

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

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

Claimants

and

Kingdom of Spain

Respondent

ICSID Case No. ARB/13/30

AWARD

Members of the Tribunal

Professor Alain Pellet, President

Professor Pedro Nikken

Professor Robert Volterra

Secretary of the Tribunal

Mr. Gonzalo Flores

Date of dispatch to the parties: 11 December 2019

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings [2006]
C-[#]	Claimants' Exhibit
CM	Claimants' Memorial on the Merits dated 21 November 2014
CNE	National Energy Commission
CPHB	Claimants' Post Hearing Brief dated 5 May 2017
CPI	Consumer Price Index
CR	Claimants' Reply on the Merits dated 22 December 2016
CRR	Claimants' Response to Respondent's Submission on Tribunal's Information Request dated 26 March 2018
CS	Claimants' Submission on Tribunal Request dated 5 March 2018
CSP	Concentrated Solar Power
CL-[#]	Claimants' Legal Authority
ECT	Energy Charter Treaty
DCF	Discounted Cash Flow
Decision on Jurisdiction	The Tribunal's Decision on Jurisdiction of 6 June 2016
FIT	Feed in Tariffs
Hearing	Hearing on the Merits held on 20-24 March 2017

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceeding
IDEA	<i>Instituto para la Diversificación y Ahorro de la Energía</i>
IRR	Internal Rate of Return
MOA	Margin of Appreciation
MITYC	Ministry of Industry, Tourism and Commerce
PEIF	RREEF Pan-European Infrastructure Fund L.P.
PER	Renewable Energy Plan
PFER	Renewable Energy Promotion Plan
R-[#]	Respondent's Exhibit
RAIPRE	<i>Registro Administrativo de Instalaciones de Producción de Energía Eléctrica [en régimen especial]</i>
REEF Infra	RREEF Infrastructure (G.P.)
RREEF Pan-European Two	RREEF Pan-European Infrastructure Two Lux S.à r.l.
RCM	Respondent's Counter-Memorial on the Merits dated 15 July 2016
RE	Spain's Renewable Energy power generation sector

RPHB	Respondent's Post Hearing Brief dated 5 May 2017
RR	Respondent's Rejoinder on the Merits dated 3 February 2017
RRR	Respondent's Response to Tribunal Request for Additional Information dated 5 March 2018
RRS	Respondent's Reply to Claimants' Submission to Tribunal's Request for Additional Information dated 26 March 2018
RL-[#]	Respondent's Legal Authority
SES / SEE	Spanish Electricity Sector
TVPEE	Tax on the Value of the Production of Electric Energy
Treaty	Energy Charter Treaty
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 31 July 2014
VCLT	Vienna Convention on the Law of Treaties
WACC	Weighted Average Cost of Capital
YBILC	Yearbook of the International Law Commission

LIST OF CASES

<i>AAPL v. Sri Lanka</i>	<i>Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/87/3, Award, 27 June 1990 (CL-165)
<i>Abengoa v. Mexico</i>	<i>Abengoa, S.A. y COFIDES, S.A. v. United Mexican States</i> , ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 (RL-104)
<i>Antin v. Spain</i>	<i>Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain</i> , ICSID Case No. ARB/13/31, Award, 15 June 2018 (CL-245)
<i>Chevron v. Ecuador</i>	<i>Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador</i> , UNCITRAL, PCA Case No. 34877, Final Award, 31 August 2011
<i>Eiser v. Spain</i>	<i>Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain</i> , ICSID Case No. ARB/13/36, Award, 4 May 2017 (CL-242)
<i>Foresight v. Spain</i>	<i>Foresight Luxembourg Solar I S.À.R.L., et al. v. Kingdom of Spain</i> , SCC Case No. 2015/150, Final Award, 14 November 2018
<i>Gold Reserve v. Venezuela</i>	<i>Gold Reserve Inc. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (CL-222)
<i>Maffezini v. Spain</i>	<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Award, 13 November 2000 (CL-23)
<i>Metalclad v. Mexico</i>	<i>Metalclad Corporation v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (CL-36)
<i>Micula v. Romania</i>	<i>Ioan Micula, Viorel Micula and others v. Romania</i> , ICSID Case No. ARB/05/20, Award, 11 December 2013 (RL-100)
<i>Middle East Cement v. Egypt</i>	<i>Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/99/6,

	Award, 12 April 2002 (CL-37)
<i>Mobil v. Venezuela</i>	<i>Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/07/27, Award, 9 October 2014 (RL-84)
<i>Mondev v. USA</i>	<i>Mondev International Ltd. v. United States of America</i> , ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002
<i>Murphy v. Ecuador</i>	<i>Murphy Exploration & Production Company International v. Republic of Ecuador</i> , PCA Case No. 2012-16, Final Award, 10 February 2017
<i>National Grid v. Argentina</i>	<i>National Grid P.L.C. v. Argentine Republic</i> , UNCITRAL, Award, 3 November 2008 (CL-40)
<i>Pezold v. Zimbabwe</i>	<i>Bernhard von Pezold and others v. Republic of Zimbabwe</i> , ICSID Case No. ARB/10/15, Award, 28 July 2015 (CL-218)
<i>Rusoro v. Venezuela</i>	<i>Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (RL-102)
<i>Santa Elena v. Costa Rica</i>	<i>Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/96/1, Award, 17 February 2000 (CL-17)
<i>SGS v. Paraguay</i>	<i>SGS Société Générale de Surveillance S.A. v. Republic of Paraguay</i> , ICSID Case No. ARB/07/29, Award, 10 February 2012 (CL-53)
<i>SPP v. Egypt</i>	<i>Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/84/3, Award, 20 May 1992
<i>TecMed v. Mexico</i>	<i>Técnicas Medioambientales Tecmed S.A. v. United Mexican States</i> , ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (CL-55)

<i>Teinver v. Argentina</i>	<i>Teinver S.A. and others v. Argentine Republic</i> , ICSID Case No. ARB/09/01, Award, 21 July 2017
<i>Vestey v. Venezuela</i>	<i>Vestey Group Ltd v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/06/4, Award, 15 April 2016 (RL-98)
<i>Wena Hotels v. Egypt</i>	<i>Wena Hotels Ltd. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002

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I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Energy Charter Treaty which entered into force on 16 April 1998 (the “ECT” or “Treaty”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, which entered into force on 14 October 1966 (the “ICSID Convention”).
2. The Claimants are RREEF Infrastructure (G.P.) Limited (“RREEF Infra” or the “First Claimant”) and RREEF Pan-European Infrastructure Two Lux S.à r.l. (“RREEF Pan-European Two” or the “Second Claimant”), jointly referred as “the Claimants” or “RREEF.”
3. RREEF Infra is a private limited liability company incorporated in 2005 under the laws of Jersey. RREEF Pan-European Two is a private limited liability company (*Société à responsabilité limitée*) incorporated in 2006 under the laws of Luxembourg.
4. As set forth under the Tribunal’s Decision on Jurisdiction, RREEF specialises in infrastructure investments, with experience across different sectors, including the power generation sector. RREEF is a member of the Deutsche Bank Group, and in 2013, RREEF was re-branded and now operates together with Deutsche Bank’s asset and wealth management divisions, under the unified name Deutsche Asset & Wealth Management.
5. The First Claimant is the general partner of RREEF Pan-European Infrastructure Fund L.P. (“PEIF”). PEIF holds 100% of the share capital in RREEF Pan-European Infrastructure Lux S.à r.l. (“RREEF Pan-European”) and an indirect 100% equity stake, through RREEF Pan-European, in the Second Claimant.
6. The Respondent is the Kingdom of Spain (“Spain” or “the Respondent”).
7. The Claimants and the Respondent are collectively referred to as the “Parties”. The Parties’ representatives and their addresses are listed above on page (i).

8. This dispute relates to renewable energy generation installations in Spain.
9. The Tribunal refers to chapter IV of its Decision on Responsibility and on the Principles of Quantum dated 30 November 2018 for the description of the main facts relating to the merits of the dispute.

II. PROCEDURAL HISTORY

10. On 30 November 2018, the Tribunal issued a Decision on Responsibility and on the Principles of Quantum, with a Partially Dissenting Opinion from Prof. Volterra (together “the Decision”). The Tribunal refers to chapter III of this Decision for the previous procedural history.
11. On that same date the Secretariat, in accordance with Section 23 of Procedural Order No.1, invited the Parties to consent to the publication of the Decision on the ICSID’s website.
12. On 17 January 2019, the Tribunal issued Procedural Order No. 11 on Confidentiality. The Tribunal ordered the Parties to keep the Decision on Responsibility and on the Principles of Quantum and the attached Partial Dissenting Opinion of Prof. Robert Volterra confidential, until they reach an agreement on the pending matters of *quantum* set out in paragraph 600(5) of the Decision or have informed the Tribunal that they have been unable to do so.
13. On 7 March 2019, pursuant to paragraph 596 of the Tribunal’s Decision on Responsibility and on the Principles of Quantum of 30 November 2018, the Tribunal received the Parties’ Experts’ Joint Models quantifying the damages due to the Claimants.
14. By communication of 12 March 2019, the Claimants asked the Tribunal to provide an indication of the next steps it intends to take (including the Parties’ submissions on costs), and their likely timeline.
15. By communication of 12 March 2019, the Claimants argued that the Respondent was responsible for leaking the Decision and requested the Tribunal to review Procedural Order No. 11.

16. By communication of 12 March 2019, the Respondent objected to the Claimants' allegations, accepted the disclosure of the Dissenting Opinion and requested the Tribunal to disregard the Claimants' comments regarding the Respondent's breach of the Confidentiality Order.
17. On 1 April 2019, the Tribunal issued Procedural Order No. 12 on Termination of Confidentiality. The Tribunal found that the confidentiality it had ordered was no longer necessary and decided that there is no objection to the publication of its Decision on Responsibility and on the Principles of Quantum and the attached Partial Dissenting Opinion of Professor Robert Volterra.
18. On 16 August 2018, the Parties filed simultaneous updated submissions on costs.

III. DAMAGES

A. CALCULATION OF DAMAGES

The Parties' Positions

19. The Parties' Experts agree on a number of points:
 - each of the CSP projects fail to obtain the Tribunal's target 6.86% after-tax lifetime project return under the New Regulatory Regime;¹
 - the incremental cash flow² that is necessary for each of the CSP plants to obtain the Tribunal's target 6.86% after-tax lifetime project return;³
 - the damages analysis must translate the series of incremental cash flows into present value figures;⁴
 - using a discounted cash flow ("DCF") model and adopting a "Valuation Date" of 30 June

¹ Brattle-BDO Joint Memorandum, 6 March 2019, para. 4.

² *Ibid.* "The annual incremental cash flow is the additional amount of cash flow needed in each year after 2013 for each of the CSP projects to achieve the target 6.86% lifetime return."

³ *Ibid.*

⁴ *Ibid.*, para. 15.

2014, matching their respective expert reports and financial models;⁵

- projecting cash flows based on the expectations as of the Valuation Date, and discounting the projected cash flows to the Valuation Date using a discount rate based on market conditions as of the Valuation Date;⁶
- Using the same DCF model for the CSP projects to estimate damages for Legitimate Expectations (CSP) and the same DCF model for the wind projects to estimate damages for Retroactivity (Wind).⁷

20. The Tribunal considers that, even though it is not bound by the experts' conclusions, there is no reason to deviate from their common positions.

21. On the other hand, the Parties disagree on several points regarding the calculation of damages for CSP Plants and the wind plants.

(a) CSP

1. Applicable Discount Rate

a. The Positions of the Parties' Experts

i. The Position of the Claimants' Experts

22. The Claimants' Experts continue to apply the same discount rate than the one they proposed in the earlier phases of the proceedings.⁸ They consider that the Tribunal only calculated a WACC for the purpose of calculating the reasonable return. According to them, the Tribunal did not in fact reach any conclusion on the appropriate discount rate in its Decision on Responsibility and on the Principles of Quantum.⁹

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Brattle-BDO Joint Memorandum, 6 March 2019, para. 19.

⁹ *Ibid.*, para. 20.

23. The views of the Claimants' Experts are that their discounting assumptions are appropriate for the APV model because the APV requires a discount rate that accounts for the presence of debt financing in the way that the Claimants' Experts are proposing.¹⁰

ii. The Position of the Respondent's Experts

24. The Respondent's Experts are calculating the discount rate using the same methodology than the one the Tribunal used to calculate the reasonable return. They adjust this calculation by taking into consideration the valuation date agreed by the experts, June 2014, and by excluding the interest tax shield. They also agree with Claimants' experts on that last point.¹¹
25. The Respondent's Experts do not discuss whether the methodology used by the Tribunal for the purpose of calculating the reasonable return would be appropriate for the APV model.

b. *The Tribunal's Analysis*

26. The Tribunal has calculated a WACC for the purpose of determining what is the reasonable return for a project, taking "into consideration the financial structure of the whole project."¹² In their Joint Report, the Parties' Experts are calculating a WACC but for a different purpose: to calculate the damages with the APV method.¹³ Both Brattle¹⁴ and BDO¹⁵, without questioning the WACC calculated by the Tribunal, agree that for the purpose of calculating damages, the WACC should be calculated differently. To that end, they agree to base themselves on two different parameters: the valuation date¹⁶ and the withdrawal of the interest tax shield¹⁷. There is no reason to oppose their common views, which do not contradict those of the Tribunal since these parameters are used for another purpose.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 21.

¹² Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 577.

¹³ Both experts accept this method. Brattle-BDO Joint Memorandum, 6 March 2019, para. 15.

¹⁴ *Ibid.*, para. 20.

¹⁵ *Ibid.*, para. 21.

¹⁶ *Ibid.*, para. 15.

¹⁷ *Ibid.*, paras. 20 and 21.

27. However, the experts disagree on the methodology to calculate the WACC within the APV method. But it is to be noted that, while Brattle does propose a complete alternative WACC to that end, BDO, which agrees that the WACC calculated by the Tribunal for determining the reasonable return does not fit the APV method, nevertheless uses “the Tribunal’s valuation methodology and parameters, such as the beta, the financial leverage, cost of debt, income tax rate, etc”¹⁸. As Brattle rightly states: “The Tribunal did not propose its WACC for the discount rate.”¹⁹ Therefore, there is no objection to adopt a different methodology to calculate the WACC for evaluating the damages and, in this regard, the Tribunal is of the view that the WACC calculated by Brattle is more appropriate:

- The Tribunal notes that BDO only calculates its WACC with parameters used by the Tribunal in its Decision, while acknowledging that the Tribunal’s WACC was calculated for another purpose, without demonstrating why these parameters would also be relevant for the calculation of damages;
- In particular, the method used by the Tribunal to calculate the reasonable return does not appropriately take into account the financing of the debt in a way which should, in all fairness, be taken into account when evaluating the damages;
- As both Experts agree, it is also necessary to take into account (and deduct) the interest tax shield, which would not have been appropriate for calculating the return;
- As explained by Brattle, the use of BDO’s WACC results in the appearance of a present value gain at Arenales under the New Regulatory Regime, while both experts “agree that each of the CSP projects fail to obtain the Tribunal’s target 6.86% after-tax lifetime project return under the New Regulatory Regime.”²⁰
- When applying the APV method, it is apposite to take June 2014 as the critical date for these calculations as both Experts agree.

¹⁸ *Ibid.*, para. 23.

¹⁹ *Ibid.*, para. 20.

²⁰ *Ibid.*, para. 4.

2. *Application of the Illiquidity Discount*

a. *The Positions of the Parties' Experts*

28. The Parties' Experts agree on the magnitude and application of the liquidity discount in the Actual scenario. Both Experts apply a liquidity discount of 18% when valuing RREEF's interests under the New Regulatory Regime. However, the Experts disagree on the application of the liquidity discount in the scenario reflecting the Tribunal's target return of 6.86%.²¹

i. The Position of the Claimants' Experts

29. The Claimants' Experts do not apply a liquidity discount in a scenario assuming the Tribunal's target return of 6.86%.²² They consider that as the Tribunal calculated the target by using the WACC, it necessarily assumed the underlying investment interests were liquid.²³ In other words, the Claimants' position is that: "if one defines the reasonable return in a way that excludes an illiquidity premium, but then applies an illiquidity discount when calculating present values, the result will be the same as if one failed to compensate investors for the lack of liquidity."²⁴

ii. The Position of the Respondent's Experts

30. The Respondent's Experts do not see any reason why the liquidity discount should not be applied in the But-For scenario. On the contrary, they consider that the discount should be applied in both scenarios in order to compare the fair market value of the two plants. In their opinion, the Tribunal only calculated the project IRR and did not take into account any equity related factors in its calculation.²⁵

²¹ *Ibid.*, para. 24.

²² *Ibid.*, para. 25.

²³ *Ibid.*, para. 26.

²⁴ *Ibid.*

²⁵ *Ibid.*, para. 30.

b. *The Tribunal's Analysis*

31. When calculating the damages suffered by the Claimants, both Experts agree “that the damages should be quantified as the difference of the fair market value of the plants in 2 different scenarios (the Actual and the But-for scenario).”²⁶ In their respective first Reports both Brattle and BDO referred to the RD 661/2007 regime and applied an illiquidity discount in both scenarios.²⁷ However, the Experts differed as to whether it was correct to apply an illiquidity discount in the context of the quantum calculation based on the 6.86% prescribed reasonable rate of return that was directed to be achieved in the Tribunal’s Decision.
32. The But-for scenario to be retained at this stage is a scenario according to which the Claimants would have obtained a reasonable return, as defined by the Tribunal in its Decision. The opposition between the experts in this respect comes from the fact that the Claimants’ Experts consider that, since the reasonable return has been defined by the Tribunal without applying an illiquidity discount, such a discount should not be applied when calculating the fair market value of the Claimants’ investment in the But-for scenario while it would still apply in the Actual scenario. The Respondent’s Experts’ opinion on this point references a discounted cash flow valuation to net present value calculation.
33. The Tribunal stresses that calculating a damage is a different exercise than calculating a reasonable return. The Tribunal made a calculation for the purpose of calculating a reasonable return for a project, not for the purpose of calculating a fair market value, which was the Experts’ task.
34. The method of calculating damages is different. It consists in calculating first the value of the investment in the “but for” scenario without taking into account the breach of the treaty and then, in a second step, the value of the investment in the Actual scenario (taking into account the violations). The damage corresponds to subtracting this amount from the previous one. To calculate the value of the investment, it is normal to add an “illiquidity

²⁶ *Ibid.*

²⁷ Brattle Quantum Report, 21 November 2014, para. 182; Brattle Rebuttal Quantum Report, 22 December 2016, para. 175; BDO First Report, 14 July 2016, Annex VII.

discount” which adjusts the value of the company on the grounds that it is not, or only slightly, liquid (because it cannot be easily sold). But the illiquidity discount should only be added to calculate the fair market value, i.e. the estimated sale value of an asset. There is no reason to add one to calculate the internal rate of return of a project. Such an addition in only one of two scenarios totally distorts the comparison with the current scenario, keeping in mind that, in the present case, there is no expropriation or damages against the investment itself.

35. When defining the methodology to calculate the reasonable return, the Tribunal explained:

“There can be no doubt that the ECT protects shareholder interests. As such, it ensures to them the right to a fair and equitable treatment, including the respect of their legitimate expectations. As the Tribunal already explained, the only legitimate expectations the Claimants had in this case was to obtain the reasonable return that the Respondent was committed to. It is therefore necessary to look precisely at the Respondent’s commitment. Both the Claimants and the Respondent agree that the reasonable return targeted by the Spanish law is a project IRR. The Tribunal see no reason to decide otherwise.”²⁸

36. An illiquidity discount represents the lack of liquidity of an asset. The issue of the liquidity of an asset only arises when calculating the fair market value of an investment, from the investors’ point of view (the market). Therefore, as in the present case the Tribunal has considered that a reasonable return had to be calculated for a project, there was logically no basis for applying an illiquidity discount in the calculation of the reasonable return to the projects guaranteed by the Respondent. In the view of the Tribunal, there is no reason why the reasonable return calculation would “compensate” for a lack of liquidity.

37. On the contrary, it is necessary to add this discount when calculating the fair market value in both scenarios as the Experts have done in all their previous calculations²⁹ and as BDO,³⁰

²⁸ Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 545.

²⁹ Brattle-BDO Joint Memorandum, 6 March 2019, para. 30.

³⁰ *Ibid.*, paras. 30-31.

contrary to Brattle,³¹ does in respect to the liquidity discount. Applying this discount only in one scenario completely biases the comparison of the two scenarios.

3. *Offset Damages at the Andasol Plants with a Possible Gain at Arenales*

a. *The Positions of the Parties' Experts*

i. The Position of the Claimants' Experts

38. The Claimants' Experts point out that the Respondent's Experts' use of a lower discount rate artificially exaggerates the supposed difference between effects on different assets of the Claimants, under the principles enunciated by the Tribunal in the Decision. They point out that whether or not to include negative damages into a quantum calculation is a legal question and not an economic one.³²

ii. The Position of the Respondent's Experts

39. The Respondent's experts point out that as a consequence of the preferred share scheme in force, RREEF had the ability to collect cash distributions from Arenales prior to other shareholders. Taking into account that the damages are calculated as the sum of the impact on the three plants, they consider that all the elements, together those that increase the damages and those that reduce them, including the effect of the said preferred share scheme, should be taken into account in the damages' calculation.

³¹ *Ibid.*, paras. 25-29.

³² *Ibid.*, para. 33.

b. *The Tribunal's Analysis*

40. The Tribunal notes that, when applying the discount rate proposed by Brattle as the Tribunal deems appropriate,³³ it appears that Arenales did not earn money, and therefore the question of the deduction of its gain from the losses suffered by the Claimants with Andasol does not arise.

(b) Wind Plants

1. Applicable Discount Rate

41. The Tribunal sees no reason to depart from the line of argument followed in respect to the applicable discount rate (under III.A.(a) 1. above). The same discount rate should be applied for both the CSP and the wind plants.

2. Inflation Indexing

a. *The Positions of the Parties' Experts*

42. While the Parties' Experts agree that retroactivity damages should not reflect a change in the calculation of the return and that the relevant analysis should only attempt to eliminate the clawback of historical profits under the New Regulatory Regime, they disagree about precisely how to eliminate the claw-back of historical profits under the New Regulatory Regime.³⁴

i. *The Position of the Claimants' Experts*

43. The Claimants' Experts note that the remuneration that the Claimants received under the previous regime was indexed on the inflation, contrary to the remuneration under the New Regime that is not indexed on inflation. They consider that given the same target rate of return, the choice to index for inflation affects the anticipated profile of payments over time

³³ See para. 27 *supra*.

³⁴ Brattle-BDO Joint Memorandum, 6 March 2019, para. 4.

and the implicit profile of capital repayment. According to them, the “treatment of inflation” is an inherent part of the retroactivity identified by the Tribunal as a breach.³⁵

ii. The Position of the Respondent’s Experts

44. The Respondent’s experts refer to the Tribunal’s Decision³⁶ and note that the Tribunal did not indicate that any inflation matters had to be corrected and they consider that, as the reasonable return of 7.398% is a nominal rate of return, it already takes inflation into account.³⁷

b. *The Tribunal’s Analysis*

45. As a reminder: the Tribunal found in its Decision that the New Regime is retroactive because:

- It grants the investors a 7.398% return per year;
- The Claimants received more in the early years (before 2014) as they were under the old regime;
- As a result, Spain considered that the Claimants will have less than 7.398% in the future (after 2014) in order to compensate for the surplus that they had under the old regime.

46. In order to calculate the damages suffered by the Claimants, it is therefore necessary, as proposed by the Claimants’ Experts, to attribute to them the difference between:

- what they earned under the old regime and;
- the 7.398% target.

³⁵ *Ibid.*, paras. 5-7.

³⁶ *Ibid.*, para. 9, citing Decision on Responsibility and on the Principles of Quantum, para. 482.

³⁷ *Ibid.*, paras. 10-11.

B. THE REQUESTED TAX-GROSS UP

a. The Parties' Positions

i. The Claimants' Position

47. To achieve full reparation, the Claimants request that the Tribunal also order compensation including a tax gross-up of 29.22%, corresponding to the Luxembourg corporate tax rate applicable to any amounts received by the Claimants under the award.³⁸ Brattle estimated a tax gross-up of EUR 115 million.³⁹
48. The Claimants argue that Article 21 of the ECT is no obstacle for the Tribunal to award the tax gross-up. Contrary to Respondent's assertion, Article 21 of the ECT is concerned with whether or not the Tribunal has jurisdiction over a dispute where a State measure can be characterized as taxation, which is a question unrelated to the application of a tax gross-up on damages under the Award.⁴⁰
49. Also, the tax gross-up is not speculative. Contrary to the Respondent's assertion, it does not fall under the EU's participation exemption of profit distribution between subsidiaries within the EU. Moreover, the Claimants have computed a specific tax gross-up claim for a specific country, Luxembourg; unlike the claimants in *Mobil v. Venezuela* - the case referenced by the Respondent - whose claims were found to lack specificity when they contended that there was a risk that other jurisdictions seek to impose taxes.⁴¹
50. The Claimants then suggest three ways in which the Tribunal could address the issue of the tax gross-up. The Claimants suggest placing the full amount of the gross-up in escrow, pending the final determination by a tax authority; or the appropriate entity could provide a

³⁸ CM, para. 583.

³⁹ Brattle Rebuttal Quantum Report, 22 December 2016, para. 41.

⁴⁰ CR, paras. 768 and 769.

⁴¹ CR, paras. 770-774.

written undertaking that any amount not paid to the tax office would be returned to Spain; or order the Respondent to hold the Claimants harmless from any tax due.⁴²

ii. The Respondent's Position

51. Regarding the tax gross-up, the Respondent argues that it is excluded under Article 21 of the ECT, which establishes a tax gross-up carve out, by providing that nothing in the ECT shall create rights or impose obligations about taxation measures of the Contracting Parties. The Contracting Parties, according to the Respondent, should be understood here as either the home or the host country of the investor, which follows from the distinction made in Article 15 of the ECT. Luxembourg is an ECT Contracting Party and has not consented to subject tax-related matters to arbitration upon signing the ECT. The Tribunal would lack jurisdiction to assess the tax gross-up, being a tax measure. Also, Article 21 states that in case of inconsistency, it prevails over other provisions of the ECT, including Articles 10 and 13 or Article 26. Also, consistent with Article 2 of the Draft Articles on Responsibility of States of the ILC and its Comment (1), pursuant to which the conduct or act must be attributable to the State under international law, no tax measure of Luxembourg could create an obligation for Spain based on the ECT. With support in *Rusoro v. Venezuela*, the Respondent argues that tax obligations derived from tax laws different from those of the host country do not qualify as consequential loss and the host country cannot be liable for them.⁴³
52. Alternatively, no tax on the amount awarded would arise in Luxembourg. First, compensation for income that was not received falls under the EU's participation exemption, which provides for the exemption of profit distributions between parent companies and subsidiaries of different EU Member States.⁴⁴
53. Alternatively, if the Tribunal does not find that Article 21 has a tax gross-up carve out and that no tax exemption applied, the Respondent argues that applying the tax gross-up is inappropriate, since it is speculative and uncertain. The Claimants have failed to supply legal

⁴² CR, para. 775.

⁴³ RCM, paras. 1064-1067 and RR, paras. 1147-1161.

⁴⁴ RCM, para. 1068 and RR, para. 1162.

basis with regard to Luxembourg's hypothetical taxation and Claimants themselves say in their Reply that it is not possible to know with certainty the decision of the Luxembourg tax authority. With support on *Mobil v. Venezuela*, the Claimants argue that regarding foreign taxation, a tax gross-up claim is speculative and uncertain. Similarly, the Respondent argues that the tribunal in *Abengoa v. Mexico* found that the claimants had fail to provide any evidence of possible double taxation and the tribunal could not speculate on the tax treatment.⁴⁵

b. *The Tribunal's Analysis*

54. The Tribunal agrees with the Claimants that Article 21 is irrelevant to the present discussion: the hypothetical taxes for which they ask compensation are not the consequences of the ECT, but would be the consequence of a more general obligation to pay taxes on benefits made by the Claimants and repatriated (if repatriated) in Luxembourg. However, the benefits from which the Claimants have been wrongfully deprived would, most probably, have been submitted to taxation had the Claimants integrally received the sum due to them in accordance with their legitimate expectations.
55. Moreover, the Tribunal notes that the Claimants have not provided sufficient evidence of whether and in what amount any tax on the compensation determined by this Award would have to be paid by them⁴⁶. Accordingly, the harm the Claimants complain of is uncertain and hypothetical and cannot give rise to compensation.

C. COMPENSATION DUE TO THE CLAIMANTS

56. The Claimants are entitled to compensation for the harm caused by the Respondent's wrongful acts as determined in the Tribunal's Decision, that is, resulting from its breaches of its obligations under the ECT for the retroactive application of the New Regime with respect to the Wind plants and the CSP plants belonging to the Claimants and, with respect to each of the CSP Plants, of its obligation to insure a reasonable return to the Claimants'

⁴⁵ RCM, paras. 1061-1071 and RR, paras. 1164-1170.

⁴⁶ See e.g. *Eiser v. Spain*, para. 456.

investment. In view of the above, the Tribunal considers that the damages must be calculated in conformity with the Claimants' Experts' discount rate⁴⁷ as well as by applying an illiquidity discount in both scenarios for CSP plants⁴⁸ and by taking into account inflation indexation for wind plants.⁴⁹

57. According to the agreed Experts' calculations, the damages that the Respondent shall pay to the Claimants are equivalent to EUR 58,5 million for the CSP plants⁵⁰ and to EUR 1,1 million for the wind plants⁵¹.

D. INTEREST

a. The Parties' Positions

i. The Claimants' Position

58. To achieve full compensation, the Claimants assert that the Tribunal must award pre- and post-award interest on the amounts due. The Claimants refer to Article 13 of the ECT, which provides for interest at a commercial rate established at a market basis from the date of expropriation until date of payment which, they argue, is also an appropriate benchmark for damages resulting from ECT breaches other than expropriation. The Claimants also refer to Article 38 of the ILC Articles, under which interest on a sum due shall be payable to ensure full compensation, running from the date when the sum is due until the date of payment.⁵² The Claimants assert that the Respondent did not contest that the principle of full reparation requires that interest be paid on any damages awarded.⁵³
59. The Claimants maintain that the Tribunal should adopt different interest rates for pre- and post-award interest. Pre-award interest serves to achieve full reparation, while post-award

⁴⁷ See para. 27 *supra*.

⁴⁸ See para. 37 *supra*.

⁴⁹ See para. 46 *supra*.

⁵⁰ Brattle-BDO Joint Memorandum, 6 March 2019, Table 4.

⁵¹ *Ibid.*, Table 5.

⁵² CM, paras. 575-577.

⁵³ CR, para. 761.

interest serves as incentive to promptly pay the amounts due under the award and prevent unjust enrichment.⁵⁴

60. For pre-award interest, the Claimants argue that the Tribunal should calculate the interest at Spain's borrowing rate (based on the yield on Spanish 10-year bonds), which affords full reparation and corresponds to a commercial rate established on a market basis within the meaning of the ECT.⁵⁵ That rate for the relevant period amounts to 2.07%, compounded monthly.⁵⁶ In Brattle's Rebuttal Report, the amounts to pay for pre-award interest were calculated as EUR 14 million.⁵⁷
61. The Claimants contest the 2-year borrowing rate suggested by the Respondent for pre-award interest, linked to the time elapsed between the valuation date as at June 2014 and the Award. The Claimants consider that such rate has no support, while the 10-year bond is a commercial rate established on a market basis and that even BDO used in several parts of its own reports. Also, Spain's 10-year bond yields are considerably lower than the rates at which the Project Companies can borrow funds in Spain, so any interest rate lower than the one chosen by the Claimants would cease to be a commercial rate. Finally, in any case, more than 2 years have elapsed since June 2014 and more time will continue to elapse until the award is made, making the 2-year borrowing rate inappropriate.⁵⁸
62. For post-award interest, the Claimants request that the Tribunal uses a rate higher than 2.07% also compounded on a monthly basis. Contrary to Respondent's assertion, the Claimants argue that payment of post-award interest is neither punitive nor inconsistent with Article 36 of the ILC Articles. The Respondent, according to the Claimants, fails to distinguish between the nature of compensation – which includes payment of compensation and pre-award

⁵⁴ CM, paras. 578 and 582.

⁵⁵ CM, para. 581.

⁵⁶ *Ibid.*

⁵⁷ Brattle Rebuttal Quantum Report, 22 December 2016, para. 41.

⁵⁸ CR, para. 762.

interest – and the purpose of post award interest to incentivize compliance with the award, as explained in *Von Pezold v. Zimbabwe* and in *Gold Reserve v. Venezuela*.⁵⁹

ii. The Respondent's Position

63. If the Tribunal found that there are damages, the Respondent asserts that for pre-award interest, the Tribunal should not opt for a 10-year bond, but instead consider the bond to a period of approximately 2 years, equivalent to the gap between the appraisal date and the date of the award, as considered in BDO's report.⁶⁰ Additionally, the Respondent argues that such rate should be a risk-free rate, as it is not logical to compensate for a risk that has not yet incurred.⁶¹
64. For post-award interest, the Respondent opposes to a rate higher than 2.07%, which would have a punitive character and lacks legal basis. With support on the Commentary (4) on Article 36 of the ILC Articles, the Respondent maintains that compensation should correspond to financially assessable damages and not to punish the responsible State.⁶² Further, the Respondent references the decision in *Vestey v. Venezuela*, according to which post-award interest seeks to account for the risk of repairing a hypothetical breach of ICSID Convention, while the tribunal has jurisdiction to decide on breaches of the relevant treaty. The Respondent also references *National Grid v. Argentina* according to which the function of post-award interest is to protect the value of the award from inflation and so a risk-free rate should apply. Finally, the Respondent referenced *Micula v. Romania* where the tribunal saw no reason to treat differently the cost of the deprivation of money before or after the award and applied the same rate to pre- and post-award interest.⁶³

⁵⁹ CR, paras. 763-766.

⁶⁰ RCM, para. 1057 and RR, para. 1134.

⁶¹ RR, para. 1135.

⁶² RCM, paras. 1058-1060.

⁶³ *Micula v. Romania*, para. 1269.

b. *The Tribunal's Analysis*

65. Interests (whether pre or post award) are a necessary consequence of the principle of full reparation. They are a compensation for the damage suffered by the loss of use of the principal sum during the period for which the payment thereof continued to be withheld. As noted by the *Middle East Cement v. Egypt* tribunal, “[i]nternational jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due.”⁶⁴ Interests have the function to reimburse the Claimant(s) for the delay in the payment of funds owed because “compensation must not be eroded by the passage of time or by the diminution in the market value”⁶⁵. Therefore, interests are awarded to ensure that the present value of the judgment equals the present value of the harm and the start date for the prejudgment interests should be the date of breach or loss⁶⁶. In this matter, the Arbitral Tribunal shares the view of the tribunal in *Micula v. Romania* which did “not see why the cost of the deprivation of money (which interest compensates) should be different before and after the Award [...]. Both are awarded to compensate a party for the deprivation of the use of its funds.”⁶⁷ Consequently, interests should be paid from the date of the occurrence of the damages until that of the payment and there is no reason to make a distinction between the pre-Award and post-Award interests; in both cases, the purpose is to make good of the harm caused to the Claimants by the breaches of the Respondent’s obligations.
66. This is in keeping with Article 38 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts:

“1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

⁶⁴ *Middle East Cement v. Egypt*, para. 174; see also *Teinver v. Argentina*, para. 1121.

⁶⁵ *Wena Hotels v. Egypt*, para. 52.

⁶⁶ See e.g. *SPP v. Egypt*, para. 234; *AAPL v. Sri Lanka*, para. 114; *Maffezini v. Spain*, para. 96; *TecMed v. Mexico*, para. 196; *National Grid v. Argentina*, para. 294; *SGS v. Paraguay*, para. 184; or *Antin v. Spain*, para. 734.

⁶⁷ *Micula v. Romania*, para. 1269.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”⁶⁸

Moreover, this has been the general practice of ICSID tribunals.

67. Although it is conscious that there is no *jurisprudence constante* as to the choice between compound or simple interest, the Tribunal shares the view of the *Santa Elena v. Costa Rica* tribunal:

“[W]here an owner of property has at some earlier time lost [whether fully or partly] the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.”⁶⁹

In other words, “compound interest better reflects current business and economic realities and therefore the actual damage suffered by a party.”⁷⁰

68. The Tribunal notes the ICSID Convention gives no guidance concerning the question of the interest rate to be retained and the jurisprudence in this respect is anything but “*constante*”. Although Article 13(1) of the ECT, which provides for interest at a commercial rate established at a market basis, only applies in case of expropriation –which is not at stake in this case, this provision can constitute a guidance by analogy. And the Tribunal shares the view of the Claimants which suggest to calculate the interest at Spain’s borrowing rate (based on the yield on Spanish 10-year bonds), which is appropriate to afford full reparation in the framework of a private investment realized on a market basis (all the more so taking into consideration the time which has elapsed between the occurrence of the harm and the date of the Award). According to the Claimants’, that rate for the relevant period amounts to 2.07%, compounded monthly.⁷¹ This figure has not been challenged as such by the Respondent.

⁶⁸ International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, annexed to General Assembly Resolution 56/83 of 12 December 2001 and corrected by document A/56/49 (Vol. I) Corr. 4 (2002) (CL-86).

⁶⁹ *Santa Elena v. Costa Rica*, para. 104.

⁷⁰ *Gold Reserve v. Venezuela*, para. 854; *Foresight v. Spain*, para. 544.

⁷¹ See para. 59 *supra*.

69. As a consequence, the Respondent shall pay interests on the sum awarded above from 30 June 2014 to the date of payment of all sums due pursuant to this Award at a rate of 2.07%, compounded monthly.

IV. COSTS

a. *The Parties' Positions*

i. The Claimants' Position

70. In their updated submission(s) on costs, the Claimants argue that the Respondent should bear the total arbitration costs incurred by Claimants, including legal fees and expenses, totalling £ 5,996,252.46.⁷²
71. The Claimants submit that the Tribunal has broad discretion to allocate the costs and that it should make an award on costs in their favour, taking into consideration that: (i) the Respondent committed several breaches of its obligations under the ECT in relation to the Claimants' investment, and (ii) the Respondent's jurisdictional challenges lacked merit.⁷³
72. The Claimants claim that, "as the Tribunal confirmed in its Decision on Responsibility and on the Principles of Quantum, the Respondent committed a number of breaches of its international law obligations under the ECT in relation to RREEF's investment in Spain."⁷⁴ and that, they are entitled to their costs on a full indemnity basis, as such compensation is necessary to reinstate the Claimants to the position they would have been in but for the Respondent's breaches of the ECT.⁷⁵

⁷² Claimants' Updated Statement of Costs, 16 August 2019, para. 22.

⁷³ Claimants' Statement of Costs, 6 June 2016, paras. 17-18.

⁷⁴ Claimants' Updated Statement of Costs, 16 August 2019, para. 20.

⁷⁵ Claimants' Statement of Costs, 6 June 2016, para. 19.

73. The Claimants have submitted the following claims for legal and other costs:

Costs	Amount in GBP
Legal fees	£ 3,865,494.61
Legal disbursements	£ 162,582.41
Translation costs	£ 216,104.63
Experts fees and expenses	£ 944,976.39
Other disbursements	£ 40,524.01
Claimants' payments to ICSID	£ 767,570.41

ii. The Respondent's Position

74. In its submission(s) on costs, the Respondent argues that the Claimants should bear the total arbitration costs incurred by the Respondent, including legal fees and expenses, totalling EUR3,379,802.70.⁷⁶

75. The Respondent submits that the costs incurred by the Respondent should be paid by the Claimants in the case that the Tribunal decides not to uphold the Claimants' claim. The Respondent considers that:

“the Claimants would not be covered by International Law and the costs incurred by the Respondent for its defense come from Spanish taxpayers and could have been used in other public needs instead. Therefore, the result of this arbitration should be neutral for the Spanish public budget.”⁷⁷

76. The Respondents also argues that the Claimants' behaviour has not been always presided by *bona fide* during the proceedings and points out several of the Claimants' acts:⁷⁸

- Not providing 24 hours prior to the commencement of the hearing on jurisdiction with the power point presentations which were going to be used by them, in violation of

⁷⁶ Respondent's Statement of Costs, 6 June 2017, para. VI

⁷⁷ *Ibid.*, para. 19.

⁷⁸ *Ibid.*, para. 20.

Section 16.7.1 of Procedural Order No.1;

- Requesting 134 categories of documents during the production phase and only providing a few of them with their Statements;
- Trying to submit new calculations by Brattle a few days before the hearings on the merits;
- Wilfully omitting to submit important facts until the direct examination of two of their witnesses without meeting the prerequisites established by Procedural Order No.1, Section 18.3;
- Making baseless accusations that made Respondent’s counsel work more than required.

Costs	Amount in EUR
Advance on Costs paid to ICSID	EUR 882,367.00
Expert Report	EUR 769,077.00
Translation	EUR 55,324.65
Editing Services	EUR 85,244.72
Courier	EUR 6,698.12
Traveling expenses	EUR 18,586.54
Legal fees	EUR 1,923,390.00

b. *The Tribunal’s Analysis*

77. Article 61 of the ICSID Convention gives the Tribunal complete discretion with respect to allocation of the costs among the parties but provides no guidance on how that discretion is to be exercised. Arbitration Rules 28 and 47 refer to costs, but they give no guidance either on how such costs are to be apportioned.

78. It is generally accepted that, in principle, the loser must pay all the costs. However, this principle hardly applies when neither party can be considered totally winning or totally losing. Likewise, when the outcome of the litigation is difficult to predict due to the novelty or difficulty of the dispute or because there is no established trend in case law. In such a case, it can hardly be considered that the Claimants acted frivolously when deciding to litigate and the principle “loser pays” has no support when neither party has been totally defeated and/or when the loser had well-grounded reasons to litigate.

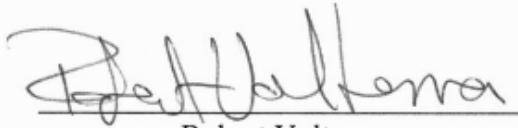
79. These two reasons are valid in this case. Neither in matters of jurisdiction nor in questions of merit, neither party was totally defeated. Both were partly winners and partly losers on the various issues that the Tribunal had to resolve. Equally, the litigation has dealt with novel matters, with respect to which the arbitral case law has been quite inconsistent. Moreover, the discussion of the factual and legal issues by both Parties and their Experts have been extremely helpful and the Tribunal would like to acknowledge the special assistance provided by the parties' Experts' Joint Models quantifying the damages due to the Claimants. This is in line with an abundant case-law according to which "it is equitable in this matter for each party to bear its own costs and fees, as well as half the advance payments made to ICSID."⁷⁹
80. Accordingly, each party should share equally the costs of the arbitral proceeding and each shall bear individually the other legal costs and expenses that they have incurred.

V. AWARD

81. For the reasons stated in its *Decision on Responsibility and on the Principles of Quantum* of 30 November 2018 and the body of this Award, the Tribunal hereby declares, orders and decides:
- (a) By majority: The Respondent shall pay a sum of EUR 59.6 million as compensation for the damages resulting from its wrongful acts as determined in the Tribunal's *Decision on Responsibility and on the Principles of Quantum*.
 - (b) Unanimously: The Respondent shall pay interests on the sum awarded above from 30 June 2014 to the date of payment of all sums due pursuant to this Award at a rate of 2.07%, compounded monthly.
 - (c) By majority: All other claims and requests of the Parties are dismissed.

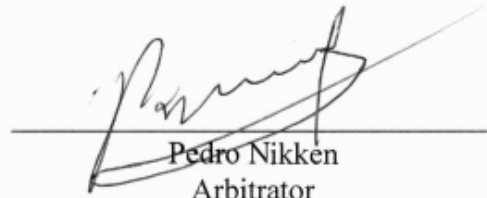
⁷⁹ See e.g. *Metalclad v. Mexico*, para. 130; *Mondev v. USA*, p. 58; *Chevron v. Ecuador*, para. 376; or *Murphy v. Ecuador*, para. 80.

- (d) By majority: Each Party shall bear its legal and other expenses.
- (e) By majority: The fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be borne equally between the Parties.



Robert Volterra
Arbitrator

Date: 4 November 2019



Pedro Nikken
Arbitrator

Date: 26 October 2019



Alain Pellet
President of the Tribunal

Date: 29 November 2019