. On October 5, 2021, the Tribunal declared the proceedings closed pursuant to ICSID Arbitration Rule 38.

### III. THE PARTIES' NEW CALCULATION IN THE JOINT MEMORANDUM

#### A. THE OVERVIEW OF THE JOINT MEMORANDUM

20. The Joint Memorandum states that it was prepared by Drs. Jorge Padilla, Alejandro Requejo, and Antón García of Compass Lexecon (“**Compass Lexecon**”) and Dr. Daniel Flores of Quadrant Economics (“**Dr. Flores**” or “**QE**”) <sup>5</sup> (together referred to as the “**Experts**”). The Joint Memorandum states that the Experts collaborated in preparing the Joint Memorandum and were able to constructively identify the points of agreement and disagreement regarding their respective interpretation of the Tribunal’s instructions set in the Decision. <sup>6</sup>
21. According to the Joint Memorandum, the Experts reached an agreement on how to implement the following corrections to the Compass Lexecon’s Damages Model DoB (CLEX-201, the DCF method as employed by Compass Lexecon in conducting the DoB valuation in Annex H in its Second Expert Report) directed by the Tribunal in the Decision such as useful life, illiquidity discount, minority discount and inflation projection as determined in para. 1349 ii) (b), (c), (d) and (e) of the Decision.
22. The Experts are also in agreement on the pre-award interest rate to be used and the interest amounts due. <sup>7</sup>

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<sup>5</sup> The Joint Memorandum states that Dr. Flores was affiliated with Econ One Research through September 2018 and has been affiliated with Quadrant Economics since October 2018. Joint Memorandum, footnote 1.

<sup>6</sup> Joint Memorandum, para. 1.

<sup>7</sup> *Ibid.*, para. 4.

23. Following the direction of the Tribunal at paragraphs 1344 and 1349 v) of the Decision, the Experts inform the Tribunal that the Spanish 10-year bond yield rates were 2.7% as of 21 June 2014 and 0.6% as of 21 May 2021.<sup>8</sup> In response to the Tribunal’s request for clarification, the Parties confirm that while the pre-award interest rate was displayed with only one decimal in the footnote 2 of the Joint Memorandum, i.e., 2.7% following standard rounding convention, the exact figure is 2.748% and that this figure is used in the Excel file “CLEX-201\_With adjustments from the Decision” tab “Damage calculation” cell D29.<sup>9</sup>
24. However, the Joint Memorandum states that the Experts disagree on the implementation of the Decision regarding the following two items: (i) the impact of the 7% TVPEE (para. 1349 iii) of the Decision); and (ii) how to adjust the transaction value of the sold shares from the date of sale to the DoB (para. 1349 ii)(a) of the Decision).<sup>10</sup>
25. Reflecting the different interpretations of the Decision on the two points of disagreement between the Experts, the Joint Memorandum presents a matrix table (Figure 1 – Summary of the Experts’ Positions) showing four different figures which provide a range of damages at the Date of the Award (“DoA”) using May 21, 2021 as a proxy date. This Figure 1 is reproduced below.<sup>11</sup>

**Figure 1 – Summary of the Experts’ Positions**

	<b>Approach to Disagreement #1: 7% TVPEE</b>	<b>Approach to Disagreement #2: Transaction Price</b>	<b>Damages at the DoA (21/05/2021) (€ Millions)</b>
A	Compass Lexecon	Compass Lexecon	47.93
B	Compass Lexecon	Quadrant Economics	43.68
C	Quadrant Economics	Compass Lexecon	32.62
D	Quadrant Economics	Quadrant Economics	28.36

<sup>8</sup> *Ibid.*, footnote 2, referring to <https://www.investing.com/rates-bonds/spain-10-year-bond-yield-historical-data>.

<sup>9</sup> Mr. Alberto Fortun Costea’s email to the Tribunal, dated August 20, 2021, and the email of Ana Fernández-Daza dated as of the same date, confirming the Respondent’s agreement with the Claimant.

<sup>10</sup> Joint Memorandum, para. 5.

<sup>11</sup> *Ibid.*, para. 6.

## B. TWO OUTSTANDING ISSUES

### (1) The Impact of 7% TVPEE

26. Compass Lexecon points out that in its Decision the Tribunal noted the Respondent's position that the 7% levy measure was compensated in the Actual scenario from July 2013 onwards, but the Tribunal was silent on whether such a measure would have also been compensated in the But-for scenario.<sup>12</sup> Claiming that the Government of Spain declared that one of the policy goals of the current regulatory framework, as explained in RD-L 9/2013, was to allow renewable plants to compete in the market on equal terms with other technologies<sup>13</sup>, Compass Lexecon argues that a compensation of the 7% tax would have been reasonable on the grounds of putting renewable plants on equal level with conventional generators, given that, unlike conventional generators also subject to the 7% tax, renewable energy generators cannot pass through the levy by increasing their prices in the electricity market.<sup>14</sup>
27. Based on this rationale, Compass Lexecon states that it has considered that the 7% TVPEE is fully neutralized in the But-for scenario as it was in the Actual scenario.<sup>15</sup> Stating that the Tribunal may consider that there is uncertainty with regards to whether full compensation would have occurred in the But-for scenario, Compass Lexecon presents a model offering five options which would allow the Tribunal to choose the probability of the neutralization (from 100%, 75%, 50%, 25% and 0%) occurring in the But-for scenario.<sup>16</sup>
28. In contrast, Dr. Flores deducts the 7% TVPEE from January 2013 onward in the But-for scenario and does not include a hypothetical measure in the But-for scenario that would neutralize the effect of the 7% TVPEE, as claimed by Compass Lexecon.<sup>17</sup>

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<sup>12</sup> *Ibid.*, para. 9.

<sup>13</sup> *Ibid.*, para. 11.

<sup>14</sup> *Ibid.*, para. 10.

<sup>15</sup> *Ibid.*, para. 12.

<sup>16</sup> *Ibid.*, paras. 13-14, Figure 2.

<sup>17</sup> *Ibid.*, para. 27.

29. Dr. Flores submits that there is nothing in the Decision that indicates that in the But-for scenario there would be a hypothetical measure that would increase the remuneration of the plants neutralizing the 7% TVPEE effective July 2013. He adds that allowing renewable energy plants to compete in the market on equal terms with other technologies does not mean that each category element must have exactly the same effect on renewable plants as on conventional generators.<sup>18</sup>
30. The Tribunal recalls that in its Decision, having reviewed the Parties' submissions, the report of the Experts and the evidence on the record of these proceedings, the Tribunal has determined that the impact of the 7% TVPEE should be permanent in the But-for scenario and accordingly should be deducted from the calculation of the value in the But-for scenario beyond July 2013.<sup>19</sup>
31. As the Tribunal noted in para. 1173 of the Decision, the Claimant's damage framework is based on the proposition that the imposition of the 7% TVPEE constitutes a breach of Article 10(1) of the ECT and that the impact of the 7% TVPEE was phased out in July 2013. As further noted in para. 1175 of the Decision, at the instruction of the Claimant, Compass Lexecon conducted a sensitivity test to its DoB valuation on the assumption that the 7% TVPEE on revenues was not one of the Disputed Measures for the purpose of estimating damages. Under such assumption, Compass Lexecon's second report presented that the DoB value was EUR 62.4 million. Under the assumption that the 7% TVPEE was considered as one of the unlawful Disputed Measures, the DoB value was EUR 78.3 million.<sup>20</sup> In this sensitivity test, Compass Lexecon did not take into account any probability of neutralization of the impact of the 7% TVPEE in the But-for scenario as it now advances in the Joint Memorandum.
32. Compass Lexecon admits that the sensitivity calculation referred to above was based on an instruction from counsel to the Claimant which asked Compass Lexecon to calculate the impact of the 7% levy without consideration for the possibility of neutralization. Compass Lexecon argues that "*in the present case the Tribunal is instructing us to deduct the 7%*

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<sup>18</sup> *Ibid.*, para. 29.

<sup>19</sup> Decision, para. 1184.

<sup>20</sup> CER-CL2, paras. H.16 and H.17; Table 37.

*TVPEE in a context, where the Tribunal explicitly refers to the tax being neutralized in the Actual scenario”.*<sup>21</sup>

33. The Tribunal does not find this argument convincing. The Tribunal has determined that “*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.*”<sup>22</sup> The Tribunal considers that the hypothetical neutralization measure argument is contrary to the damage framework the Claimant has advanced in this proceeding.

34. Accordingly, the Tribunal agrees with Dr. Flores’ calculation that the 7% tax from January 2013 onward is deducted in the But-for scenario without including any hypothetical neutralization measure in the But-for scenario as claimed by Compass Lexecon.

## **(2) Adjustment of the Transaction Prices as of June 21, 2014**

35. Compass Lexecon argues that from an economic viewpoint, to obtain a consistent estimate of damages at the DoB, “*we must take into consideration the premium achieved by the Claimant as of the DoB, but not the increase in value between the DoB and the DoS [date of sale] due to the drop in interest rates.*”<sup>23</sup>

36. Based on this proposition, Compass Lexecon explains that its approach to adjust the Transaction Value for the sold shares (EUR 17.3 million) in the Actual scenario to the DoB consists of the following:

- a) “*Estimating the premium over the market value obtained by JGC at the DoS [date of sale], calculated as the difference between the transaction price and the value of the sold shares in the plants according to our DCF valuation.*”
- b) *Discounting this premium to the DoB to reflect the time value of money and;*
- c) *Adding to our DCF valuation of the sold shares at the DoB in the Actual scenario.*”<sup>24</sup>

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<sup>21</sup> Joint Memorandum, para. 16.

<sup>22</sup> Decision, para. 1184.

<sup>23</sup> Joint Memorandum, para. 21.

<sup>24</sup> Joint Memorandum, para. 22.

37. According to Compass Lexecon, the adjusted transaction price for the sold shares is EUR 12.8 million as of the DoB.<sup>25</sup>
38. In contrast, Dr. Flores’ adjustment considers the time value of money as measured by the cost of equity. Dr. Flores states that the Claimant received EUR 17.3 million for its 13% interest in the Solacor Plants on January 7, 2016 and that since damages are to be assessed as of June 21, 2014, he adjusted EUR 17.3 million as of January 7, 2016 using the Solacor Plant’s cost of equity and arrived at EUR 16.3 million as of June 21, 2014.<sup>26</sup>
39. In the Decision, *“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”*.<sup>27</sup>
40. The Tribunal considers that Compass Lexecon’s approach of conducting a hypothetical exercise that creates a hypothetical damages mitigation that is much lower than the damages mitigation that the Claimant actually achieved by the January 7, 2016 sale is not in line with the Tribunal’s direction. The Tribunal considers that Dr. Flores’ approach of adjusting the time value of what was actually received using the cost of equity is a correct implementation of the Tribunal’s direction.

### **(3) Conclusion: Amount of Damages as at DoB**

41. Applying the determination of the Tribunal as stated above on the two outstanding issues to the “Control Panel” submitted by the Experts together with the Joint Memorandum (CLEX-200\_ With adjustments from the Decision, “Damage Calculation” tab) results in total damages in the amount of EUR 23.51 million as at the DoB (EUR 11.59 million for Solacor 1 and EUR 11.92 million for Solacor 2). The pre-award interest rate at the rate of

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<sup>25</sup> *Ibid.*, para. 23.

<sup>26</sup> *Ibid.*, para. 31.

<sup>27</sup> Decision, para. 1203.



2.748% shall apply to EUR 23.51 million from June 21, 2014 until the date of the Award, compounded monthly.

**(4) Post-Award Interest**

42. In the Decision, the Tribunal deferred its decision on the post-award interest rate until after it has reviewed the specific figure of the pre-award interest rate as determined by the Tribunal and considered 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 10-year bond rate. In this regard, the Tribunal directed 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 the Decision as set forth in the Direction.<sup>28</sup>
43. As stated in para. 23 *supra*, the Parties jointly inform the Tribunal that the Spanish 10-year bond yield rates were 2.748% as of June 21, 2014 and 0.6% as of May 21, 2021.
44. In view of the substantial difference between the Spanish 10-year bond rates as of June 21, 2014 and May 21, 2021 and the declining trend of the rate since June 21, 2014 to date, the Tribunal considers that post-award interest rate of 1.6%, compounded monthly, would serve as a reasonable incentive for the Respondent to pay the Award in a timely manner and thus determines that this rate shall be the post-award interest rate. Accordingly, the Tribunal decides that the post-award interest rate of 1.6% shall apply to EUR 23.51 million from the date of the Award until the date of payment, compounded monthly.

**IV. DECISION ON COSTS**

45. As stated in the procedural history in the Decision (see paras. 84 to 86 of the Decision) and in this Award (see para. 18), the Parties submitted four submissions on cost, including observations on the other Party's submissions on cost and the Parties' respective replies thereon.

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<sup>28</sup> *Ibid.*, para. 1344.

**A. THE CLAIMANT’S POSITION**

46. In its most updated submission<sup>29</sup>, the Claimant states that costs incurred by the Claimant from the time this dispute under the ECT arose with the Respondent and in connection with the present arbitration proceedings are as follows:

DESCRIPTION	AMOUNT
Attorneys’ Fees (CUATRECASAS and NO&T)	EUR 3,006,572.50 JPY 50,075,890.00
Expert Witnesses’ Fees and Expenses	EUR 813,199.47
Expenses incurred by JGC’s Representatives	JPY 9,625,124.00 EUR 5,632.20
Expenses incurred by JGC and JGC’s Witnesses	JPY 1,041,855.00 EUR 8,347.63
Other Expenses	EUR 114,534.52 JPY 2,407,842.00
Advance payments to provide funds to the Tribunal and ICSID	USD 725,000.00
<b>TOTAL</b>	<b>EUR 3,948,286.32</b> <b>JPY 63,150,711</b> <b>USD 725,000.00</b>

47. Arguing that the important principle guiding the tribunals in exercising their discretion to decide on the cost allocation is the “*costs follow the event*” or “*loser pays*” rule, the Claimant submits that if the Respondent is found liable under the ECT, the Claimant is entitled to recover the reasonable costs incurred in this arbitration.<sup>30</sup>

<sup>29</sup> Claimant’s Updated Statement on Costs, September 1, 2021, para. 15.

<sup>30</sup> Cl. Cost - Jan.31, 2019, paras. 21-28.

48. The Claimant submits that this arbitration concerns the Respondent's series of breaches under Article 10(1) of the ECT and that as a result the Tribunal should order the Respondent to bear the Claimant's costs incurred to date in their entirety (as detailed in para. 46 *supra*), plus post-award interest, calculated at a rate equal to the cost of equity at the relevant valuation date (4.99% assessed as of September 30, 2017) plus an additional 2%, that is, an annual rate of 6.99%, compounded, until full payment thereof.<sup>31</sup>
49. The Claimant stated that it had no comments on the Respondent's Submission on Costs dated January 31, 2019.<sup>32</sup>
50. The Claimant does not agree with the Respondent's criticism that the Claimant's attorney's fees are excessive in terms of total hours spent and the rate charged by legal counsels and that certain expenses are unjustified and undue (see para. 60 *infra*).
51. Pointing out that this arbitration required up to seven full blown submissions on the Claimant's side<sup>33</sup> and a total of 24 items of sub-projects of work performed by the Claimant's legal team<sup>34</sup>, the Claimant maintains that the overall amounts of hours fall within a reasonable range. It also submits that the billing rates applied to those hours (average rates of 388 EUR/h for Cuatrecasas and 41,761 JYP/h for Nagashima Ohno and Tsunematsu) are equally reasonable.<sup>35</sup>
52. The Claimant explains that Nagashima Ohno and Tsunematsu, retained as counsel to JGC, has actively provided legal advice to the Claimant in strategic, substantive and procedural matters and assisted the Claimant and Cuatrecasas in preparing this arbitration.
53. In response to the Respondent's questioning of costs and fees incurred by JGC's representatives, Mr. Nobukazu Ishii and Mr. Akifumi Takita, the Claimant states that the amount of costs stemming from the internal work of Mr. Ishii (approximately EUR 14,400) and Mr. Takita (approximately EUR 10,100) are reasonable and related to the internal work

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<sup>31</sup> *Ibid.*, para. 15; para 47(iv) and (v).

<sup>32</sup> Cl. Cost - Feb. 22, 2019, email from Cuatrecasas, the Claimant's counsel, to ICSID Secretariat (received at 12:17 pm) on February 22, 2019.

<sup>33</sup> Cl. Cost – Mar. 1, 2019, para. 7, noting that 7 submissions had been filed up to that date.

<sup>34</sup> *Ibid.*, referring to Cl. Cost – Jan. 31, 2019, para. 7.

<sup>35</sup> *Ibid.*, paras. 12 and 16.

devoted to the in-house supervision and close management of the case and thus, directly related to the present arbitration proceedings. The Claimant points out that both Mr. Ishii and Mr. Takita attended, in their capacity of JGC representatives, the September 2018 Hearing in Paris.<sup>36</sup>

54. The Claimant further argues that the assessment of the reasonableness is not to be made against the Respondent's costs.<sup>37</sup>

#### **B. THE RESPONDENT'S POSITION**

55. In its most updated submission<sup>38</sup>, the Respondent states that costs incurred by the Respondent in connection with the present arbitration proceedings are as follows:

<b>Category</b>	<b>Amount</b>
ICSID fees and Advance Payments	616,163.02 EUR
Legal fees directly incurred by the Kingdom of Spain	920,000 EUR
Expert Submissions	639,814.60 EUR
Translations	34,605.98 EUR
Editing and Printing Services	17,737.19 EUR
Courier Services	3,911.22 EUR
Travelling Expenses	38,820.32 EUR
<b>TOTAL AMOUNT</b>	<b>2,271,052.33EUR</b>

<sup>36</sup> *Ibid.*, para. 22.

<sup>37</sup> *Ibid.*, para. 18.

<sup>38</sup> Respondent's Updated Submission on Costs, September 9, 2021, para. 4.

56. The Respondent submits that the Tribunal has a very broad discretion with respect to the allocation of costs, both in terms of the procedural costs and the costs incurred by the Parties. The Respondent further submits that the exercise of the Tribunal's discretion is entirely unfettered and that the ICSID Arbitration Rules do not explicitly favour a specific approach.<sup>39</sup>
57. The Respondent claims that in the event that it ultimately prevails in this arbitration, it is entitled to its costs on a full indemnity basis.<sup>40</sup> Specifically, the Respondent asks the Tribunal to order the Claimant to pay all the costs and expenses arising from this arbitration, including administrative expenses incurred by ICSID and the fees of the Arbitrators, as well as the fees of the legal representation of the Respondent, its experts and advisers, as well as any other costs or expenses it may have incurred. These costs and expenses must also bear a reasonable interest rate from the date these costs are incurred until the date of their actual payment.<sup>41</sup>
58. In the alternative, the Respondent argues, even if the Tribunal upholds the Claimant's claim, the Respondent should never be ordered to bear the Claimant's costs, since this case involved a number of challenging procedural and legal issues which the Respondent addressed with professional and effective advocacy.<sup>42</sup>
59. Referring to Article 28 of the ICSID Arbitration Rules, the Respondent submits that the costs submitted by the Parties to the Tribunal must be (i) reasonable and (ii) incurred or borne during the proceedings.<sup>43</sup> The Respondent argues that the costs submitted by the Claimant do not meet these two limits.
60. Specifically, the Respondent argues that the Claimant's legal fees are completely unjustified, excessive and abusive in terms of total hours and the rates charged by legal counsels, and thus should be considered as unreasonable.<sup>44</sup> The Respondent further alleges that the legal fees attributed to the work of Nagashima Ohno & Tsunematsu is in stark

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<sup>39</sup> Resp. Cost – Jan. 31, 2019, para. 21.

<sup>40</sup> *Ibid.*, para. 25.

<sup>41</sup> *Ibid.*, para. 10.

<sup>42</sup> *Ibid.*, para. 26.

<sup>43</sup> Resp. Cost - Feb. 22, 2019, paras. 4-5.

<sup>44</sup> *Ibid.*, paras. 6-13.

contrast and disproportionate to the actual and tangible work shown in this proceeding. In this regard, the Respondent requests that the Tribunal reduce the amount of legal fees to a reasonable amount that should never exceed one million euros, or in the alternative to order the Claimant to produce the documents substantiating the legal fees.<sup>45</sup>

61. In addition, pointing out that the Claimant has included costs and fees in the amount of JYP 9,131,812 and EUR 5,632.20, supposedly incurred by JGC's representatives, Mr. Nobukazu Ishii and Mr. Akifumi Takita, whom the Respondent has not heard in this proceeding, the Respondent argues that these costs are unjustified as they have no relationship with this proceeding. The Respondent adds that it is not reasonable to try to charge on the Respondent some internal work of more than 200 hours with no basis.<sup>46</sup>

### C. THE TRIBUNAL'S DECISION ON COSTS

62. Article 61(2) of the ICSID Convention provides that:

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

63. Rule 28 (2) of the ICSID Arbitration Rules provides that:

*“(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.”*

64. The Parties submit, and the Tribunal agrees, that these provisions allow the Tribunal discretion to allocate all costs of the arbitration (including the legal counsels' fees and other costs incurred by the Parties in connection with this arbitration) between the Parties as it deems appropriate.

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<sup>45</sup> *Ibid.*, para. 13.

<sup>46</sup> *Ibid.*, paras. 14-18.

65. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID administrative fees and direct expenses, amount to USD 1,334,948.32, itemized as follows:

Arbitrators' fees and expenses	
Hi-Taek Shin	USD 423,970.31
August Reinisch	USD 87,000.00
Mónica Pinto	USD 216,942.24
Rudolf Dolzer	USD 162,467.93
ICSID's administrative fees	USD 232,000.00
Direct expenses (estimated)	USD 212,567.84
<b>Total</b>	<b>USD 1,334,948.32</b>

The above costs have been paid out of the advances made by the Parties in equal portions.

66. In exercising the discretion, the Tribunal considers that the allocation of costs should be made in consideration of the relative success of each Party's claims and defences, including the Respondent's jurisdictional objections and the Claimant's claims, under the specific circumstances of the case and the overall conduct of the Parties in the proceedings.
67. In these proceedings, the Respondent submitted two jurisdictional objections. The Tribunal accepted one of them relating to the 7% TVPEE. The Respondent withdrew the EU law Jurisdictional Objection, the other jurisdictional objection, more than one year after the Parties had made full submissions and arguments at the Hearing.<sup>47</sup> The Claimant prevailed on liability by substantiating the Respondent's breach of its obligations under Article 10(1) of the ECT and proved that it had suffered harm caused by the Respondent's breach. However, the Tribunal did not accept all the elements and underlying assumptions of the Claimant's claims and directed certain corrections to the elements and assumptions used by the Claimant's expert in estimating damages as set forth in the Decision. While the Claimant seeks compensation in the amount of EUR 105.2 million (amount calculated as of September 30, 2017, see para. 378 of the Decision), the Tribunal awarded the Claimant EUR 23.51 million as at DoB (according to the Joint Memorandum, including the pre-award interest, the damages as at May 21, 2021 amount to EUR 28.36 million).

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<sup>47</sup> Decision, para. 99.

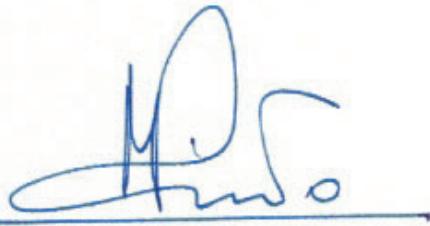
68. Having reviewed the Parties' respective arguments and submissions on cost, the Tribunal considers that the costs incurred by each Party were reasonable, given the complexity of the issues involved, the number of submissions and applications filed by each of the Parties, including those filed subsequent to the Post-Hearing Brief on new arbitral precedents, as well as the duration of the proceedings.
69. The Tribunal does not find persuasive the Respondent's argument questioning the legal fees of Nagashima Ohno & Tsunematsu. The Tribunal does not accept either the Respondent's argument that the costs related to Mr. Nobukazu Ishii and Mr. Akifumi Takita were unjustified as they had no relationship with this proceeding. As pointed out by the Claimant, the record of this arbitration shows that Messrs. Ishii and Takita attended the Hearing in September 2018 in Paris.
70. Taking into account the circumstances of the present case, the Parties' conduct in the proceedings and the extent to which the Claimant has prevailed in their claim, the Tribunal determines that the Respondent shall bear 75% and the Claimant shall bear 25% of the costs of arbitration set forth in para. 65 above. Accordingly, the Respondent shall pay the Claimant USD 333,737.08.
71. The Tribunal has further determined that (i) the Respondent shall bear its own legal costs and expenses, and (ii) the Respondent shall pay 40% of the Claimant's legal costs and related expenses (that is EUR 1,579,314.53; JPY 25,260,284.4; and USD 290,000.00 out of EUR 3,948,286.32; JPY 63,150,711; and USD 725,000.00).
72. The Respondent shall pay interest at the rate of 1.6%, compounded monthly, on the amounts it owes to the Claimant under paras. 70 and 71 from the date of the Award until the date of payment.

## **V. AWARD**

73. Incorporating the Decision of May 21, 2021 into this Award, and for the reasons set forth above and in that Decision, the Tribunal decides as follows:



- i) The Respondent's jurisdictional objection on questions concerning the 7% TVPEE measures is upheld. Except for the questions concerning the 7% TVPEE measures, the Tribunal has jurisdiction to determine the Claimant's claims.
- ii) In compensation for the damages caused by the Respondent's breach of its obligations under the Article 10(1) of the ECT, the Respondent shall pay the Claimant EUR 23.51 million with pre-award interest on that amount at the rate of 2.748%, compounded monthly, from June 21, 2014 until the date of this Award.
- iii) The Respondent shall pay the Claimant USD 333,737.08 (25% of the total cost of arbitration).
- iv) The Respondent shall pay the Claimant EUR 1,579,314.53; JPY 25,260,284.4; and USD 290,000.00 (40% of the Claimant's legal costs and related disbursements).
- v) The Respondent shall pay interest at the rate of 1.6%, compounded monthly, on the amount it owes to the Claimant as at the date of the Award under ii), iii) and iv) above from the date of the Award until the date of payment.
- vi) Except as set forth above, all other claims of the Claimant are denied.



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Professor Mónica Pinto  
Arbitrator

Date: November 1, 2021

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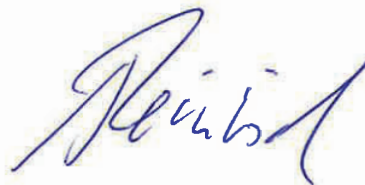
Professor Dr. August Reinisch  
Arbitrator

Date:

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Professor Hi-Taek Shin  
President of the Tribunal

Date:



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Professor Mónica Pinto  
Arbitrator

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Professor Dr. August Reinisch  
Arbitrator

Date:

Date: November 3, 2021

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Professor Hi-Taek Shin  
President of the Tribunal

Date:

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Professor Mónica Pinto  
Arbitrator

Date:

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Professor Dr. August Reinisch  
Arbitrator

Date:



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Professor Hi-Taek Shin  
President of the Tribunal

Date: November 5, 2021