**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**MATHIAS KRUCK AND OTHERS**

Claimants

and

**KINGDOM OF SPAIN**

Respondent

**ICSID Case No. ARB/15/23**

# DECISION ON JURISDICTION, LIABILITY AND PRINCIPLES OF QUANTUM

***Members of the Tribunal***
Professor Vaughan Lowe, KC, President
Dr. Michael Pryles AO, PBM, Arbitrator
Prof. Zachary Douglas, KC, Arbitrator

***Secretary of the Tribunal***
Mr. Paul-Jean Le Cannu

*Date of dispatch to the Parties*: 14 September 2022

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| | |
|---|---|
| APPA | Association of Renewable Energy Producers |
| APV | Adjusted Present Value |
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings 2006 |
| C-[#] | Claimants' Exhibit |
| CAPM | Capital Asset Pricing Model |
| Cl. Mem. | Claimants' Memorial on the Merits dated 28 July 2016 |
| Cl. PHB | Claimants' Post-Hearing Brief dated 19 September 2019 |
| Cl. Rej. | Claimants' Rejoinder on Jurisdiction dated 23 July 2017 |
| Cl. Reply | Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction dated 26 April 2017 |
| Cl. SPHB | Claimants' Supplemental Post-Hearing Brief date 4 June 2021 |
| CL-[#] | Claimants' Legal Authority |
| CPI | Consumer Price Index |
| Decision 1 or Decision on Jurisdiction and Admissibility | The Tribunal's Decision on Jurisdiction and Admissibility dated 19 April 2021 (Appendix 1) |
| Decision 2 | The Tribunal's 6 December 2021 Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021 (Appendix 2) |
| Decision 3 | The Tribunal's 25 July 2022 Decision on the Respondent's Request for Reconsideration of the Tribunal Decision dated 19th April 2021 and the Tribunal's Decision dated 6th December 2021 (Appendix 3) |

| | |
|---|---|
| DSG Claimants | The first 73 Claimants listed at paragraph 5 of this Decision and paragraph 2 of Decision 1, i.e. the Tribunal's Decision on Jurisdiction and Admissibility dated 19 April 2021 (Appendix 1) |
| DSG claims | The claims of the DSG Claimants |
| DSG GmbH | DSG Deutsche Solargesellschaft GmbH |
| ECT | Energy Charter Treaty, 17 December 1994 |
| ER | Expert Report |
| EU | European Union |
| FIT | Feed-In Tariff |
| Hearing | Hearing on jurisdiction and merits held on 3 June to 7 June 2019 |
| 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 |
| IRR | Internal Rate of Return |
| Kruck Beteiligungs GmbH | Later became DSG Spanien Verwaltungs GmbH |
| NDP | Non-Disputing Party |
| NRR | New Regulatory Regime, which was established by a series of measures including RDL 9/2013 (12 July 2013); Law 24/2013 (26 December 2013); RD 413/2014 (6 June 2014), and Ministerial Order IET/1045/2014 (16 June 2014) |
| PV | Photovoltaic energy |
| R-[#] | Respondent's Exhibit |
| RAIPRE (or REPE) | Administrative Registry for Special Regime Generation Facilities |
| RD | Royal Decree |

| | |
|---|---|
| RDL | Royal Decree-Law |
| Resp. C-Mem. | Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 31 October 2016 |
| Resp. PHB | Respondent's Post-Hearing Brief dated 19 September 2019 |
| Resp. Rej. | Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 27 June 2017 |
| RL-[#] | Respondent's Legal Authority |
| RRoR | Reasonable Rate of Return |
| SES | Spanish Electricity System |
| SPV | Special Purpose Vehicle |
| TGU | Tax Gross-Up |
| TMR | Variable reference tariff |
| Tr. Day [#] [Speaker(s)] [page:line] | Transcript of the Hearing on jurisdiction and merits held on 3 June to 7 June 2019 |
| Tribunal | Arbitral tribunal constituted on 19 January 2016 |
| TS Claimants | The last 43 Claimants listed at paragraph 2 of Decision 1, i.e. the Tribunal's Decision on Jurisdiction and Admissibility dated 19 April 2021 (Appendix 1) |
| TS claims | The claims of the TS Claimants |
| TVPEE | Tax on the Production Value of Electric Power (created by Law 15/2012 of 27 December 2012, on fiscal measures for energy sustainability) |
| VCLT | Vienna Convention on the Law of Treaties, 23 May 1969 |
| WACC | Weighted Average Cost of Capital |
| WS | Witness Statement |

## I. INTRODUCTION AND PARTIES

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

2. The Parties are the "DSG Claimants" - 65 limited liability partnerships, two private companies, and six individuals, all having German nationality,[1] the full list of which is found below at paragraph 5 - and the Kingdom of Spain (the "**Respondent**" or "**Spain**").

3. In its 'Decision on Jurisdiction and Admissibility' dated 19 April 2021 ("**Decision 1**" or "**Decision on Jurisdiction and Admissibility**") the Tribunal set out its decisions on jurisdiction and admissibility, together with its reasoning and with summaries of the procedural history and the factual background to that case as they stood at the time. Decision 1 is incorporated in this Decision on Jurisdiction, Liability and Principles of Quantum ("**Decision 4**") by reference. It is attached to this Decision as **Appendix 1**.

4. Paragraph 326 of Decision 1 reads (internal references omitted) as follows:

> *VII. DECISION*
>
> *326. For the reasons set forth above, the Tribunal decides as follows:*
>
> *(1) The jurisdictional objection based upon the relationship between the ECT and EU law is rejected;*
>
> *(2) The jurisdictional objection based upon the tax carve-out in ECT Article 21 is upheld, and claims brought under ECT Article 10 based on the effect of the TVPEE are outside the jurisdiction of the Tribunal;*
>
> *(3) The objection referred to as the multi-party objection is upheld in part, and the Tribunal decides that it will not proceed to determine the merits of*

[1] Decision on Jurisdiction and Admissibility, ¶ 186.

*the claims of the TS Claimants because they are not part of 'the dispute' that the Respondent agreed to arbitrate;*

*(4) The Tribunal will proceed to determine the merits of the claims of the DSG Claimants;*

*(5) A written submission may be made by (i) the group of DSG Claimants and (ii) the Respondent, in accordance with paragraphs 242-243 above, each explaining the position specifically in relation to the claims of DSG Claimants;*

*(6) The Tribunal will take the necessary steps to proceed with the determination of the remaining questions, including questions bearing upon jurisdiction, relating to the DSG claims; and*

*(7) The question of costs is reserved for decision in the context of its Award.*

5. The 73 DSG Claimants were identified in paragraph 2 of Decision 1. They are as follows:

1. Solar Andaluz 1 GmbH & Co. KG
2. Solar Andaluz 2 GmbH & Co. KG
3. Solar Andaluz 3 GmbH & Co. KG
4. Solar Andaluz 4 GmbH & Co. KG
5. Solar Andaluz 5 GmbH & Co. KG
6. Solar Andaluz 6 GmbH & Co. KG
7. Solar Andaluz 7 GmbH & Co. KG
8. Solar Andaluz 8 GmbH & Co. KG
9. Solar Andaluz 9 GmbH & Co. KG
10. Solar Andaluz 10 GmbH & Co. KG
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17. Solar Andaluz 17 GmbH & Co. KG
18. Solar Andaluz 18 GmbH & Co. KG
19. Solar Andaluz 19 GmbH & Co. KG
20. Solar Andaluz 20 GmbH & Co. KG
21. Solarpark Calasparra 251 GmbH & Co. KG
22. Solarpark Calasparra 252 GmbH & Co. KG
23. Solarpark Calasparra 253 GmbH & Co. KG
24. Solarpark Calasparra 254 GmbH & Co. KG
25. Solarpark Calasparra 255 GmbH & Co. KG
26. Solarpark Calasparra 256 GmbH & Co. KG
27. Solarpark Calasparra 257 GmbH & Co. KG
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29. Solarpark Calasparra 259 GmbH & Co. KG
30. Solarpark Calasparra 260 GmbH & Co. KG
31. Solarpark Calasparra 261 GmbH & Co. KG
32. Solarpark Calasparra 262 GmbH & Co. KG
33. Solarpark Calasparra 263 GmbH & Co. KG
34. Solarpark Calasparra 264 GmbH & Co. KG
35. Solarpark Calasparra 265 GmbH & Co. KG
36. Solarpark Tordesillas 401 GmbH & Co. KG
37. Solarpark Tordesillas 402 GmbH & Co. KG
38. Solarpark Tordesillas 403 GmbH & Co. KG
39. Solarpark Tordesillas 404 GmbH & Co. KG
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60. Solarpark Tordesillas 425 GmbH & Co. KG
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62. Solarpark Tordesillas 427 GmbH & Co. KG
63. Solarpark Tordesillas 428 GmbH & Co. KG
64. Solarpark Tordesillas 429 GmbH & Co. KG
65. Solarpark Tordesillas 430 GmbH & Co. KG
66. DSG Deutsche Solargesellschaft mbH
67. DSG Spanien Verwaltungs GmbH[2]
68. Mr. Mathias Kruck
69. Mr. Joachim Kruck
70. Mr. Peter Flachsmann
71. Mr. Ralf Hofmann
72. Mr. Rolf Schumm
73. Mr. Frank Schumm

6. Paragraphs 252-253 of Decision 1 identified the remaining questions bearing upon jurisdiction. They read as follows:

> *252. The fact of these investments was not challenged by the Respondent, although their characterization as "Investments" and the possibility of them serving as the basis of a claim in this case was disputed. Those matters are most easily considered along with other substantive questions, and will therefore be addressed later, along with questions of merits and quantum.*
>
> *253. The Tribunal determines, with the reservation in the preceding paragraph concerning the status of their "Investments", that it has jurisdiction ratione personae over the DSG Claimants, and can proceed to consider the merits of their claims, subject to the remaining objections to jurisdiction ...*

## II. PROCEDURAL HISTORY

7. Paragraphs 242-244 of Decision 1 addressed the next procedural steps as follows:

> *In these circumstances the Tribunal has considered what steps, if any, are necessary to ensure that each Party has had a proper opportunity to present its case in respect of the DSG claims. While the Tribunal considers that with diligent analysis, greatly assisted by the Parties' respective Post-Hearing Briefs, it is possible to obtain a full picture of each Party's case in respect of the DSG claims, it also considers that it is in the interests of the sound administration of justice that, before it decides upon the merits of the DSG claims, the DSG Claimants be afforded the opportunity to make a short written submission which summarizes the position concerning the DSG*

2 Kruck Beteiligungs GmbH was renamed as DSG Spanien Verwaltungs GmbH on 13 October 2015 (*see* Claimants' Response to Respondent's Preliminary Objections under ICSID Arbitration Rule 41(5), p. 3, fn. 8; Cl. Reply, fn. 6).

*claims that they have presented in their previous written and oral submissions. Similarly, the Respondent will be afforded the opportunity to make a short written submission which summarizes the position concerning the DSG claims that it has presented in its previous written and oral submissions. Thus, each Party will have the opportunity to explain briefly how it would have presented differently its case on the merits and quantum if it had been addressing only the DSG claims.*

*The written submissions should be as concise as possible and should focus on explaining clearly any features of the Party's case that are specific to one or more of the DSG Claimants, and which the Party considers that it did not have an adequate opportunity to emphasize and distinguish from the submissions that it has made in relation to the DSG and TS claims as a whole. The submissions should assume (i) that the Tribunal is familiar with all of the written and oral submissions already made, and (ii) that it is unnecessary to make any further submissions in relation to matters that are not affected by the identities of the Claimants, such as the status and interpretation of Spanish laws and decrees. The DGS Claimants should file their submission by **Monday, 31 May 2021**, and the Respondent should file its submission by **Monday, 12 July 2021**.*

*Existing submissions stand in the record, and these written submissions are intended to serve as aids to understanding them properly in the context of a case confined to the DSG claims. This is not intended to be an opportunity to present a wholly new case, materially different from that already put before the Tribunal. Any request to introduce or respond to any novel arguments or new evidence should be made separately to the Tribunal. The Tribunal will proceed to address the merits of the DSG claims once any submissions have been received.*[3]

8. By emails of 28 May 2021, the Parties agreed that the DSG Claimants would submit their brief by Friday, 4 June 2021, and that Spain would receive a similar extension to submit its brief by Friday, 16 July 2021.

9. On 4 June 2021, the DSG Claimants submitted their Supplemental Post-Hearing Brief.

10. On 16 June 2021, the Respondent sought leave to submit a memorandum prepared by Spain's quantum experts and a factual exhibit pursuant to paragraphs 242 and 244 of

[3] Footnote omitted.

Decision 1. On 18 June 2021, the Tribunal informed the Respondent that it could make its proposed submissions.

11. On 16 July 2021, the Respondent submitted the Supplementary Memorial of the Kingdom of Spain following the Decision on Jurisdiction and Admissibility,[4] along with consolidated lists of exhibits and legal authorities, and the Supplementary Report in light of the Tribunal's Decision on Jurisdiction and Admissibility dated 19 April 2021, dated 16 July 2021 and prepared by Grant Greatrex and Jesús Fernández-Salguero. The Respondent also uploaded exhibit R-0410 and legal authorities RL-0157 through RL-0170 to the case Box folder.

12. On 30 September 2021, the Respondent filed a Request for Reconsideration of the Tribunal's Decision dated 19 April 2021, dated 30 September 2021 (the "**Request for Reconsideration**"), along with the Consolidated List of Legal Authorities (RL) dated 30 September 2021 and legal authorities RL-0171 and RL-0172. The Respondent requested that the Tribunal reconsider its decision on the intra-EU jurisdictional objection.

13. On 29 October 2021, the Claimants filed their Response to Spain's Request for Reconsideration of the Tribunal's Decision of 19 April 2021, along with their Consolidated Legal Authorities (Index) and legal authorities CL-230 to CL-238. The Claimants requested that the Tribunal reject the Request for Reconsideration.

14. On 6 December 2021, after deliberation, the Tribunal issued its 'Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021' ("**Decision 2**"). Decision 2 is incorporated in this Award by reference. It is attached to this Award as **Appendix 2**.

[4] A corrected Spanish version of the Supplementary Memorial was filed on 6 August 2021, along with the English version of the submission.

15. Paragraph 48 of Decision 2 reads as follows:

> *For the reasons given above, the Tribunal DECIDES:*
>
> *(i) That the Judgment of the CJEU in the* Komstroy *case does not warrant the reopening of the questions addressed and decided in the Tribunal's Decision of 19 April 2021; and*
>
> *(ii) That it will not alter its Decision of 19 April 2021.*

16. On 14 January 2022, the Respondent wrote to advise the Tribunal that it reserved its rights with respect to any potential grounds for annulment of the Award to be rendered in this proceeding. The Respondent did so "to avoid any argument in the future (however baseless) that such grounds have been waived."

17. On 21 Feburary 2022, the Respondent sought leave to submit the Decision on Jurisdiction, Liability and the Principles of Quantum issued in *Sevilla Beheer B.V. and others v. Kingdom of Spain* (ICSID Case No. ARB/16/27), in accordance with paragraph 16.3 of Procedural Order No. 1.

18. On 1 March 2022, the Secretary of the Tribunal conveyed the following message from the Tribunal to the Parties:

> *The Tribunal has considered the Respondent's communication dated 21 February 2022, and recalls its decision of 24 January 2020 on the admission of the* BayWa *Decision and the* Stadtwerke*,* OperaFund *and* Cube *Awards into the record by the Tribunal. There it decided 'to allow the Parties to enter into the record the above-referred Decisions and Awards, including dissents, to the extent that they are publicly and freely available via the Internet and that either Party considers that the Tribunal should review them. ... [T]he Tribunal does not require hard copies: it will be sufficient to send a list of such Decisions and Awards together with an indication of their legal authority number and where on the Internet they are to be found. The Tribunal does not wish to receive comments on these additional legal authorities.'*
>
> *The Tribunal will admit the* Sevilla Beheer B.V. and others v. Spain *Decision on Jurisdiction, Liability and the Principles of Quantum into the record on the same basis and under the same conditions.*

19. On 2 March 2022, the Respondent submitted a consolidated list of legal authorities which included a reference to RL-0173 - the *Sevilla Beheer B.V. and others v. Spain* Decision on Jurisdiction, Liability and the Principles of Quantum - and RL-0174 - the Partial Dissenting Opinion by Professor Peter D Cameron -, along with a link to access the Decision and the Opinion.

20. On 24 June 2022, the Respondent filed a Request for Reconsideration of the Tribunal Decision dated 19th April 2021 and the Tribunal's Decision dated 6th December 2021 (the "**Respondent's Second Request for Reconsideration**"), along with legal authority RL-0175 and the Respondent's updated list of legal authorities.

21. Further to the Tribunal's invitation, the Claimants submitted their comments on the Respondent's Second Request for Reconsideration on Monday, 11 July 2022.

22. On 25 July 2022, The Tribunal issued the following decision on the Respondent's Second Request for Reconsideration ("**Decision 3**"):

> *The Tribunal has considered the submissions relating to the* Green Power *award, in which not only was the dispute between a national of one EU Member State and another EU Member State but the* lex arbitri *was the law of a third EU Member State. The Tribunal does not consider that the handing down of an award in another case that takes a view on a question of law that is different from the view taken by this Tribunal (and by many other tribunals) is a sufficient ground to warrant the reconsideration of its earlier decisions. The Tribunal's Decision on Jurisdiction and Admissibility dated 19 April 2021 is accordingly maintained.*[5]

23. The Tribunal accordingly proceeds here to set out the sections of its Decision relating to the merits[6] and the remaining questions concerning jurisdiction in respect of the claims of the DSG Claimants.

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5 Decision 3 is incorporated in this Award by reference. It is attached to this Award as **Appendix 3**.

6 In this Decision, liability and principles of quantum.

## III. SUBSTANTIVE ISSUES

24. The Claimants state that the main issue before the Tribunal is whether Spain should be permitted to induce foreign investment through a specific set of incentives and then, once the investments have been made, to "fundamentally alter and abolish that framework [of incentives]". In the Claimants' view this is, as affirmed by previous tribunals, exactly what happened in the case at hand and, as a consequence, the Respondent has harmed their investments and violated the ECT, as previously held in other cases involving Spain.[7]

25. In particular, the Claimants maintain that Spain violated: ***(1)*** their right to receive a fair and equitable treatment; ***(2)*** their right to protection against the impairment of their investments through unreasonable or discriminatory measures; ***(3)*** the Respondent's duty to observe all the obligations it has entered into regarding the Claimants' investments (the "umbrella clause"); and ***(4)*** the prohibition against unlawful expropriation.

26. The Respondent, on the other hand, maintains that all the measures it adopted were in accordance with the legal framework provided by the ECT and by Spanish legislation in force prior to the making of the DSG Claimants' investments and, therefore, it has not committed the violations alleged by the Claimants.

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[7] Cl. Mem., ¶¶ 390-392; Cl. Opening Statements, Slides 6-8; Tr. Day 1 [Mr. Smith] [7:20-8:5; 8:25-9:12]; *citing Eiser Infrastructure Limited & Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 4 2017 (CL-182); *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, 15 Febreuary 2018 (CL-191); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (CL-207); *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (CL-206); *Foresight Luxembourg Solar 1 S.à.r.l. et al. v. Kingdom of Spain*, SCC Arb. No. 2015/150, Final Award, 14 November 2018 (CL-202); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and Principles of Quantum, together with partial dissenting opinion of Robert Volterra, 30 November 2018 (CL-201); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability, and Partial Decision on Quantum, 19 February 2019 (CL-209); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Partial Final Award, 12 March 2019 (decision not public, reported on IA Reporter); *9REN Holding S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019 (CL-210).

## IV. FACTUAL BACKGROUND

27. This section draws on the parts of paragraphs 117–159 of Decision 1 that are relevant to the claims of the DSG Claimants. It describes the main features of the Spanish regulatory regime applicable to the DSG Claimants' investments and the changes in the regime which underlie the claims in this case. Additional detail is given as necessary in the subsequent sections of this Decision that discuss the specific claims and defences put forward.

28. All of the DSG Claimants say that they invested in renewable energy plants in Spain in the context of the efforts of EU Member States, including Spain, to increase their use of renewable energy.

29. Spain had set its national energy policy in a series of National Energy Plans, beginning in 1975, with the Plan for the years 1991-2000 ("**PEN 1991**") including provisions regarding the development of renewable energy production.[8] The need for such development was brought into sharper focus by the work associated with the 1992 United Nations Framework Convention on Climate Change, and in particular by the 1997 Kyoto Protocol on greenhouse gases. In 2001, EU Directive 2001/77/EC set targets for the proportion of its energy that each Member State was to derive from renewable sources. Spain, which in 1997 derived around 19.9% of its energy from renewable sources, was given a target of 29.4%, to be achieved by 2020.[9] That target sat alongside Spain's obligations under EU Law, which limit the grant of State Aid.[10]

30. Investment in the renewable energy sector is front-loaded, with most of the expenditure being incurred as capital costs at the start of a project and the subsequent running and maintenance costs being relatively low, with the result that (as the Claimants put it) "the cost of electricity produced from renewable sources is essentially fixed at the time of construction, whereas the cost of electricity from hydrocarbon sources is more variable

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8 Cl. Mem., ¶¶ 79–97; PEN 1991, 13 September 1991 (C-044).

9 Directive 2001/77/EC of the European Parliament and of the Council on the promotion of electricity produced from renewable energy sources in the internal electricity market, 27 September 2001 (C-057). The correct percentage of energy derived from renewable sources in 1997 was 19.9%, and not 19.8% as inadvertently indicated in paragraph 119 of the Decision on Jurisdiction and Admissibility.

10 Resp. C-Mem., ¶ 347.

depending on the cost over time of the fuel source and other inputs."[11] That cost is largely fixed at the time of construction even if the costs of the technology subsequently fall (as they did in the case of PV plants). Renewable energy plants are, moreover, exposed to the vagaries of wind, sun and rain; and as it is difficult to store electricity on a large scale it is important that renewable power producers be able to sell their electricity when it is produced. Furthermore, the environmental and energy security benefits of renewable energy are economic externalities, not naturally reflected in the market price of the energy.[12]

31. It was necessary for Spain to devise a scheme to attract the necessary investment in renewable energy. The background was provided by the main Spanish legislation, the Act or Law 54/1997 on the Electricity Sector.[13] That Law distinguished between an "Ordinary Regime" applicable to electricity production from non-renewable sources and a "Special Regime" applicable to renewable energy production. The Special Regime, implemented through RD 2818/1998,[14] provided two options for producers: (i) a Feed-In Tariff ("**FIT**") setting the price at which a producer would sell its entire production to electricity distributors, or alternatively (ii) a specified premium to be paid to producers who chose to sell their production on the wholesale electricity market. The tariffs and premium were expressly made subject to change. Provision was made for their revision every four years "without prejudice to the stipulations of the eighth transitory provision of the 1997 Electricity Act, by taking into account the evolution of the price of electric power on the market, the participation of these facilities in coverage of demand and their impact on the technical management of the system."[15] The "eighth transitory provision" of the 1997 Electricity Law required the Government to set premiums at rates that would provide

11 Cl. Mem., ¶ 114.

12 First Witness Statement of Joachim Kruck, 21 July 2016 ("First Kruck WS"), ¶ 6; Cl. Mem., ¶¶ 112–118.

13 Law 54/1997 on the Electric Power Sector, 27 November 1997 ("Law 54/1997") (R-0074/C-066).

14 Royal Decree 2818/1998 on the production of electrical energy by facilities supplied with renewable energy, waste or co-generation resources or sources, 23 December 1998 ("RD 2818/1998") (R-0082/C-067).

15 RD 2818/1998, Article 32 (C-067).

certain renewable electricity plants with "reasonable profitability rates with reference to the cost of money on the capital market."[16] Similarly, Article 30(4) of the 1997 Law stated:

> *To work out the premiums, the voltage level on delivery of the power to the network, the effective contribution to environmental improvement, to primary energy saving and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred shall all be taken into account so as to achieve reasonable profitability.*[17]

32. Those provisions did not succeed in attracting the investment necessary for Spain to reach its targets for renewable energy production. By 2002, it had reached only 19.7% of the target to be reached in 2006 in relation to solar photovoltaic energy production.[18] A new regime was established in March 2004 by RD 436/2004, replacing RD 2818/1998. The new regime allowed operators of renewable energy installations to choose between two remuneration mechanisms: (a) assigning their electricity to distributors at a fixed tariff which would be a single flat-rate in euro cents per kilowatt hour (the "**fixed tariff**" option); and (b) selling the electricity to distributors by participating in the market and receiving the market price supplemented by an incentive for participating in the market[19] and a premium (the "**market price + premium**" option).[20] The choice would be made annually by each operator, according to its own best interests. The Preamble to RD 436/2004 stated that "[w]hichever remuneration mechanism is chosen, the Royal Decree guarantees operators of special regime installations fair remuneration for their investments and an equally fair allocation to electricity consumers of the costs that can be attributed to the electricity system […]". It also stated that the Special Regime for renewable energy made

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16 Law 54/1997, Eighth transitory provision (R-0074).

17 Law 54/1997, Article 30(4) (R-0074). Article 30(3) stated "The remuneration arrangements for electric power generation installations under the special regime shall satisfy the stipulations of point 1 of article 16 for electric power generators." Article 16(1) does not refer to "reasonable profitability."

18 Cl. Mem., Table 4.1 and ¶¶ 131-134.

19 Because this was considered "the way to minimise administrative intervention in the setting of electricity prices as well as to better, and more efficiently allocate the system costs." Royal Decree 436/2004 establishing the methodology for the updating and systematisation of the legal and economic regime for electric power production under the special regime, 12 March 2004 ("RD 436/2004"), Preamble (R-0084/C-075).

20 RD 436/2004, Article 22 (R-0084/C-075).

it "possible to reach the goal set out in the 1997 Electricity Act, i.e. to ensure that by the year 2010 renewable energy sources cover at least 12% of total energy demand in Spain."[21]

33. Tariffs, premiums and incentives for each plant, which were significantly higher than those offered previously, were set for a period of 25 years, after which they were to be reduced to around 80% of their previous level.[22] Article 40 of RD 436/2004 made provision for four-yearly revisions of the tariffs, premiums, incentives and supplements payable to operators, with the revisions coming into force on January 1st of the second year subsequent to the year in which the revision was carried out. Article 40(3) contained an important provision. It stated that:

> *3. The tariffs, premiums, incentives and supplements resulting from any of the revisions provided for in this section shall apply solely to the plants that commence operating subsequent to the date of the entry into force referred to in the paragraph above and shall not have a backdated effect on any previous tariffs and premiums.*

34. Thus, the revised rates would not be applicable to existing plants, which would continue to operate under the rates previously set for them; and operators of plants to which the revised rates would be applicable would have at least twelve months' notice of that fact, so that they could adjust their plans prior to the commencement of operation of those plants.

35. RD 436/2004 governed Spain's PV sector at the time that Mr. Joachim Kruck, one of the DG Claimants, began considering an investment in that sector in Spain, in the mid-2000s. Mr. Joachim Kruck already had experience of investment in renewable energy, including PV projects, in Germany through the family-owned business established by him and his father, Mr. Mathias Kruck. The company develops and manages commercial and residential properties as well as PV and wind projects, and maintains PV projects in Canada, Spain and Italy. Mr. Joachim Kruck learned that Spain was offering incentives for investment in the renewable energy sector.[23] In 2006, there were indications that changes in the Spanish regulatory regime were being considered in order to accelerate investment

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21 RD 436/2004, Preamble (R-0084/C-075).

22 RD 436/2004, Article 33 (R-0084/C-075); First Kruck WS, ¶ 12.

23 First Kruck WS, ¶¶ 11-14.

in the renewable energy sector and enable Spain to reach its renewable energy targets.[24] In the course of 2006, Mr. Kruck contacted and was contacted by a number of people, including a company that already had the rights to a 2.0MW development in Alcolea de Calatrava, south of Madrid. He spoke on several occasions to Ms. Mafalda Soto, a Spanish attorney fluent in German, about the proposed new regulatory regime, having already read about it in the German media and specialist magazines discussing the PV industry. Those changes in the regulatory regime eventually materialized as RD 661/2007,[25] adopted on 25 May 2007 and published in the State Bulletin (the *Boletín Oficial del Estado* or "*BOE"*) the following day.

36. It was asserted in the Request for Arbitration that the DSG Claimants began acquiring and developing projects in Spain in November 2006.[26] The DSG Claimants' Supplemental Post Hearing Brief, however, states that "the history should be distinguished from the specific Investments in respect of which Claimants have brought legal claims in this arbitration. Claimants made all of those investments in 2008."[27] Significant changes to the regulatory regime were made by RD 661/2007, before the investments were made in 2008.

37. The Preamble to RD 661/2007 noted that targets for certain renewable energy technologies "are still far from being reached", and described how the new regulatory regime would operate in developing renewable energy:

> *The economic framework established in the present Royal Decree develops the principles provided in Law 54/1997, of 27 November, on the Electricity Sector, guaranteeing the owners of facilities under the special regime a reasonable return on their investments, and the consumers of electricity an assignment of the costs attributable to the electricity system which is also reasonable, although incentives are provided to playing a part in this market since it is considered that in this manner lower government intervention will be achieved in the setting of prices, together with better, more efficient, attribution of the costs of the system, particularly in respect of the handling of diversions and the provisions of supplementary services.*

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24 Cl. Mem., ¶¶156-161.

25 Royal Decree 661/2007 regulating the activity of electricity production under the special regime, 25 May 2007 ("RD 661/2007") (R-0086/C-098).

26 Request for Arbitration, ¶ 12.

27 Cl. SPHB, ¶ 7. The dates on which particular investments were made are considered in detail below.

*To this effect, a system which is analogous to that provided in Royal Decree 436/2004, of 12 March, is maintained, in which the owner of the facility may opt to sell their energy at a regulated tariff, which will be the same for all scheduling periods, or alternatively to sell this energy directly on the daily market, the term market, or through a bilateral contract, in this case receiving the price negotiated in the market plus a premium. In this latter case, an innovation is introduced for certain technologies, namely upper and lower limits for the sum of the hourly price in the daily market, plus a reference premium, such that the premium to be received for each hour may be limited in accordance with these values. This new system protects the promoter when the revenues deriving from the market price falls excessively low, and eliminates the premium when the market price is sufficiently high to guarantee that their costs will be covered, thus eliminating irrationalities in the payment for the technologies the costs of which are not directly related to the prices of petroleum in the international markets.*

38. Thus, RD 661/2007 provided most operators of renewable electricity with an annual choice between fixed tariffs – the FIT option – and the market price + premium mechanism;[28] but PV operators were eligible only for the FIT option.[29] The tariffs were significantly higher – 82% higher – than those payable under RD 436/2004, and were linked to Spain's Consumer Price Index ("**CPI**"), an objective reference point, rather than to a variable reference tariff ("**TMR**") that was fixed annually by a formula that allowed considerable discretion to the Government, as had been the case under RD 436/2004.[30] Other supplements were also available under RD 661/2007.[31] The tariffs were said to be payable to registered facilities for 25 years, and thereafter a tariff of 80% of the previous tariff would be paid.[32] No limit was placed on the period for which the tariffs were available: they were understood to be available throughout the operational life of a facility, thus

[28] RD 661/2007, Articles 24.1, 25 (R-0086/C-098).

[29] First Expert Report of Jaume Margarit "Report on the Regulatory Framework to Promote Renewable Energy before RDL 9/2013 and its Determining Factors", 7 July 2016 ("Margarit ER"), p. 28; RD 661/2007 (R-0086/C-098), Article 36, Table 3. (The relevant lines of the Table, relating to group b.1.1 (PV installations) are available in the Spanish version and in the improved English version of C-098).

[30] RD 661/2007, Article 44.1 (R-0086/C-098).

[31] RD 661/2007, Articles 28, 29 (R-0086/C-098).

[32] RD 661/2007, Article 36, Table 3 (R-0086/C-098). (The relevant lines of the Table, relating to group b.1.1 (PV installations) are available in the Spanish version and in the improved English version of C-098).

providing what was referred to as "legal certainty", enabling the commercial viability of a project to be determined with some certainty and precision.[33]

39. RD 661/2007 stipulated that these tariffs were to be reviewed in 2010, and every four years thereafter. They could be amended, but it was stipulated that the amendments "shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed", thus preserving the position of facilities that were already in operation or in the course of planning and construction at the time of the review. The material provision is Article 44.3:

> *During the year 2010, on sight of the results of the monitoring reports on the degree of fulfilment of the Renewable Energies Plan (PER) 2005-2010, and of the Energy Efficiency and Savings Strategy in Spain (E4), together with such new targets as may be included in the subsequent Renewable Energies Plan 2011-2020, there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to the costs associated with each of these technologies, the degree of participation of the special regime in covering the demand and its impact upon the technical and economic management of the system, and a reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets. Subsequently a further review shall be performed every four years, maintaining the same criteria as previously.*
>
> *The revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed.*[34]

40. This attractive new scheme was a limited offer. RD 661/2007 set a target for the production to be derived from each kind of renewable energy facility: the "target reference installed power" for PV installations was 371 MW.[35] The Decree provided that once 85% of that target had been reached, a cut-off date should be set after which date no more facilities could be registered and entitled to the tariffs set under the Decree. The cut-off date was to

[33] Cl. Mem. ¶¶ 182-185, fn. 313-323.

[34] RD 661/2007, Article 44.3 (R-0086/C-098).

[35] RD 661/2007, Article 37 (R-0086/C-098).

be set taking into account information on the fulfilment of the power target for each technology and the estimated period for the fulfilment of the corresponding target, and on "the speed of implementation of new facilities and the average duration of the works for a standard project of any technology", and the date could not be less than 12 months ahead.[36] There was, accordingly, an incentive to establish PV facilities quickly in order to benefit from the scheme, and an obligation to allow a period within which projects already under construction might be completed before the scheme was closed.

41. The Spanish Ministry of Industry, Tourism and Commerce issued a press release at the time that RD 661/2007 was adopted, which described the system established by the Decree:

> *Every 4 years the tariffs will be revised, bearing in mind compliance with the targets set. This will allow an adjustment to the tariffs in line with the new costs and the degree of compliance with the targets. The tariff revisions carried out in the future will not affect those installations already operating. This guarantee affords legal safety to the producer, providing stability to the sector and promoting its development. The new regulations will not be of a retroactive nature. The installations operating before January 1, 2008 may continue to adopt the previous regulations under the fixed tariff option throughout their working life.*
>
> […]
>
> *The new text, which replaces Royal Decree 436/2004, fits into the energy policy commitment to drive forward the use of clean, native and efficient energies in Spain. The Government commitment to these energy technologies was the reason why the new regulations sought stability over time, which allows businessmen to carry out medium and long-term scheduling as well as a sufficient, fair return that, combined with stability, makes the investment and dedication to this activity attractive.*
>
> […]
>
> *The new regulations will not be of a retroactive nature. The installations that are operational by January 1, 2008 may continue to adopt the previous regulations under the fixed tariff option throughout their operating life. When they take part in the market, they may maintain their prior regulation until December 31, 2012. These installations may voluntarily opt to abide by this new Royal Decree as from its publication.*

[36] RD 661/2007, Articles 21, 22 (R-0086/C-098).

> *It will be in 2010 that the tariffs and premiums set out in the proposal will be revised in accordance with the targets set in the Renewable Energies Plan 2005-2010 and in the Energy Efficiency and Savings Strategy and in line with the new targets included in the following Renewable Energies Plan for the period 2011-2020.*
>
> *The revisions carried out in the future of the tariffs will not affect those Installations already in operation. This guarantee provides legal safety for the producer, affording stability to the sector and fostering its development.*[37]

42. In his witness statement dated 21 July 2016, Mr. Joachim Kruck wrote of his view of the new regime:

> *The incentives under RD 661/2007 offered investors a fixed long-term tariff at rates equal or even higher – for relatively large facilities – than those offered under RD 436/2004. The full tariff would apply for twenty-five years, after which the facility would receive approximately 80% of the fixed tariff rate for the duration of the life of the facility. Further, the tariff would be adjusted annually under the consumer price index (CPI), which was also a clear indication that Spain would not arbitrarily modify the tariff in future years. Notably, the decree ensured that once a facility had been granted rights under the applicable tariff regime, any future revisions to the tariff rates would not impact those facilities. Thus, it was critically important for us to develop and finalize our facilities quickly so that they would receive the RD 661/2007 tariffs.*[38]

43. RD 661/2007 proved very successful in attracting investment in PV facilities, and the level of 85% of the 371 MW target was passed by September 2007.[39] It was announced, in accordance with the terms of RD 661/2007, that no further registrations would be allowed

[37] Press Release, "The Government prioritizes profitability and stability in the new Royal Decree pertaining to renewable energies and cogeneration. Government commitment to clean and native energies," 25 May 2007 ("Press Release for RD 661/2007") (C-099).

[38] First Kruck WS, ¶ 16.

[39] Resolution of the General Energy Secretariat which sets forth the regulated tariff maintenance period for the photovoltaic technology, pursuant to article 22 of Royal Decree 661/2007, 27 September 2007 ("Resolution of 27 September 2007") (C-151). It records that the "Board of Directors of the National Energy Commission, in its meeting dated September 27, 2007, conclud[ed] that on August 31, 2007, the percentage reached with regard to the installed power for solar photovoltaic technology is 91 percent, and that 100 percent of the target shall be achieved in the month of October 2007."

under the scheme after 29 September 2008.[40] Facilities registered after that date would, therefore, not be eligible for the tariffs set in RD 661/2007.

44. This was the regulatory regime that was in place when the DSG Claimants made the first of the investments in PV plants in respect of which claims are made in this case. As the Claimants' Supplemental Post-Hearing Brief notes,

> *4.* […] *this case involves broadly two different types of Investments protected by the ECT: (i) ownership interests in Spanish companies and PV plants in Spain, and (ii) contractual rights associated with those PV plants, which include, for certain Claimants, a right to a bonus payment in the event the respective PV plants exceeded a threshold electricity production target, and, for other Claimants, a right to purchase the Spanish SPVs and their respective PV plants after 25 years of operation.*
>
> […]
>
> *8. With respect to the first type of Investment at issue, there can be no dispute that Claimants Solar Andaluz 1-20 GmbH & Co. KG, Solarpark Calasparra 251-265 GmbH & Co. KG, and Solarpark Tordesillas 401-430 GmbH & Co. KG each invested in a single 100 kW PV plant in Spain through the plants' respective Spanish SPVs between February and August 2008. In fact, the Tribunal correctly has acknowledged that the "core DSG Claimants' investments in the PV plants were completed by the end of August 2008, before the closure of registration under RD 661/2007 and before the enactment of RD 1578/2008, both of which are significant events in this case."*
>
> *9. With respect to the second type of Investments, there similarly can be no dispute that Claimants DSG Deutsche Solargesellschaft mbH ("DSG GmbH"), Joachim Kruck, Peter Flachsmann, Ralf Hofmann, Rolf Schumm, and Frank Schumm—who own the respective contract rights in question—acquired those Investments in 2008.*[41]

45. In the light of the success of RD 661/2007, further legislation was adopted in 2008. RD 1578/2008 was adopted on 26 September 2008. By that time, each of the companies who are Claimants 1-20 (referring to the list at paragraph 5, above) had, on 28 February 2008, purchased the assets of one of the Project Alcolea PV plants through the Claimant

[40] Resolution of 27 September 2007 (C-151).

[41] Cl. SPHB ¶¶ 4, 8-9 (footnotes omitted).

company's wholly-owned Spanish subsidiary.[42] Similarly, Claimants 21-35 had, on 21 August 2008, each purchased the assets of one of the Project Calasparra PV plants; and each of Claimants 36-65, also on 21 August 2008, had purchased the assets of one of the Project Tordesillas PV plants, and again in each case through the Claimant company's wholly-owned Spanish subsidiary.[43] The position of Claimant 66 (DSG Deutsche Solargesellschaft mbH), Claimant 67 (DSG Spanien Verwaltungs GmbH), Claimant 68 (Mr. Mathias Kruck), Claimant 69 (Mr. Joachim Kruck), Claimant 70 (Mr. Peter Flachsmann), Claimant 71 (Mr. Ralf Hofman), Claimant 72 (Mr. Rolf Schumm), and Claimant 73 (Mr. Frank Schumm) is more complicated; but, anticipating conclusions reached below,[44] it can be said that for practical purposes all of their investments that are material and in principle compensable in the present case were made under the regulatory regime established by RD 661/2007.

46. While none of the investments in issue in the present case was made under the terms of the RD 1578/2008 regime, it is helpful to give an account of it and of later developments in order that the development of the Spanish regulatory regime can be properly understood. As has been noted, RD 1578/2008 was adopted on 26 September 2008.[45] It established an amended and extended version of the 2007 scheme for PV plants. The purpose of RD 1578/2008 was explained in a Press Release that accompanied its adoption:

> *The development of this sector in Spain has totally outperformed the forecasts in 2005. To be precise, the target set for 2010 to attain 371 MW of photovoltaic energy was achieved in August 2007 and it is estimated that installed power at year-end 2008 will be fivefold the power target for 2010. Hence, since said goal has been surpassed, it is necessary to determine a new long-term target and a new legal framework which allows the continuity of the success achieved by this sector in Spain at reasonable*

[42] Cl. PHB ¶ 56.

[43] Cl. PHB ¶ 56.

[44] *See* ¶¶ 205-207 below.

[45] Royal Decree 1578/2008 on remuneration for production of electricity using solar photovoltaic technology for facilities after the deadline for maintaining the remuneration of RD 661/2007, 26 September 2008 ("RD 1578/2008") (R-0087/C-046).

*costs. With this in mind, a Royal Decree has been approved which will allow 3,000 MW to be attained in 2010 and around 10,000 MW in 2020.*[46]

47. While the financial incentives offered under RD 436/2004 had failed to attract sufficient investment in PV facilities, those offered under RD 661/2007 had shown themselves to be more generous than was necessary to achieve Spain's targets for renewable energy. The Preamble to RD 1578/2008 explained the thinking on this matter:

> *Just as insufficient compensation would make the investments nonviable, excessive compensation could have significant repercussions on the costs of the electric power system and create disincentives for investing in research and development, thereby reducing the excellent medium-term and long-term perspectives for this technology. Therefore, it is felt that it is necessary to rationalize compensation and, therefore, the royal decree that is approved should modify the economic regime downward, following the expected evolution of the technology, with a long-term perspective.*[47]

48. RD 1578/2008 accordingly set up a new "economic regime for facilities generating electric power with photovoltaic technology, to which the regulated tariff rates provided in Article 36 of Royal Decree 661/2007, of 25 May, on the activity of electricity power generation under the special regime, are not applicable because of their date of final registration."[48] These PV facilities, coming into operation too late to claim the benefit of RD 661/2007 tariffs, were offered markedly lower tariffs; but the tariffs payable to existing projects registered under RD 661/2007 were not affected.[49]

49. Facilities could establish their entitlement to the tariffs under the 2008 regime by a form of 'pre-assignment registration' or 'pre-registration' at the beginning of the development of a project,[50] which would provide "the necessary legal security to promoters with respect to the return that the facility will earn once it is put into operation."[51] Pre-registration was conditional upon submission of specified documents, such as permits from the local

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46 Press Release, The Government Approves the New Economic Regime for Solar Photovoltaic Technology Installations, 26 September 2008 ("Press Release for RD 1578/2008") (C-138).

47 RD 1578/2008, Preamble (R-0087).

48 RD 1578/2008, Article 1 (C-046).

49 RD 1578/2008, Articles 2, 11(6) (R-0087/C-046).

50 RD 1578/2008, Article 4 (R-0087/C-046).

51 RD 1578/2008, Preamble (R-0087).

authorities, permission to access the electricity grid, and a bond guaranteeing the facilities' ultimate connection to the grid; and registration was effected chronologically, in the order in which completed applications were filed.[52] The tariffs were again offered on a restricted basis, limited by annual capacity quotas applied at each round in which electricity capacity was sought.[53]

50. RD 1578/2008 contained a number of other significant features. It was stipulated that "the regulated rate that is applicable to a facility under this royal decree shall be maintained for a maximum period of twenty-five years after the date of the last of the following to occur: the start-up date or the date of the registration of the facility in the compensation pre-assignment registry."[54] RD 661/2007, in contrast, had not set a limit on the operational life of a facility during which the specified tariffs could be claimed.

51. Furthermore, RD 1578/2008 provided for an adjustment of the tariffs in 2012 in the light of the operation of the 2008 scheme:

> *Fifth additional provision.* Modification of the compensation for generation by photovoltaic technology.
>
> *During the year 2012, based on the technological evolution of the sector and the market, and the functioning of the compensatory regime, compensation for the generation of electric power by photovoltaic solar technology may be modified.*[55]

52. RD 661/2007, in contrast, had not given any similar notice of an open-ended possibility of amendment.

53. The Claimants point to five further regulatory changes after the adoption of RD 1578/2008, which adversely affected their investments.

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52 RD 1578/2008, Appendix II (R-0087).

53 RD 1578/2008, Article 5 (R-0087/C-046).

54 RD 1578/2008, Article 11(5) (R-0087).

55 RD 1578/2008 (R-0087). "Disposición adicional quinta. Modificación de la retribución de la actividad de producción mediante tecnología fotovoltaica. Durante el año 2012, a la vista de la evolución tecnológica del sector y del mercado, y del funcionamiento del régimen retributivo, se podrá modificar la retribución de la actividad de producción de energía eléctrica mediante tecnología solar fotovoltaica."

54. First, on 19 November 2010 RD 1565/2010 was adopted.[56] It removed the entitlement to the advertised fixed feed-in tariffs after the 25th year of operation.

55. Second, on 23 December 2010 RDL 14/2010 "on the establishment of urgent measures for the correction of the tariff deficit in the electricity sector" was enacted.[57] Among other steps, it introduced an annual cap on the number of operating hours for which a PV facility would be paid the feed-in tariffs set out in RD 661/2007 and RD 1578/2008.[58] It also required distributors to apply an "access fee" to each MWh of electricity released on to their networks.[59]

56. RDL 14/2010 also addressed another matter. The removal by RD 1565/2010 of the entitlement to the original FIT after 25 years had led to criticism from investors. RDL 14/2010 responded to the criticism by extending the fixed 25-year period to 28 years[60] (and subsequently, in 2011, to 30 years)[61], thus "largely offset[ting] the economic impact of the elimination of the tariff at the 80% level thereafter".[62]

57. The third measure identified by the Claimants is Law 15/2012, which imposed a 7% 'energy tax'.[63] This, Claimants say, "was indistinguishable from a straightforward 7% reduction in the tariff rates guaranteed by RD 661/2007 and RD 1578/2008."[64]

58. The Preamble to Law 15/2012 set out the purpose of the Law, as follows:

> *The objective of this Act is to harmonize our tax system with a more efficient use which greater respects* [sic] *the environment and sustainability, values*

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56 Royal Decree 1565/2010 which regulates and modifies certain aspects of the electricity production activities under the Special Regime, 19 November 2010 ("RD 1565/2010"), Ten (C-129).

57 Royal Decree-Law 14/2010 on the establishment of urgent measures for the correction of the tariff deficit in the electricity sector, 23 December 2010 ("RDL 14/2010") (R-0073/C-102). A further measure in 2010, RD 1614/2010, modified the regime applicable to solar thermal and wind power plants.

58 RDL 14/2010, First Additional Provision, and Second Transitional Provision (R-0073).

59 RDL 14/2010, First Transitional Provision (R-0073).

60 RDL 14/2010, Preamble, ¶ 4 and First Final Provision (R-0073).

61 Law 2/2011 of Sustainable Economy, 4 March 2011 ("Law 2/2011"), 44th Final Provision (amending RDL 14/2010 First Final Provision) (R-0060/C-095) (Spanish version).

62 Cl. Mem., ¶ 315, fn. 622.

63 Law 15/2012 regarding fiscal measures for energy sustainability, 27 December 2012 ("Law 15/2012") (R-0018/C-040).

64 Cl. Mem. ¶ 325.

> *which have inspired this reform of the tax system, and as such in line with the basic principles governing the tax, energy and, of course, environmental policies of the European Union.*
>
> *In today's society, the increasingly greater effect of energy production and consumption on environmental sustainability requires a legislative and regulatory framework which guarantees for all the agents involved correct operation of the energy model which also contributes to preserving our rich environmental heritage.*
>
> *The basic foundation of this Act lies in Article 45 of the Constitution, a precept in which the protection of our environment is established as one of* [the] *guiding principles of social and economic policies. One of the bases of this tax system reform will therefore be the internalization of the environmental costs arising from the production of electrical energy* […].
>
> *For this purpose and also with a view to favouring budgetary balance, Title I of this Act establishes a tax on the value of the production of electrical energy, of a direct and real nature, which is levied on the performance of activities of production and incorporation into the electricity system of electrical energy in the Spanish electricity system.*[65]

59. Fourth, on 1 February 2013 Spain enacted RDL 2/2013, "on urgent measures in the energy sector and in the financial sector."[66] That law changed the basis for the calculation of the indexing of the feed-in tariffs, so as to use an "amended" consumer price index. The Claimants say that "the effect of this change was to reduce the inflation adjustment by about three percentage points (from +2.98% to -0.03%)."[67]

60. The thinking behind the change was explained in the Preamble to RDL 2/2013:

> *The data reported by the National Energy Commission in its report 35/2012 of the 20th of December on the order proposal establishing the access tolls are established from the 1st of January 2013 and tariffs and premiums of special regime facilities, has revealed the appearance of new deviations in estimates of costs and revenues caused by various factors, both for the end of 2012 and 2013, that in the current economic context, would render*

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65 Law 15/2012, Preamble (R-0018).

66 Royal Decree-Law 2/2013 on urgent measures in the energy sector and in the financial sector, 1 February 2013 ("RDL 2/2013") (R-0078/C-083).

67 Cl. Mem. ¶ 333.

*almost unfeasible their coverage with electric tolls and the items prescribed from the State General Budget.*

*These deviations are due largely to a higher growth in the cost of the special regime, due to an increase in the operation hours exceeding the projected and an increase in the compensation values after indexing to the Brent price, and a reduction of toll revenues due to a very sharp drop in demand which is consolidated for this exercise.*

*The proposed alternative would be a further increase in access tolls paid by electricity consumers. This measure would affect directly household economies and corporal* [sic] *competitiveness, both in a delicate situation, given the current economic situation.*

*Given this scenario, in order to alleviate this problem the Government has decided to adopt certain cost-reduction urgent measures to avoid the assumption of a new effort by consumers; helping them, through consumption and investment, to collaborate as well for the economic recovery.*

*Consequently, with the purpose of using a more stable index which is not affected by the volatility of unprocessed foods no*[r] *those from domestic fuels, all those remuneration updating methodologies that are linked to CPI shall substitute it by the Consumption Price Index to constant taxes with no unprocessed food nor energy products.*[68]

61. The fifth step was the replacement of the "Special Regime" for renewable energy, which had existed since 1994 and included the tariffs fixed by RD 661/2007 and RD 1578/2008, with a new regime. The Claimants point to a series of measures that had this effect,[69] beginning with RDL 9/2013, establishing "urgent measures to ensure the financial stability of the electricity system",[70] which was adopted on 12 July 2013. The Respondent, in contrast, emphasizes the continuity of the basic principles on which both the old and the new regimes were based.[71]

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68 RDL 2/2013, Preamble (R-0078).

69 Cl. Mem. ¶¶ 335.

70 Royal Decree-Law 9/2013 which sets forth urgent measures to ensure the financial stability of the electricity system, 12 July 2013 ("RDL 9/2013") (R-0079/C-091).

71 Resp. Rej., ¶¶ 864–982.

62. The lengthy Preamble to RD 9/2013 describes in some detail Spain's repeated efforts to devise a satisfactory regime for electricity production and the issues faced as a result of unexpected difficulties, including the world economic crisis. These considerations pointed to "the unsustainable nature of the deficit of the electricity sector and the need to adopt urgent measures of an immediate effect that would put an end to this situation."[72] The Preamble outlined the new regime that was to be introduced:

> *It shall be based on receiving the revenue derived from participation in the market, with an additional return that, if necessary, shall cover those investment costs that an efficient and well-managed company does not recover in the market. In this sense, according to community case law, a company shall be deemed as being efficient and well-managed if it has the necessary means for the development of its field, whose costs are those of an efficient enterprise in that field and considering the corresponding revenue and a reasonable profit for the execution of its functions. The aim is to ensure that the high costs of an inefficient company are not taken as reference.*
>
> […]
>
> *This framework shall articulate a remuneration that shall allow renewable energy, cogeneration, and waste facilities to cover the costs necessary to compete in the market at an equal level with the rest of technologies and get a reasonable rate of return.*
>
> […]
>
> *In this way, the Law carries out a balanced allocation of the costs attributable to the electricity system, electrical consumers and taxpayers, to the extent in which part of these costs are financed under the General State Budget.*
>
> *Furthermore, Law 54/1997, of 27 November, stipulates the regulation on the concept of reasonable rate of return, setting it, in line with the legal principles on the particular case law developed within the last few years, within project profitability that will be focused, prior to taxes, on the average yield in the secondary market of State Obligations within ten years, by applying the appropriate differential.*

72 RDL 9/2013, Preamble (R-0079).

> […]
>
> *In this way, the aim is to consolidate the continuous adaptation that the regulation has experienced, in order to keep this reasonable rate of return through a predictable system, subject to temporary realisation.*[73]

63. RDL 9/2013 prescribed a "reasonable rate of return" for PV investments:

> *For purposes of the provisions of the penultimate paragraph of Article 30.4 of Law 54/1997, of 27 November, for the facilities that as of date of the entry into force of this Royal Decree law have the right to a feed-in tariff scheme, the reasonable rate of return shall focus, before taxes, on the average yield in the secondary market for ten years prior to the entry into force of this Royal Decree-Law of the Obligations of the State within ten years*[74] *increased by 300 basic points, without prejudice to the revision envisaged in the last paragraph of that article.*[75]

64. While RDL 9/2013 indicated the shape of things to come, it did not itself set out the new regulatory regime ("**NRR**") in detail. In the words of the Preamble to RD 413/2014,[76] RDL 9/2013 "explicitly outlined the principles upon which the framework to be applied to these facilities is to be based, pursuant to the terms that were later included in Act 24/2013, of 26th December, on the Electricity Sector, and which are developed herein." The necessary detail was added by Law 24/2013, RD 413/2014, and Ministerial Order IET/1045/2014, which together constitute the NRR.

65. Law 24/2013, adopted on 26 December 2013,[77] once more recalled in its Preamble Spain's successive attempts since 1997 to establish a stable and sustainable economic and financial

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[73] RDL 9/2013, Preamble (R-0079).

[74] *I.e.*, 10-year Spanish Treasury bonds.

[75] RDL 9/2013, Preamble and First Additional Provision (R-0079). Article 30.4 of Law 54/1997 is quoted *supra*, at ¶ 30. A later measure defined 300 basis points above the average historic yield (over ten years) on Spanish ten-year treasury bonds as 7.398%: *see* Ministerial Order IET/1045/2014 adopting the remuneration parameters of standard facilities applicable to certain electrical energy production plants using renewable energy sources, cogeneration and waste, 16 June 2014 ("Ministerial Order IET/1045/2014"), Annex III, Article 1.3 (R-0101/C-179). The Brattle Regulatory Report, at ¶ 189, states that the ten-year average became a two-year historical average in the periodic reviews provided for in the NRR, with the result (as a consequence of falling interest rates) that the reasonable rate of return falls.

[76] Royal Decree 413/2014 regulating the production of electrical energy from renewable energy sources, cogeneration and waste, 6 June 2014 ("RD 413/2014"), Preamble (R-0095).

[77] Law 24/2013 regarding the Electrical sector, 26 December 2013 ("Law 24/2013") (R-0062/C-180).

system applicable to energy production. It provided a helpful summary of the position at that time:

> *Essentially, the continuous normative changes have entailed an important distortion to the normal operation of the electrical system and which needs to be corrected through action by the legislator which lends the regulatory stability that electrical activity requires. This regulatory safety, combined with the need to undertake the reforms needed to ensure the sustainability of system in the long-term and to resolve the existing shortcomings in system operation would recommend the approval of an overall reform of the sector, based on a new income and expenses regime for the electrical system which tries to return to the system the financial sustainability it lost a long time ago and whose eradication has not been achieved to date through the adoption of partial measures.*
>
> […]
>
> *The present Law essentially sets out to establish the regulation for the Electrical Sector, ensuring electrical supply with the necessary quality levels and at the lowest possible cost, to ensure the economic and financial sustainability of the system and allow an effective competition level in the Electrical Sector, all within the environmental protection principles of a modern society.*
>
> […]
>
> *The widespread awareness of the tariff deficit situation and the consequent threat to the very feasibility of the electrical system has led to the need to make major changes to the remuneration regime for regulated activities. In view of the progressive deterioration in the sustainability of the electrical system, the legal entities in the latter could no longer legitimately trust the maintenance of the parameters which had degenerated into the situation described and any diligent operator could anticipate the need for these changes.*
>
> *For activities with regulated remuneration, the Law reinforces and clarifies the principles and criteria for establishing the remuneration regimes to which end the necessary costs will be considered to carry out activity by an efficient, well-managed company through the application of homogeneous criteria throughout Spain. These economic regimes will allow appropriate returns to be obtained with regard to the activity risk.*
>
> […]

*The technical and economic management of the system essentially maintains the other remuneration criteria, incorporating into the system operator's remuneration incentives for the reduction of system costs deriving from the operation.*

*The high penetration of production technologies deriving from renewable energy sources, cogeneration and waste, included in the so-called special regime for electrical energy production, has meant that its unique regulation connected with power and its technology lacks any object. By contrast, it makes it necessary for regulation to consider these installations in a similar way to those of other technologies which will be integrated into the market and, in any case, for them to be considered because of their technology and impacts on the system, rather than because of their power which is why the differentiated concepts of ordinary and special regime are abandoned. This is why unified regulation is being carried out without prejudice to any unique considerations which need to be established.*

*The remuneration regime for renewable energies, cogeneration and waste will be based on the necessary participation in the market of these installations, complemented by market income with specific regulated remuneration which enables these technologies to compete on an equal footing with the other technologies on the market. This specific complementary remuneration will be sufficient to attain the minimum level required to cover any costs which, by contrast to conventional technologies, they cannot recover on the market and will allow them to obtain a suitable return with reference to the installation type applicable in each case.*[78]

66. Law 24/2013 set out a number of measures intended to address the widening gap between the costs of providing electricity and the revenue derived from it – the "tariff deficit". It was, however, RD 413/2014, adopted on 6 June 2014,[79] that was the main instrument in the establishment of the NRR.

67. Yet again, the Preamble to RD 413/2014 provided a detailed and frank account of the development of Spanish policy on renewable energy regulation. In relation to the Special Regime for renewable energy as it was provided for by RD 661/2007 it said:

*Although, considering the circumstances existing at each moment in time, these provisions permitted the achievement of the purposes for which they were introduced, it cannot be overlooked that the forecasts prevailing when*

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[78] Law 24/2013, Preamble (R-0062).

[79] RD 413/2014 (R-0095/C-090).

*they were adopted were soon surpassed as a result of the highly favourable support framework. This circumstance, together with the fact that the costs of technology were gradually falling, made it necessary to make a series of amendments to the regulatory framework in order to guarantee both the principle of reasonable return and the financial sustainability of the system itself.*

[…]

*The measures adopted between 2009 and 2011 proved insufficient for fulfilling their intended aims and the regulatory framework was found to be suffering from certain failings—which remained uncorrected despite the huge effort made to adapt the regulation—seriously compromising the system's financial sustainability. This situation led to the adoption of Royal Decree-Act 1/2012, of 27th January, which suspended the remuneration pre-allocation procedures and withdrew financial incentives for new facilities generating electrical energy through cogeneration or from renewable energy sources or waste, and Royal-Decree Law 2/2013, of 1st February, on urgent measures for the electricity system and the financial sector, which, among other measures, amended Royal Decree 661/2007, of 25th May, eliminating the "market price plus premium" option applicable to certain technologies and establishing tariff-based remuneration for all special regime facilities, while at the same time modifying the criteria for updating the remuneration of regulated activities in the electricity system.*

*In this context—it having become apparent that the financial sustainability of the electricity system had to be guaranteed, that the successive amendments to the regulation required consolidation (among other reasons, to ensure the stringent and correct application of the principle of reasonable return), and that the regulatory framework needed to be reviewed in order to adapt it to the actual circumstances of the industry—Royal Decree-Act 9/2013, of 12th July, on urgent measures to ensure the financial stability of the electricity system, was passed.*[80]

68. The main features of the NRR were described as follows:

*Under this new framework, in addition to the remuneration earned by selling energy at market rates, facilities may also receive specific remuneration throughout their regulatory useful lives. This specific remuneration comprises an amount per unit of installed capacity, intended to cover any investment costs incurred by a standard facility that cannot be recovered through the sale of its energy on the market, known as "compensation for investments"; and an amount linked to operations,*

[80] RD 413/2014, Preamble (R-0095).

*intended to cover any difference between a standard facility's operating costs and the revenue generated from its participation in the energy production market, known as "compensation for operations".*

*The compensation for investments and compensation for operations applicable to a standard facility are to be calculated based on standard revenues from the sale of energy valued at market rates, standard operating costs required to perform the activity and the standard value of the initial investment—all three standard values established on the basis of an efficient, well-managed company. A set of compensation benchmarks will be established for each standard facility by order of the Ministry of Industry, Energy and Tourism* […].

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

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

[…]

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

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

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

> […]
>
> *Once a facility's regulatory useful life*[81] *has elapsed, it will no longer receive the compensation for investments or compensation for operations. Such facilities may remain in operation, receiving only the remuneration earned on energy sales on the market.*[82]

69. The NRR established a flexible system under which remuneration to an actual PV installation was calculated by considering the position of a hypothetical "standard installation", and making payments to supplement the market price for electricity.[83] There was an "investment incentive" or "compensation for investments (**Rinv**)" calculated per MW of installed capacity, and an 'operating incentive' or "compensation for operations (**Ro**)" calculated per MWh of electricity production.[84] The incentives were explicitly subject to review and to change over time.

70. The details of the "standard installations" were set out in Ministerial Order IET/1045/2014, of 16 June 2014.[85] The Order defines 578 "standard installations" in the PV sector, and sets out detailed parameters, including the "regulatory useful life" (30 years for all PV installations),[86] the "operation threshold" (below which no incentives (Rinv or Ro) were payable) and the minimum operation hours required (up to which only a proportion of the Rinv and Ro was payable),[87] and the maximum operating hours for which the Rinv and Ro would be payable.[88]

71. The Claimants' case is that the NRR in effect "abolished the incentives regime entirely and replaced it with a completely different regulatory paradigm."[89] The Respondent rejects the

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[81] The regulatory life of an installation was to be "the useful regulatory life of the associated standard facility—as set forth in a ministerial order to be issued the Ministry of Industry, Energy and Tourism, subject to prior approval by the Government's Executive Committee for Economic Affairs": RD 413/2014 (R-0095), Article 28(1). It was set at 30 years for all PV installations.

[82] RD 413/2014, Preamble (R-0095).

[83] RD 413/2014, Article 11 (R-0095/C-090).

[84] RD 413/2014, Article 11(6)(a) and (b), respectively (R-0095/C-090).

[85] Ministerial Order IET/1045/2014 (R-0101/C-179).

[86] Ministerial Order IET/1045/2014, Article 5 (R-0101/C-179).

[87] Ministerial Order IET/1045/2014, Article 7 (R-0101/C-179).

[88] Ministerial Order IET/1045/2014, Article 8 (R-0101/C-179).

[89] Cl. Mem., chapter IV.H.5.

Claimants' view and maintains that the NRR was "the foreseeable result of the [Spanish Electricity System ("**SES**")], in accordance with its principles and objectives."[90]

# V. APPLICABLE LAW

## A. THE PARTIES' POSITIONS

### (1) Claimants' Position

72. The Claimants submit that under Article 42(1) of the ICSID Convention, the Tribunal shall decide the dispute on the basis of the laws agreed by the Parties.[91] Based on the Parties' agreement, in accordance with Article 26(6) of the ECT, the law applicable to this dispute is the ECT itself and international law.[92] They further submit that EU law is not part of the applicable law.[93]

73. Since the Parties did not agree on the applicability of Spanish law, the Claimants argue that Spanish law is relevant only as a matter of fact and shall be considered by the Tribunal along with the other facts of the case. Accordingly, "Spanish law does not provide and cannot influence the legal standards that the Tribunal applies to determine whether Spain violated the ECT and international law."[94] Accordingly, since the Respondent cannot avoid liability under international law by relying on its domestic law, it is irrelevant for the determination of liability whether the measures at issue complied or not with Spain's domestic law.[95]

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90 Resp. PHB, ¶ 38.

91 Cl. Mem., ¶ 383.

92 Cl. Mem., ¶¶ 384-388; *citing Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014, ¶ 113 (CL-047); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. 116/2010, Award, 19 December 2013, ¶ 851 (CL-048); *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 7.6.4 (CL-038).

93 Tr. Day 5 [Ms. Frey] [87:8-16; 93:21-94:5].

94 Cl. Mem., ¶ 389.

95 Cl. Mem., ¶ 389.

### (2) Respondent's Position

74. The Respondent agrees on the applicability of the ECT. Therefore, it submits that the Tribunal must decide the dispute applying the ECT itself and also the applicable rules and principles of international law.[96] Accordingly, it submits that the standards invoked must be interpreted in a manner that is consistent with EU Law, which is applicable law as a part of international law pursuant to Article 26 of the ECT and Articles 41 and 42 of the ICSID Rules.[97]

75. Further, the Respondent argues that this is a dispute regarding Spanish law, which will have to be assessed by the Tribunal when resolving the dispute. As such, Spanish law has to be understood as part of the European legal order. Thus, European Law will be applicable to both the jurisdiction and merits of the case.[98]

## B. THE TRIBUNAL'S ANALYSIS

76. ICSID Article 42(1) clearly identifies the law to be applied by the Tribunal. It provides that

> *(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

77. In this case the Parties have by agreeing to arbitration under ECT Article 26, and specifically under Article 26(4), agreed on the law to be applied by the Tribunal. ECT Article 26(6) provides that:

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96 Tr. Day 1 [Mr. Elena Abad] [265:15-20].

97 Resp. PHB, ¶ 93; Tr. Day 5 [Ms. Ruiz Sánchez] [133:10-17]; *citing* Judgment of CJEU (Court of Justice of the European Union) Case C-284/16, Republic of Slovakia v. Achmea BV, 6 March 2018 (RL-0113); and Decision C(2017) 7384 of the European Commission regarding the Support for electricity generation from renewable energy sources, cogeneration and waste (S.A.40348 (2015/NN)), 10 November 2017 (RL-0124).

98 Tr. Day 1 [Mr. Elena Abad] [265:15-267:2]; Tr. Day 5 [Ms. Ruiz Sánchez] [133:20-25]. As to the jurisdictional aspect, *see* the Tribunal's Decision on Jurisdiction and Admissibility, Section V.B.

*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.*

78. It is plain that the dispute is to be decided in accordance with the ECT and applicable rules and principles of international law. The only question in the present case is whether, as the Respondent submits "EU Law […] is in fact international law directly applicable to the merits of this dispute, in accordance with Article 26 ECT […]"[99]

79. Although its origins and main focus of membership lies in Europe, the ECT is an international agreement, with States Parties from many parts of the globe. The Contracting Parties include, for example, Australia, Iceland, Japan, Mongolia, Turkey and Yemen; and the ECT Observers include, for example, Algeria, Canada, Nigeria, Saudi Arabia, the USA, and Venezuela. The ECT provides for limited modifications of its applicability to particular States, for example in Articles 26(3) and 32. Otherwise, there is no reason to suppose that the applicability of the rules and principles in the ECT will vary from State to State. Similarly, there is no reason to suppose that the "rules and principles of international law" to which ECT Article 26(6) refers will vary from State to State. The Tribunal also considers that there is no reason to suppose that the term "international law" in ECT Article 26(6) has a meaning different from the term "international law" in Article 42(1) of the ICSID Convention. The Tribunal considers that the question whether EU Law "is in fact international law" must be viewed in this context, and that the question has one answer, applicable as between any and all ECT Contracting Parties.

80. The term "international law" has an "ordinary meaning"[100] that is well understood, and epitomised by the familiar description of the various sources and evidences of international law that appears as Article 38(1) of the Statute of the International Court of Justice.[101] That

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99 Resp. PHB, ¶ 93.

100 To which the Vienna Convention on the Law of Treaties ("VCLT"), Article 31(1) refers (CL-049).

101 As earlier ICSID tribunals have noted: *see*, *e.g.*, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 116 (CL-056). The Report of the Executive Directors attached to the ICSID Convention takes the same approach:

"Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable.

meaning accords with the logic of the uniform application of the ECT. International law, as the body of rules and principles recognised by States as binding and applicable in the relations between them, is to be distinguished from municipal laws, which vary from State to State and are created by and applicable in each individual State.

81. Within the EU, EU Law has a privileged status by virtue of the principles of its supremacy and its direct effect. But on the international stage it is a regional legal system. Like municipal laws, it has a very important role the development of international law, for example by forming the basis of State practice that contributes to the generation of "international custom, as evidence of a general practice accepted as law", and contributes to the creation and definition of the body of "general principles of law recognized by civilized nations."[102] It is also relevant as a matter of fact; and, of course, the analyses of issues and laws by the judges who sit within any relevant legal system always merit respectful consideration. What EU law and municipal law cannot do, under ECT Article 26, is have dispositive legal force, definitively determining whether acts and omissions are or are not compatible with the international law obligations undertaken by the States that are Contracting Parties to the ECT. Put in other words, in the absence of some provision in the ECT admitting that EU law can alter the scope and content of rights and duties established by the ECT, EU law cannot have such an effect.

82. The Tribunal will accordingly decide the issues in dispute in accordance with the ECT and applicable rules and principles of international law.

## VI. JURISDICTION

83. Initially it is necessary to return to questions of jurisdiction and admissibility in order to identify the investments in respect of which this Tribunal has jurisdiction. The Tribunal

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The term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes." (Report of the Executive Directors, ¶ 40, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf).

102 The quoted phrases appear in Article 38(1) of the Statute of the International Court of Justice.

recalls the definition of 'investment' under Article 1(6) of the Energy Charter Treaty, which reads as follows:

> *"Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*
>
> *(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;*
>
> *(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;*
>
> *(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*
>
> *(d) Intellectual Property;*
>
> *(e) Returns;*
>
> *(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.*
>
> *A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.*
>
> *"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.*

84. The DSG Claimants' Supplemental Post-Hearing Brief lists the "DSG Claimants' Investments."[103] The list identifies those investments in respect of which compensation is

[103] Cl. SPHB, pp. 8-10.

claimed, compensation for losses resulting from the remainder being subsumed within compensation that is claimed. The list reads as follows (the highlighted investments are the 'contractual' claims, as explained below):

| DSG Claimants' Investments | | | | |
|---|---|---|---|---|
| **No** | **Claimant** | **Project(s)** | **Investment and Ownership Share** | **Allocation of Compensation Claimed** |
| 1-20 | Solar Andaluz 1-20 GmbH & Co. KG (the "Alcolea Claimants") | Alcolea | Each Alcolea Claimant owns 100% of a Spanish SPV and one of the twenty 100 kW PV facilities comprising this Project | Each Alcolea Claimant claims 5% of the harm caused to Project Alcolea for the first 25 years of operation, reflecting its shareholding in Alcolea |
| 21-35 | Solarpark Calasparra 251-265 GmbH & Co. KG (the "Calasparra Claimants") | Calasparra | Each Calasparra Claimant owns 100% of a Spanish SPV and one 100 kW of the fifteen 100 kW PV facilities comprising this Project | Each Calasparra Claimant claims 6.67% of the harm caused to Project Calasparra for the first 25 years of operation, reflecting its shareholding in Calasparra |
| 36-65 | Solarpark Tordesillas 401-430 GmbH & Co. KG (the "Tordesillas Claimants") | Tordesillas | Each Tordesillas Claimant owns 100% of a Spanish SPV and one of the thirty 100 kW PV facilities comprising this Project | Each Tordesillas Claimant claims 3.33% of the harm caused to Project Tordesillas for the first 25 years of operation, reflecting its shareholding in Tordesillas |
| 66 | DSG Deutsche Solargesellschaft mbH ("DSG GmbH") | Alcolea, Calasparra, and Tordesillas | Claims to bonus payments resulting from higher-than-projected revenue when Projects Alcolea, Calasparra, and Tordesillas surpass projected electricity production | 100% of the harm caused to DSG GmbH as a result of lost bonus payments from Alcolea, Calasparra, and Tordesillas |
| 67 | DSG Spanien Verwaltungs GmbH ("DSG Spain") | Alcolea, Calasparra, and Tordesillas | Indirect Interests in the Alcolea, Calasparra, and Tordesillas Claimants as their General Partner | None – compensation for this claim is covered through the compensation allocated to the Alcolea, Calasparra, and Tordesillas Claimants |
| 68 | Mathias Kruck | Calasparra | 50% of Claimant Solarpark Calasparra 253 GmbH & Co. KG | None – compensation for this claim is covered through the compensation allocated to Claimant Solarpark Calasparra 253 GmbH & Co. KG |

| | | | | |
|---|---|---|---|---|
| 69 | Joachim Kruck | Alcolea | 100% of Claimant Solar Andaluz 3 GmbH & Co. KG | None – compensation for this claim is covered through the compensation allocated to Claimant Solar Andaluz 3 GmbH & Co. KG |
| | | | 25% of real estate lessor, Solar Andaluz Grundstücks S.L., related bonus payments, and purchase right | 25% of the harm caused to Solar Andaluz Grundstücks S.L. |
| | | Calasparra | 50% of Claimant Solarpark Calasparra 253 GmbH & Co. KG | None – compensation for this claim is covered through the compensation allocated to Claimant Solarpark Calasparra 253 GmbH & Co. KG |
| | | Tordesillas | 100% of Claimant Solarpark Tordesillas 414 GmbH & Co. KG | None – compensation for this claim is covered through the compensation allocated to Claimant Solarpark Tordesillas 414 GmbH & Co. KG |
| | | | 43% of Claimant Solarpark Tordesillas 422 GmbH & Co. KG | None – compensation for this claim is covered through the compensation allocated to Claimant Solarpark Tordesillas 422 GmbH & Co. KG |
| | | Alcolea, Calasparra, and Tordesillas | 57% of Claimant DSG GmbH | None – compensation for this claim is covered through the compensation allocated to Claimant DSG GmbH |
| | | Calasparra & Tordesillas | 33.3% of real estate lessor, Deutsche Solar Ibérica Real Estate S.L. and related purchase rights | 33.3% of the harm caused to Deutsche Solar Ibérica Real Estate S.L. |
| 70 | Peter Flachsmann | Alcolea | 100% of Claimant Solar Andaluz 2 GmbH & Co. KG | None – compensation claimed through Claimant Solar Andaluz 2 GmbH & Co. KG |
| | | | 25% of real estate lessor, Solar Andaluz Grundstücks S.L., related bonus payments, and purchase right | 25% of the harm caused to Solar Andaluz Grundstücks S.L. |
| | | Tordesillas | 50% of Claimant Solarpark Tordesillas 418 GmbH & Co. KG | None – compensation claimed through Claimant Solarpark Tordesillas 418 GmbH & Co. KG |
| | | Alcolea, Calasparra, and Tordesillas | 43% of Claimant DSG GmbH | None – compensation claimed through Claimant DSG GmbH |
| | | Calasparra and Tordesillas | 33.3% of Deutsche Solar Ibérica Real Estate S.L. and related purchase rights | 33.3% of the harm caused to Deutsche Solar Ibérica Real Estate S.L. |
| 71 | Ralf Hofmann | Alcolea | 100% of Claimant Solar Andaluz 1 GmbH & Co. KG | None – compensation claimed through Claimant Solar Andaluz 1 GmbH & Co. KG |
| | | Calasparra | 100% of Claimant Solarpark Calasparra 251 GmbH & Co. KG | None – compensation claimed through Claimant Solarpark Calasparra 251 GmbH & Co. KG |
| | | Tordesillas | 100% of Claimants Solarpark Tordesillas 407 GmbH & Co. KG and Solarpark Tordesillas 413 GmbH & Co. KG and 1% of Claimant Solarpark Tordesillas 421 GmbH & Co. KG | None – compensation claimed through relevant Tordesillas Claimants |
| | | Alcolea | 25% of real estate lessor, Solar Andaluz Grundstücks S.L. and related bonus payments and purchase right | 25% of the harm caused to Solar Andaluz Grundstücks S.L. |
| | | Calasparrra and Tordesillas | 33.3% of Deutsche Solar Ibérica Real Estate S.L. and related purchase rights | 33.3% of the harm caused to Deutsche Solar Ibérica Real Estate S.L. |
| 72 | Rolf Schumm | Alcolea | 12.5% of real estate lessor, Solar Andaluz Grundstücks S.L., related bonus payments, and purchase right (until August 1, 2013) | 12.5% of the harm caused to Solar Andaluz Grundstücks S.L. |
| 73 | Frank Schumm | Alcolea | 100% of Claimant Solar Andaluz 4 GmbH & Co. KG | None – compensation for this loss is covered through the compensation allocated to Claimant Solar Andaluz 4 GmbH & Co. KG |
| | | | 12.5% of real estate lessor, Solar Andaluz Grundstücks S.L., related bonus payments, and purchase right (until August 1, 2013) | 12.5% of the harm caused to Solar Andaluz Grundstücks S.L. |

85. The investments in respect of which compensation is claimed fall into three groups. First, each of claims 1–65 is a claim made by a German company (GmbH & Co. KG) in respect of 100% of a corresponding Spanish SPV and 100 kW PV facility. The Tribunal has no doubt that each is a genuine investment by a German investor in Spain, and within the definition of an investment in ECT Article 1(6) and within the Tribunal's jurisdiction.

86. The Tribunal is also satisfied that the requirements of Article 25(1) of the ICSID Convention are met in relation to each of the investments.

87. Second, claim 66 is made by a German company, DSG GmbH, which was the operations and maintenance, administrative and accounting manager for each of the German companies (GmbH & Co. KG) making claims 1–65, and was the operator of the PV plants held by each of those companies. Claim 66 is made in respect of bonus payments payable under the O&M (operation and maintenance) contracts – it is one of the 'contractual claims'. As was explained in the Memorial:

> *Claimant DSG GmbH, which today is owned by Claimants Joachim Kruck and Peter Flachsmann, entered into O&M contracts with each of the Spanish investment companies holding the PV facilities in Projects Alcolea, Calasparra, and Tordesillas. In addition to its regular fees under the contracts, in exchange for its services, DSG GmbH received a bonus payment of 10% of defined "excess proceeds" received by Project Alcolea and 50% of the "excess proceeds" received by Projects Calasparra and Tordesillas. In the contracts, the term "excess proceeds" is defined as the amount exceeding forecasts for the production of electricity multiplied by the applicable RD 661/2007 fixed tariff. Thus, DSG GmbH owns interests related to the performance of the plants, based on the RD 661/2007 tariff rates.*[104]

88. The characterization of this arrangement as an "investment" is more problematic. DSG GmbH's contingent entitlement to a bonus was certainly dependent in part upon the work and skill with which it acted in fulfilment of its contractual obligations to operate and maintain the plants. But the interest of DSG GmbH is a contingent contractual entitlement on the part of one German claimant as against each of the 65 claimant German companies holding the PV plants arising from the possibility of generating 'excess' production, and as such it may be doubted whether it counts as an 'investment' for the purposes of the ECT. It is essentially a mechanism for sharing the benefits and risks of each project between DSG GmbH and the limited partners in the GmbH & Co. KGs holding the PV plants: if an amount were to be paid by a GmbH & Co. KG as a bonus to DSG GmbH that same amount would be lost to the GmbH & Co. KG; and conversely, unless the GmbH & Co. KG received "excess proceeds" in the first place, DSG GmbH would have had no entitlement to a share of them.

[104] Cl. Mem., ¶ 30 (footnotes omitted).

89. For that reason any losses of a GmbH & Co. KG's monies that would have been used to fulfil DSG GmbH's contractual bonuses may be viewed as elements of the losses sustained by each GmbH & Co. KG. It follows that any such losses, flowing from unlawful harm allegedly caused to each GmbH & Co. KG – each of Claimants 1–65 – can be regarded as the results of harm done investments of investors over whom the Tribunal undoubtedly has jurisdiction. Accordingly, the jurisdiction of the Tribunal extends to any such losses.

90. The Claimants' third group of investments in respect of which compensation is claimed are the interests held by Mr. Joachim Kruck, Mr. Peter Flachsmann, Mr. Ralf Hofmann, Mr. Rolf Schumm, and Mr. Frank Schumm in the two Spanish companies that held the land on which the PV plants were located: Solar Andaluz Grundstücks S.L. and Deutsche Solar Ibérica Real Estate SL. These interests are held by German citizens in Spanish companies that own or control land in Spain, and are undoubtedly within the definition of an investment in ECT Article 1(6) and within the Tribunal's jurisdiction.

91. In addition to the Claimants in respect of these three groups of investments, there are two other DSG Claimants: (i) Claimant 67, DSG Spanien Verwaltungs GmbH ('DSG Spain'), and (ii) Claimant 68, Mr. Mathias Kruck. DSG Spain was the general partner in each of the German companies (GmbH & Co. KG) who are Claimants 1 to 65.[105] Mr. Mathias Kruck purchased 50% of the shares in Claimant 23, Solarpark Calasparra 253 GmbH & Co. KG.[106] No claim for compensation is made in respect of Claimants 67 and 68, because their losses would be compensated by awards made in respect of Claimants 1–65, and Claimant 23, respectively. There is, however, a request for declaratory relief in respect of the alleged breaches of the rights of all DSG Claimants, and it is therefore necessary to record that the Tribunal finds that Claimants 67 and 68 and their investments in the German companies, Claimants 1–65, holding the PV plants in Spain, are also within the definition of investments in ECT Article 1(6) and within the Tribunal's jurisdiction.

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[105] Cl. Mem., ¶ 29 and fn. 16; Cl. SPHB, p. 8.

[106] Cl. Mem., ¶ 231 and fn. 428; Contract Regarding the Sale and Transfer of a Limited Partner's Share in Solarpark Calasparra 253 GmbH & Co. KG Between DS Deutsche Solargesellschaft mbH (Seller) and Joachim Kruck and Mathias Kruck (Buyers), 1 December 2008 (C-338); Cl. SPHB, p. 8.

92. The Tribunal returns below to the question whether alleged losses sustained in relation to these investments are recoverable.[107] Here, the analysis continues by addressing the question of liability. It does so on the basis of the actual submissions of the Parties, most of which were made while both the DSG Investors and the TS Investors were claimants in the case. These include submissions which do not bear directly on the claims of the DSG Claimants alone, for example, because they focus on developments after the last of the DSG Claimants investments were made. Nonetheless, the submissions are summarized as they were made, in the interests of accuracy and because the Tribunal has in fact considered all submissions made by and on behalf of the Parties.

# VII. LIABILITY

## A. FAIR AND EQUITABLE TREATMENT

### (1) The Parties' Positions

#### *a. Claimants' Position*

93. The Claimants argue that the Respondent has treated their investments unfairly and inequitably by altering and then repealing the incentives and commitments given to them under RD 661/2007 and RD 1578/2018.[108] As a consequence, the Respondent has violated Article 10(1) of the ECT.[109]

94. The Claimants submit that the obligation to accord fair and equitable treatment to investors has been routinely applied by previous tribunals in accordance with the ECT's object and purpose. They summarize the ECT's object and purpose as "strengthen[ing] the rule of law on energy issues" and "'catalyz[ing] economic growth' through investment and trade in

[107] *See* Sections VII and VIII below.
[108] Request for Arbitration, ¶ 64.
[109] Cl. Mem., ¶ 393.

energy and to establish 'a legal framework to promote long-term cooperation' between States and investors."[110]

95. The Claimants disagree with the Respondent's argument according to which the ECT's purpose is to implement "a free market in the energy sector without discrimination on the grounds of the investor's nationality" and that, consequently, "the maximum aspiration of the ECT" is national treatment and thus that this is "the limit of Spain's obligations under the ECT."[111] For them, such an interpretation renders meaningless Article 10(1) of the ECT and the obligations contained therein, which are in no manner affected by the separate obligation of national treatment.[112] Accordingly, the Claimants submit that any macroeconomic control measures that are adopted by the State on the grounds of general interest are limited by the obligations contained in the ECT.[113]

96. The Claimants assert that, in light of the object and purpose of the EC, Spain violated its obligation to treat the Claimants' investments in a fair and equitable manner by: (i) violating the Claimants' legitimate expectations; (ii) "failing to treat Claimants' investments transparently and consistently"; and (iii) "failing to act in good faith towards Claimants' investments."[114] These assertions are addressed in turn.

(i) Legitimate expectations

97. The Claimants contend that it is the State's duty, as part of its fair and equitable treatment obligation, "to ensure a stable legal and regulatory framework."[115] This duty arises when the State has created "'legitimate expectations' of such stability on the part of investors."[116] When the State's acts have given rise to such legitimate expectations, that State has accepted limitations to its power to change the regulatory framework governing the

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110 Cl. Mem., ¶ 394; *citing* VCLT, Article 31 (CL-049); ECT, An Introduction to the Energy Charter Treaty, Preamble and Article 2 (C-001); *Anatolie Stati et al. v. Kazakhstan*, SCC Case No. 116/2010, Award, 19 December 2013, ¶ 942 (CL-048).

111 Cl. Reply, ¶ 390.

112 Cl. Reply, ¶¶ 392-393.

113 Cl. Reply, ¶ 395; Tr. Day 1 [Ms. Frey] [101:10-23]

114 Cl. Mem., ¶ 395.

115 Cl. Mem., ¶ 396.

116 Cl. Mem., ¶ 396.

investment of those investors.[117] In addition to being recognized as a "major component" of the FET standard, the protection of legitimate expectations is also a general principle of law and has been consistently recognized by the Spanish Constitutional Court.[118]

98. A State can, the Claimants say, create legitimate expectations in different ways, through statements or conduct, including the following:[119]

a. By an explicit promise or guarantee by the government, or a promise included in the legal or regulatory framework of the host State at the time the investment is made or in public statements or declarations by State officials, especially when the statements are reiterated over time to induce investment;[120]

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[117] Cl. Mem., ¶ 396.

[118] Cl. Mem., ¶ 397; Cl. PHB, ¶¶ 11, 15, 17, 51; Tr. Day 1 [Ms. Frey] [111:3-11]; *citing EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 216 (CL-054); *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 302 (CL-055); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154 (CL-056); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98 (CL-057); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 183 (CL-058); Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (2d ed. 2012), pp. 145-149 (CL-059); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 575-576 (CL-051); First Expert Report of Manuel Aragón Reyes, 7 July 2016, pp. 21-22 ("Aragón ER"); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶¶ 260-261 (CL-201); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, ¶ 387 (CL-209).

[119] Cl. Mem., ¶¶ 398-399; Cl. Reply, ¶ 417; Cl. PHB, ¶¶ 30-34; *citing Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, ¶ 331 (CL-060); *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, 2013, ¶¶ 678, 669 (CL-014); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 420 (CL-061); *Saluka Investments BV v. Czech Republic*, UNCITRAL Partial Award, 17 March 2006, ¶¶ 328-329 (CL-055); *Total S.A. v. Argentine Republic*, Decision on Liability, 27 December 2010, ¶¶ 117-118 (CL-050); *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, Award, 15 June 2018, ¶¶ 536–538 (CL-206); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Award, 16 May 2018, ¶ 484 (CL-207); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, ¶ 388 (CL-209).

[120] Cl. Mem., ¶¶ 400-401, 405-406; *citing Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶¶ 117-119 (CL-050); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 377 (CL-053); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case. No. ARB/01/3, Award, 22 May 2007, ¶¶ 260-266 (CL-062); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 130-133 (CL-063).

b. By implicit promises or guarantees to the investor, which are taken into account by it in making its investment; or

c. In the absence of such assurances or representations, when the circumstances surrounding the investment were such as to give rise to a legitimate expectation.[121]

99. Once the investor's legitimate expectations have arisen, the State may not, by invoking subsequent shifting policies or competing government interests, modify the regulatory framework in a manner that undermines those expectations. According to the Claimants, this is particularly true when the investments "require substantial upfront costs that can only be recovered over a substantial period of time."[122]

100. According to the Claimants, in the case at hand the Respondent created legitimate expectations regarding the stability of the regulatory framework applicable to all their investments through the following actions and measures: [123]

a. <u>Express commitments contained in RD 661/2007 and RD 1578/2008:</u> The Claimants argue that RD 661/2007 clearly offered "a stable pricing mechanism of tariff rates over the full operating life of a facility" and RD 1578/2008 clearly stated that "upon enrollment of a facility into the pre-allocation registry, Spain confirmed the specific tariff that would apply to the facility for twenty-five years."[124] This legislation "contained […] a right to the fixed tariffs for all of the electricity that Claimants' facilities produced and sold into the grid" and "established the incentives that would apply to the electricity that Claimants' facilities produced."[125] It also confirmed that the State "would adjust those rates annually for inflation, using the Consumer Price Index" and that future revisions to the incentives "would

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121 Cl. Mem., ¶¶ 402-404, 406; Cl. Reply, ¶ 416; *citing Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 131-132, 137-139, 161, 201, 669, 677 (CL-014); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶¶ 117-121 (CL-050); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, ¶ 331 (CL-060).

122 Cl. Mem., ¶ 407; Cl. Reply, ¶¶ 418-420, 422; *citing Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶¶ 563-564 (CL-064); *Total S.A. v. Argentine Republic*, Decision on Liability, 27 December 2010, ¶¶ 114, 117-120, 309 (CL-050); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case. No. ARB/01/3, Award, 22 May 2007, ¶¶ 101-103, 260-266 (CL-062); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 49, 130-134 (CL-063).

123 Cl. Mem., ¶¶ 408, 417; Cl. Reply, ¶¶ 396, 423; Cl. PHB, ¶¶ 23, 46.

124 Cl. Mem., ¶ 409. *See* RD 1578/2008, Article 11(5) (R-0087).

125 Cl. Reply, ¶ 397.

not alter the fixed tariffs already granted to existing facilities."[126] Accordingly, the regulatory framework created by RD 661/2007 and RD 1578/2008 was stable and predictable;[127]

b. "[T]he *quid-pro-quo* required of PV producers for their plants to gain the rights in RD 661/2007 and RD 1578/2008": The Claimants' legitimate expectations were informed by this factor when they made the investments and took the steps necessary to qualify for the fixed tariffs;[128]

c. Explicit authorization targeted to each of Claimants' investments: The Claimants argue that each plant received formal confirmation that it satisfied the requirements for enrolment in the RD 661/2007 regime and registration in the Administrative Registry for Special Regime Generation Facilities ("**RAIPRE**", sometimes known as "**REPE**")[129], in accordance with RD 661/2007 and RD 1578/2008;[130]

d. The context in which Spain enacted RD 661/2007 and RD 158/2008: The Claimants contend that between 1994 and 2004, none of the schemes introduced by Spain to foster investment in the renewable energy market contained fixed tariff rates or promises regarding future changes to such tariff rates. As a result of intense lobbying by industry associations, explicit provisions regarding the non-retroactivity of future revisions to the tariff rates were included in RD 436/2004. All these provisions were maintained in RD 661/2007, which also granted more stability by the introduction of specific and fixed tariff rates (as opposed to the formula introduced in RD 436/2004);[131]

e. The well-known purposes and basic logic of RD 661/2007 and RD 1578/2008: Spain needed to meet its binding EU targets for renewable energy and to reduce its dependence on non-renewable and foreign energy sources. With this in mind, Spain designed RD 661/2007 and RD 1578/2008

126 Cl. Reply, ¶ 397.

127 Cl. Reply, ¶ 402. *See generally* on this point Cl. Mem., ¶¶ 409-411; Cl. Reply, ¶ 397; Cl. PHB, ¶¶ 28, 58, 74; Tr. Day 1 [Mr. Smith] [35:14-45:14; 52:9-22], [Ms. Frey] [74:24-75:7; 80:6-82:13]; Tr. Day 5 [Mr. Smith] [51:12-52:13]; *citing* RD 661/2007, Articles 17, 24, 25, 36, 44, Table 3 (C-098); Project Boguar Resolution in the RD 1578/2008 Pre-Allocation Registry, 9 December 2010 (C-188); Project Henibra Resolution in the RD 1578/2008 Pre-Allocation Registry, 9 December 2010 (C-189); Project Valtou Resolution in the RD 1578/2008 Pre-Allocation Registry, 28 March 2011 (C-340); Project Juan del Valle Resolution in the RD 1578/2008 Pre-Allocation Registry, 21 July 2011 (C-341); Aragón ERE, pp. 27-28; *9REN Holding S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶¶ 264–269 (CL-210). Importantly, the *9REN* tribunal also rejected Spain's attempt to dismiss the significance of Article 44.3 because it was contained in a regulation rather than a contract or other commitment directed specifically at the claimant. Id. ¶¶ 294–296 (CL-210).

128 Cl. Reply, ¶ 396.

129 Cl. Mem., ¶ 187, fn. 326.

130 Cl. Reply, ¶ 423; Cl. PHB, ¶ 35.

131 Cl. Reply, ¶¶ 400-401; Cl. PHB, ¶¶ 52-53; Tr. Day 1 [Mr. Smith] [5:9-6:4; 18:18-35:8]; *citing* RD 436/2004, Article 40 (C-075); APPA 2003 Report (C-070).

to encourage investors to act quickly by offering them, for a limited time, incentives that would remain stable;[132]

f. The manner in which RD 661/2007 and RD 1578/2008 addressed the concerns from PV investors: Spain was aware of the significant upfront costs associated with the construction of PV plants, and that both investors and lenders needed assurances that the costs were going to be recovered and that they would make a profit. Spain designed RD 611/2007 and RD 1578/2008 to address such concerns;[133]

g. Clear and repeated statements and conduct of Spanish officials: The Claimants maintain that high-ranking officials repeatedly made explicit promises to investors that the framework contained in RD 661/2007 and RD 1578/2008 would remain constant throughout the operating lives of the PV facilities.[134] This included statements from the Council of Ministers,[135] two successive Ministers in charge of Energy,[136] the CNE,[137] and the Secretary

[132] Cl. Mem., ¶ 412; CL PHB, ¶¶ 35, 80; *citing* RD 661/2007, Articles 22, 36, Table 3 (C-098).

[133] Cl. Mem., ¶ 413; Cl. PHB, ¶ 52; *citing* Luis Jesús Sánchez de Tembleque and Gonzalo Sáenz de Miera, "The Regulation of Renewable Energy," in Tratado del Sector Eléctrico (Vol. 2), Ed. Fernando Becker, Javier López García de la Serrana, Julián Martínez-Simancas, Jose Manuel Sala Arquer, Aranzadi (2009), p. 560 (C-063); Margarit ER, pp. 23-24, 53-54.

[134] Cl. Mem., ¶¶ 414-415; Cl. Reply, ¶¶ 403-406, 426.

[135] Cl. Reply. ¶¶ 403, 423; Cl PHB, ¶¶ 66, 75-76; Tr. Day 5 [Mr. Smith] [52:14-21; 55:1-57:5]; *citing* Press Release for RD 661/2007 p. 1 (C-099); Full version and improved translation of Minister of Energy's Memorandum for RD 661/2007, March 2007,p. 10 (C-350) (partially submitted by Spain as R-0064).

[136] Cl. Mem., ¶ 414; Cl. Reply, ¶¶ 404, 423; c*iting* El Economista, Press Article, "Clos Stresses that the Government 'Will Not Cause Any Legal Uncertainty for Renewable,'" 21 March 2007 (C-113); Press Release for RD 661/2007 (C-099); Joan Clos I Mathei (Minister of Industry, Tourism and Trade), Appearance before the Senate on 9 October 2007, Journal of Sessions of the Senate. VIII Legislature. Commissions No. 515. Commission of Industry, Trade and Tourism. Presidency of Excmo. Sr. D. Francisco Xabier Albistur Marín, 9 October 2007 p. 24 (C-103); Joan Clos I Matheu (Minister of Industry, Tourism and Trade), Appearance before the Congress of Deputies of 17 October 2007, Journal of Sessions of the Congress of Deputies, 2007, VIII Legislature, no. 928, Commission of Industry, Trade and Tourism, Session 56 of 17 October 2007, pp. 7, 24-25 (C-118); Miguel Sebastián (Minister of Industry, Commerce and Tourism), Appearance before the Senate on 25 September 2008, Cortes Generales. Diario de Sesiones del Senado. IX Legislatura. Comisiones Núm. 47. Comisión de Industria, Turismo y Comercio. Presidencia del Excmo. Sr. D. Antonio Cuevas Delgado on 25 September 2008, p. 10 (C-174); Europa Press, Press Article, "Clos Rejects That There Is Legal Uncertainty 'in the Photovoltaic Activity' – Industry Prepares a Strategic Plan 2008-2016, Which Is Currently Under Public Discussion," October 9, 2007 (C-117).

[137] Cl. Reply, ¶¶ 405-406, 423; Cl. PHB, ¶ 79; c*iting* Luis Jesús Sánchez de Tembleque and Gonzalo Sáenz de Miera, "The Regulation of Renewable Energy," in Treaty of the Electricity Sector (Vol. 2), Coord. Fernando Becker, Javier López García de la Serrana, Julián Martínez-Simancas, Jose Manuel Sala Arquer, Aranzadi (2009), p. 560 (C-063); CNE, "Report 30/2008 of the CNE regarding the proposal of royal decree on the remuneration of electricity generation using photovoltaic solar technology for facilities after the deadline for maintaining the remuneration stipulated under Royal Decree 661/2007, of May 25, for such technology," 29 July 2008, p. 20 (C-111).

of Energy.[138] The Claimants also refer to several presentations, including by an agency created by Spain, Invest in Spain, to attract foreign investment by promoting RD 661/2007;[139]

h. Legal advice from multiple law firms and the fact that international banks were willing to provide non-recourse financing on favourable terms due to the predictable cash flows the regimes guaranteed: The Claimants argue that Spain's promises, guarantees and aggressive promotion also sought to assure Europe's financial community, the main source of financing for the

138 Cl. Mem., ¶ 414; Cl. Reply, ¶ 423; *citing* Cinco Dias, Press Article, "Nieto Says the New Wind Regulation Provides 'Full Legal Certainty,'" 10 May 2007 (C-115); Pedro Luis Marín Uribe (General Secretary of Energy), Appearance before the Congress of Deputies on 25 September 2008, Cortes Generales. Diario de Sesiones del Congreso de los Diputados. IX Legislatura. Comisiones Núm. 84. Comisión de Industria, Turismo y Comercio. Presidencia del Excmo. Sr. D. Antonio Cuevas Delgado on 25 September 2008, pp. 19-20 (C-146).

139 Cl. Reply, ¶¶ 407, 423, 427-428; Cl. PHB, ¶ 64-65; Tr. Day 1 [Mr. Smith] [45:15-49:19; 50:17-51:17], [Ms. Frey] [91:5-92:16]; *citing* Invest in Spain and Ministry of Industry, Tourism and Trade, Presentation, "Legal Framework for Renewable Energy in Spain," 2009 (C-026); Manuela García (Invest In Spain), Presentation, "Opportunities in Renewable Energy in Spain," 15 November 2007 (C-126); Begoña Cristeto (INTERES Invest in Spain), Presentation, "Andalucía, an Attractive Marketplace for Investments (Seville)," 13 June 2007 (C-133); Manuela García (Invest in Spain), Presentation, "Opportunities in Renewable Energy in Spain," 1 November 2008 (C-136); Luis Jesús Sánchez de Tembleque (CNE), Presentation, "The Regulation of the Special Regime," 1 March 2007 (C-072); Carlos Solé Martín (CNE), Presentation, "The Necessity to Develop a Regulatory Framework for Renewable Energy," 2 December 2008 (C-073); J. Miguel Aguado, Presentation (CNE), "RD 661/2007 on Wind Energy. Key Features of RD 661/07 and Other Regulatory Changes as Development Tools for Wind Energy," 9 October 2007 (C-077); Francisco Javier Peón Torre (CNE), Presentation, "Legal Aspects of Renewable Energy" - Curso ARIAE on Energy Regulation (Colombia), 19-23 November 2007 (C-107); Carlos Solé and José Miguel Unsión (CNE), Presentation, "Price Setting Models for Renewable Generation: The International Experience (Costa Rica)," 28 April 2008 (C-127); Carlos Solé Martín (CNE), Presentation, "International Renewable Energy Regulation. The Spanish Case (Eilat, Israel)," December 2008 (C-128); Carlos Solé Martín (CNE), Presentation, "The New Regulatory Framework for Renewable Energy in Spain," 18 June 2007 (C-130); Fernando Marti Scharfhausen (CNE), Presentation, "The Legal and Regulatory Framework For Renewable Energy," 29 October 2008 (C-149); Luis Jesús Sánchez de Tembleque (CNE), Presentation, "The Regulation of Renewable Energy," February 2009 (C-150); IDAE, Presentation, "The Sun Can Be Yours. Answers to All Key Questions," 6 June 2007 (C-110); Jaume Margarit (IDAE), Presentation, "Economic Aspects of Development of Renewable Energy. Investment Costs, Profitability, and Incentives of Solar Thermo-Electric Technology (Madrid)," 11 December 2007 (C-120); IDAE, Presentation, "The Sun Can Be Yours. Response to All Key Questions on Solar Photovoltaic Energy," 11 October 2007 (C-177); Additional presentations Spain produced during document production, 2004-2008 (C-365); Invest in Spain, Webpage, "Invest in Spain among the best investment attraction agencies, according to the World Bank," 26 May 2009 (C-105); Invest in Spain, Webpage "Spain continues to attract foreign direct investment and it world's 7th larger receiver," 15 July 2009 (C-176); INTERES Invest in Spain, Press Release "INTERES unveils the opportunities available in the Spanish wind power sector for foreign investors at the Husumwind (Germany) International Trade Fair," 18 September 2007 (C-125); INTERES Invest in Spain, Press Release "Major Spanish presence at CIFIT," 9 September 2007 (C-124); Invest In Spain, Press Release "INTERES Invest in Spain organizes a seminar on investment in Luxembourg," 18 April 2007 (C-121); Invest in Spain, Opportunity Note: "Renewable Energy: Solar Photovoltaics" – "Business Opportunities in the Spanish PV Sector," 2010, p. 5 (C-153).

projects, of the stability and security of the legal framework for renewable energy.[140]

101. In addition, the Claimants argue that they conducted and received from multiple legal advisors thorough and adequate due diligence before investing in Spain. None of their advisors raised concerns regarding the stability or reliability of RD 661/2007 and RD 1578/2008. The Claimants and their legal counsel assigned no weight to the decisions from the Spanish Supreme Court that were cited by the Respondent because such cases, *inter alia*, concerned incentive regimes that pre-dated RD 661/2007 and that did not contain any express guarantee against retroactive revisions. Similarly, the improvements made by RD 661/2007 to RD 436/2004 did not put the investors on notice that Spain could make retroactive changes to the regime under which the investments were made.[141]

102. Based on the above considerations, the Claimants argue that the Respondent made specific promises about the stability and certainty of the regulatory framework contained in RD 661/2007 and RD 1578/2008, "confirming that the specific incentives that it granted to individual PV plants would be paid at fixed rates on all the electricity they produced."[142] Contrary to what was argued by the Respondent, the guarantee made by Spain under such framework was not simply that there would be "a reasonable return for investors." Spain was therefore not at liberty to make retroactive changes to such incentives, which it did in 2013 with the New Regulatory Regime.[143]

103. The Claimants, as well as many investors and sophisticated lenders, made their revenue and profit projections, estimated the price and the interest rates to be paid and acquired the PV facilities in reliance on these assurances. To demonstrate this, the Claimants prepared

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140 Cl. Mem., ¶ 416; Cl. Reply, ¶¶ 396, 408; Cl. PHB, ¶ 68; *citing* 2005 IDAE, "Summary PER for the Council of Ministers – Plan for Renewable Energy in Spain 2005-2010," August 2005, pp. 55-56 (C-084); Margarit ER, p. 31; First Witness Statement of Peter Flachsmann, 11 July 2016 ("Flachsmann WS"), ¶ 11.

141 Cl. Reply, ¶¶ 432-442; Cl. PHB, ¶¶ 67, 81; Tr. Day 1 [Ms. Frey] [85:15-88:6] *citing* Judgment of the Supreme Court, of 15 December 2005 (C-358/R-0132) (regimes pre-dating RD 436/2004); Judgment of the Spanish Supreme Court, 25 October 2006 (R-0133) (predating RD 436/2004); Judgment of the Spanish Supreme Court, 20 March 2007 (C-359/R-0134) (predating RD 436/2004); Judgment of the Spanish Supreme Court, 9 October 2007 (C-360/R-0135) (against the 2005 alteration of RD 436/2004 on technical aspects); Judgment of the Spanish Supreme Court, 3 December 2009 (C-354/R-0136).

142 Cl. Reply, ¶ 421.

143 Cl. Reply, ¶¶ 419, 421, 425, 429.

a chart that details each Claimant's investment dates and the specific representations it relied upon to make its investment.[144]

104. The Claimants argue that under international law, it is irrelevant whether the Claimants' rights under RD661/2007 and RD 1578/2008 were "acquired" or "vested" rights under Spanish law. However, they contend that upon registration of the facilities into the RAIPRE and upon the facilities' final commissioning, RD 661/2007 and RD 1578/2008 conferred specific rights on the Claimants' plants.[145] At the very least, registration in the RAIPRE "crystallized a general offer of incentives into a specific entitlement for Claimants' facilities that sufficed for purposes of a 'legitimate expectation.'"[146]

105. While the existence of this legitimate expectation cannot be questioned, the Claimants say, once Spain "had benefitted from the avalanche of investment induced by the expectation," it implemented "a series of measures that imposed unforeseen reductions on the value of the fixed tariffs it had promised," in violation of that expectation.[147] Accordingly, under international law, the Respondent is under an obligation to compensate the Claimants.[148]

106. The Claimants argue that the measures implemented by Spain that reduced the "fixed, guaranteed tariffs to be paid throughout the operating lives of their plants" and hence violated Claimants' legitimate expectations included:[149]

a. "cancelling the right of Claimants' RD 661/2007 projects to receive the tariffs after Year 25 of their operating lives […]";[150]

b. "limiting the amount of electricity eligible for feed-in tariffs by imposing annual operating hour restrictions on all PV facilities […]";[151]

[144] Cl. PHB, ¶ 56. *See* further below, ¶ 206.
[145] Cl. Reply, ¶¶ 399, 446-450.
[146] Cl. Reply, ¶ 450.
[147] Cl. Mem., ¶ 417.
[148] Cl. Reply, ¶ 445.
[149] Tr. Day 1 [Mr. Mohr] [114:8-124:19].
[150] Cl. Mem., ¶ 417(i); *citing* RD 661/2007, Article 36, Table 3 (C-098).
[151] Cl. Mem., ¶ 417(ii); *citing* RD 661/2007, Article 17 (C-098).

c. "reducing all of the income earned by Claimants' facilities from electricity production […]", through the imposition of a so-called "tax" under Law 15/2012;[152] and

d. "altering the method for updating the incentivized pricing formulas in RD 661/2007 and RD 1578/2008 by de-linking those tariffs from the Consumer Price Index and substituting a lower index […]."[153]

107. Furthermore, having been warned by the EU Commissioners for Energy and Climate Action of the need for a "stable investment climate" and "to guarantee the respect of EU law principles, includ[ing] legal certainty and the protection of legitimate confidence/expectations",[154] in addition to the measures described above, Spain entirely abolished RD 661/2007 and RD 1578/2008 in June 2013 and substituted the New Regulatory Regime a year later.[155]

108. The Claimants submit that this New Regulatory Regime is fundamentally different from the framework contained in RD 661/2007 and RD 1578/2008 which Spain had promised, and on which the Claimants relied when making their investment.[156] This New Regulatory Regime, which provides the investors with what Spain considers to be a "reasonable rate of return", violates the central guarantee of non-retroactivity, is ambiguous, complex and uncertain, and makes any remuneration to be paid to the Claimants' facilities subject to periodic partial review every three years.[157]

109. The Claimants argue that through these actions Spain has violated their "legitimate expectation of a stable, straightforward legal framework governing their investments" and, therefore violated the ECT's fair and equitable treatment standard.[158]

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[152] Cl. Mem., ¶ 417(iii).

[153] Cl. Mem., ¶ 417(iv); *citing* RD 661/2007, Article 44.1 (C-098).

[154] Cl. Mem., ¶ 418; *citing* Letter from Günter H. Oettinger (EU Energy Commissioner) and Connie Hedegaard (EU Climate Action Commissioner) to Mr. Miguel Sebastián, Spanish Minister of Industry, Tourism and Trade, 22 February 2011 (C-092).

[155] Cl. Mem., ¶ 419.

[156] Cl. Mem., ¶¶ 419-421.

[157] Cl. Mem., ¶¶ 419-422.

[158] Cl. Mem., ¶¶ 422-423.

(ii) Transparency and consistency

110. The Claimants submit that the fair and equitable treatment standard contained in Article 10(1) of the ECT also encompasses the duty to treat investors and their investments transparently and consistently.[159]

111. This duty of transparency implies that the investor must be able to know and understand the legal regime applicable to its investments, without there being any ambiguity or opacity in the treatment of these investments. Accordingly, a State violates this duty when there is an arbitrary reversal of the applicable framework, when the investor is treated inconsistently by the State, or when the State "fails to correct or clarify uncertainties that develop in a regime, and when it fails to adequately inform investors regarding possible changes to a legal regime, so that investors can plan accordingly."[160]

112. According to the Claimants, the Respondent violated its duty of transparency by retroactively modifying the clear and straightforward framework contained in RD 661/2007 and RD 1578/2008; by imposing the inconsistent measures described in the previous section of this Decision; by later abolishing the regime enshrined in RD 661/2007 and RD 1578/2008 and replacing it with an entirely New Regulatory Regime which was inconsistent with the conditions under which the Claimants had made their investments;

[159] Cl. Mem., ¶¶ 424-425; *citing, inter alia, Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570 (CL-051); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284 (CL-065); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 131 (CL-063); *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 872 (CL-014); *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 557 (CL-068).

[160] Cl. Mem., ¶¶ 426-427; *citing* Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (2d ed. 2012), pp. 145-149 (CL-059); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 76 (CL-069); *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 869-870 (CL-014); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.79 (CL-070); *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶ 285 (CL-071); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154 (CL-056); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004, ¶ 165 (CL-072); *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, ¶ 564 (CL-064).

and by not giving the Claimants any opportunity to comment on the New Regulatory Regime.[161]

113. The Claimants submit that the Respondent has not provided a reply to this aspect of their claim beyond repeating the arguments it presented in relation to the violation of the Claimants' legitimate expectations, and in particular that the Respondent's reliance on the decision in *AES v. Hungary* to support its submission on this point is unjustified because the facts of that case were vastly different from those of the case at hand.[162]

114. They contend that Spain's pleaded case itself evidences its failure to fulfil the demands of transparency. Spain would in effect have designed a framework with a non-retroactivity guarantee to attract many investors, while at the same knowing that it would make fundamental changes to such regime at a later date, after benefitting from billions of euros of investment in its renewables sector.[163] If this is indeed the case, the Claimants argue that this Tribunal cannot but conclude that the Respondent failed to treat their investments with transparency, consistency, and good faith, in violation of the FET standard's requirements.[164]

(iii) Good faith

115. According to the Claimants, the fair and equitable treatment standard also encompasses the duty to treat investments in good faith, which requires to treat investors in an "even-handed and non-discriminatory" manner.[165]

116. The Claimants submit that Spain's measures were not adopted in good faith because:

a. Spain was able to derive the complete benefit from the Claimants' PV plants and from the energy capacity that they created, while denying the Claimants the benefits that it had originally promised to offer and upon which the Claimants relied when making their investments. In addition, Spain started

[161] Cl. Mem., ¶¶ 428-433; Cl. Reply, ¶ 476; *citing* Margarit ER, pp. 54-58.

[162] Cl. Reply, ¶¶ 475, 477.

[163] Cl. Reply, ¶ 478. *See also* Cl. Reply, ¶¶ 479-480.

[164] Cl. Reply, ¶ 481.

[165] Cl. Mem., ¶ 436 *citing Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 303-307 (CL-055). *See also* the other authorities cited in Cl. Mem., ¶¶ 435-436.

going back on its promises at a time when it was no longer economically feasible for the Claimants to relocate their plants;[166]

b. The measures adopted by Spain unfairly targeted the Claimants and other renewable energy investors as the alleged cause of Spain's tariff deficit, when the real cause of the deficit was Spain's own failure to address the deficit issue from the outset and pass on costs to the consumers.[167] The Respondent forced the renewable energy investors "to bear the burden of the 'solution'" that should have also been borne by traditional energy producers, utilities, and end-consumers;[168]

c. The introduction of the purported 7% "tax" "was particularly disingenuous and unfair" because "it does not act as a *bona fide* 'tax' at all, creates a disproportionate impact on renewable energy investors, and directly reduces the tariffs Spain granted to Claimants' facilities."[169]

117. Further, the transparency and consistency violations referred to above at paragraphs 110 to 114 also fall short of the good faith standard and go against the Claimants' legitimate expectations.[170]

118. The Claimants thus conclude that Spain's failure to treat the Claimants and their investments in good faith is a further violation of the FET standard as enshrined in the ECT.[171]

#### *b. Respondent's Position*

119. The Respondent states that the burden of proof rests on the Claimants to demonstrate the violation of the FET standard.[172] While the Respondent agrees with the Claimants that the ECT must be interpreted in light of its objective and purpose,[173] it disagrees with the Claimants' "one-sided" interpretation of Article 10(1) of the ECT, which on the Claimants'

166 Cl. Mem., ¶ 437; *citing* Brattle Regulatory Report, "Changes to the Regulation of Photovoltaic Installations in Spain Since November 2010", 27 July 2016 ("First Brattle Regulatory Report"), ¶ 172.

167 Cl. Mem., ¶ 438.

168 Cl. Mem., ¶ 438; *citing* Margarit ER, p. 46.

169 Cl. Mem., fn. 782.

170 Cl. Reply, ¶¶ 474-481.

171 Cl. Mem., ¶ 439.

172 Resp. C-Mem., ¶ 1051; *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 154 (RL-0074).

173 Resp. C-Mem., ¶¶ 1013-1014, 1038; Resp. Rej., ¶ 1058.

reading would enshrine "an alleged right to petrification of general rules […] even to the detriment of States Parties and the nationals of the State Party."[174]

120. The Respondent's own interpretation of Article 10(1) of the ECT is based on the following premises: ***(1)*** the ECT does not limit the regulatory power of the States beyond the minimum standards prescribed by international law with the principal objective of securing non-discrimination compared with the treatment of national investors; ***(2)*** this interpretation is reinforced by the absence from the ECT of a national treatment obligation in relation to matters of subsidies or public aid; ***(3)*** the ECT permits the adoption of macroeconomic control measures based on public interest grounds; and ***(4)*** the measures adopted by the Respondent fulfil the ECT's objective.[175]

121. *First,* the Respondent argues that the ECT distinguishes between: ***(a)*** the period of the "'making-investment process' […] in which the conditions for guaranteeing the objective of national treatment and most-favoured nation treatment were reserved for the signing of a 'supplementary treaty', that has still not been signed";[176] and ***(b)*** the period after the investment has been made, when "the guarantee of national treatment and the most favoured nation clause are applied to the foreign investor, albeit with certain limitations […]"[177] by the ECT, including ECT Article 10.

122. The Respondent argues that the reference in Article 10(1) of the ECT to "treatment no less favourable than that required by International Law" is a reference to the minimum standard of protection guaranteed under international law.[178] The Respondent then concludes that "[t]he maximum aspiration of the ECT is, therefore, national treatment, as this treatment

174 Resp. C-Mem., ¶¶ 1015, 1032, 1052; Resp. Rej., ¶¶ 1042, 1053.

175 Resp. C-Mem., ¶¶ 1038-1048.

176 Resp. C-Mem., ¶ 1020.

177 Resp. C-Mem., ¶ 1020. *See also* on these two phases Resp. C-Mem., ¶¶ 1021-1023; *citing inter alia* Craig Bamberger, "An Overview of the Energy Charter Treaty," in Thomas W. Wälde The Energy Charter Treaty: An East-West Gateway for Investment and Trade, (Kluwer Law International, 1996) (RL-0078); Thomas W. Wälde, "Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation," (1996) 12 Transnational Dispute Management 4 (RL-0091); Thomas W. Wälde, "International Investment under the 1994 Energy Charter Treaty," in The Energy Charter Treaty: An East-West Gateway for Investment and Trade (Kluwer Law International, 1996) (RL-0077).

178 Resp. C-Mem., ¶ 1024.

shall apply to foreign investments when it is more favourable”,[179] as reflected in Article 10(7) of the ECT.[180]

123. *Second*, pursuant to Article 10(8) of the ECT, the guarantee of national treatment to investments that have already been made, in relation to matters of subsidies or state aid is subject to the conclusion of a supplementary treaty that has not been signed yet. There being no such treaty, the obligation of national treatment cannot apply in the case at hand because, according to the Respondent, the Claimants are requesting (in effect) the payment of subsidies or State aid for the production of electrical energy, contrary to EU law.[181] The Respondent maintains that its view is also supported by Article 9 of the ECT and positions taken by the ECT Secretariat.[182]

124. *Third,* based on the above, the Respondent submits that the ECT’s main objective is to achieve the implementation of a free market for energy in which foreign investors will be treated at least as well as national investors when the State adopts macroeconomic control measures.[183]

125. Indeed, as recognized by previous tribunals, “[i]n the absence of a specific commitment to petrification, no investor can have an expectation that a regulatory framework such as the one discussed in this arbitration will not be amended.”[184] In Spain’s view, “the ECT under

179 Resp. C-Mem., ¶ 1024.

180 Resp. C-Mem., ¶ 1025. *See also* Resp. C-Mem., ¶ 1023; Resp. Rej., ¶ 1051, *both citing* Thomas W. Wälde, “International Investment under the 1994 Energy Charter Treaty,” in The Energy Charter Treaty: An East-West Gateway for Investment and Trade (Kluwer Law International, 1996) (RL-0077).

181 Resp. C-Mem., ¶¶ 1026-1027.

182 Resp. C-Mem., ¶¶ 1028-1030.

183 Resp. C-Mem., ¶¶ 1016-1019, 1030, 1041; Resp. Rej., ¶¶ 1041, 1043-1046, 1048, 1050, 1083; Resp. PHB, ¶ 92; Tr. Day 1 [Mr. Elena Abad] [267:3-16]; *citing* Thomas W. Wälde, “Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation,” (1996) 12 Transnational Dispute Management 4 (RL-0091); The Energy Charter Treaty and related documents, (RL-0032); The Energy Charter Treaty: Reader's Guide, “Investment”, p. 16 (RL-0079); The Energy Charter Treaty and related documents, consolidated version in Spanish, p. 8 (RL-0103); Trattato Sulla Carta Dell’Energia e documenti correlati, official version in Italian, p. 7 (RL-0034); Der Vertrag Über Die Energiecharta und dazugehörige Dokumente,” German official version, p. 9 (RL-0035).

184 Resp. C-Mem., ¶ 1033. *See also* Resp. C-Mem., ¶¶ 1034-136; *citing Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 219 (RL-0060); *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.25 (CL-038); *Charanne B.V. and Construction*

no circumstances cancels or limits to the extreme the possibility of modifying the regulatory framework on the grounds of general interest."[185] In any event, Spain did not violate the ECT because it acted in accordance with the objective of the Treaty, did not promise to petrify the regime under RD 661/2007, and adopted reasonable, proportionate and justified macroeconomic measures.[186]

126. *Fourth*, according to the Respondent, States must be given "a reasonable margin of appreciation […] before being held to account under the ECT's standards of protection",[187] especially in strategic sectors such as the energy sector.[188] The Respondent considers that it has proven that its regulatory measures were adopted without discriminating between nationals and non-nationals,[189] and as part of macroeconomic control measures, which Spain undertook to adopt in 2012 in compliance with international commitments to address the electricity tariff deficit;[190] Spain's regulatory measures were also based on reasonable grounds,[191] including guaranteeing a reasonable rate of return to national and foreign investors,[192] avoiding over-remuneration, ensuring the sustainability of the SES in the midst of an international crisis and a sharp drop in energy demand, and preventing that the "whole economic imbalance [be passed] onto consumers."[193]

127. While the Respondent considers that Article 10 of the ECT includes only one standard and not different autonomous obligations that can be analysed separately as the Claimants have

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*Investments S.A.R.L. v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2016, ¶¶ 493, 510 (RL-0075).

185 Resp. C-Mem., ¶ 1037.

186 Resp. C-Mem., ¶ 1030; Resp. Rej., ¶ 1063.

187 Resp. Rej., ¶ 1064; *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 8.35 (RL-0028).

188 Resp. Rej., ¶¶ 1064-1065.

189 Resp. C-Mem., ¶ 1047.

190 Resp. C-Mem., ¶ 1046; *citing* Council's Recommendation of 10 July 2012 on the 2012 National Reform Programme of Spain and delivering a Council opinion on the Stability Programme for Spain, 2012-2015: "address the electricity tariff deficit in a comprehensive way, in particular by improving the cost efficiency of the electricity supply chain." (R-0044); Memorandum of Understanding signed with the European Union on 20 July 2012, Sections 29 and 31 (RL-0093).

191 Resp. C-Mem., ¶ 1045.

192 Resp. C-Mem., ¶ 1045.

193 Resp. C-Mem., ¶¶ 1045.

argued,[194] the Respondent addresses the Claimants' arguments regarding these allegedly autonomous obligations.

(i) Legitimate expectations

128. The Respondent submits that the Claimants have the burden of proving the violation of their alleged legitimate and objectively created expectations, which they have failed to do.[195]

129. In any event, Spain argues that it has not violated the Claimants' legitimate expectation because: ***(1)*** the Claimants have failed to demonstrate that they are all in the same situation and have the same legitimate expectations as one another; ***(2)*** the Claimants have failed to demonstrate the level of due diligence required for them to have any legitimate expectations; ***(3)*** even if there was due diligence on the part of the Claimants, the contested measures do not violate their objective legitimate expectations; ***(4)*** the Respondent denies that there was an aggressive campaign by Spain to attract foreign investors; ***(5)*** the Claimants' alleged legitimate expectations are not congruous with the investments made after the enactment of the challenged measures; and ***(6)*** obligations relating to legitimate expectations cannot imply the immutability of the regulatory framework, irrespective of the economic circumstances faced by the State.

130. *First,* given the plurality of the alleged investors, the differences between the Claimants' investments, and the dates in which the investments were made, which the Respondent refers to as the "subjective and objective heterogeneity of the investments",[196] the Claimants are not all in the same situation nor have they all made an investment of the same nature. In Spain's view, the Claimants have failed to explain why they should be considered, under domestic law, as being all in the same situation, having the same

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194 Resp. Rej., ¶ 1072; Tr. Day 1 [Mr. Elena Abad] [268:11-19]; Tr. Day 5 [Ms. Ruiz Sánchez] [154:24-155:8].

195 Resp. Rej., ¶ 1074; Resp. PHB, ¶ 99.

196 Resp. C-Mem., ¶ 1059.

legitimate expectations, and being all involved in a single dispute.[197] This point was raised initially when the Claimants included both the DSG Claimants and the TS Claimants.[198]

131. *Second*, the Respondent argues that for legitimate expectations to be protected, these expectations must be reasonable and objective in relation to the existing general regulatory framework.[199] This requires the Claimants to demonstrate due diligence regarding the general regulatory framework applicable to their investments, including at least knowledge of the Acts and implementing regulations and the most important decisions of the Supreme Court.[200]

132. The Respondent submits that in the case at hand, the Claimants have not demonstrated the level of diligence expected from a foreign investor making investments in a highly regulated sector like the energy sector.[201] They have failed to provide a due diligence report in support of their alleged legitimate expectations, or proof of their review of the settled case law since 2005 regarding the rights of renewable energy investors in Spain.[202] Contrary to what the Claimants have alleged, the Respondent maintains that the main associations in the renewable energy sector were aware of the possible reforms and that the only guarantee given by Spain was that investors would receive a reasonable rate of return for their projects.[203] Consequently, the expectations alleged by the Claimants are neither

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[197] Resp. C-Mem., ¶¶ 1059-1062; Resp. Rej., ¶¶ 1084-1093, 1099-1100; Resp. PHB, ¶ 100; *citing* First Expert Report of AMG, 31 October 2016 ("First AMG ER"), Appendix XII; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 154 (RL-0074); CNE Report 3/2007 regarding the proposed Royal Decree regulating the activity of electricity production under the special regime and of certain facilities of comparable technology under the ordinary regime, 14 February 2007 ("CNE Report 3/2007"), p. 20 (R-0116); Second Expert Report of AMG, 27 June 2017 ("Second AMG ER"), table 6 (¶ 4.2.).

[198] *See* Decision on Jurisdiction and Admissibility, Section V.A.

[199] Resp. C-Mem., ¶ 1063.

[200] Resp. C-Mem., ¶ 1067. *See also* Resp. C-Mem., ¶¶ 1063-1068, 1071-1075; Resp. Rej., ¶ 1101; Tr. Day 1 [Mr. Elena Abad] [272:10-273:3]; *citing* Award of *Electrabel S.A. v. Republic of Hungary*, ICSID No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.78 (RL-0028); *Charanne B.V. and Construction Investments S.A.R.L v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2006, ¶¶ 495, 505 (RL-0075).

[201] Resp. C-Mem., ¶¶ 1072, 1074; *citing Charanne B.V. and Construction Investments S.A.R.L v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2006, ¶¶ 495, 505 (RL-0075).

[202] Resp. C-Mem., ¶¶ 1069-1070, 1073; Resp. Rej., ¶ 1107, 1117 *citing Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶ 250 (RL-0045).

[203] Resp. C-Mem., ¶ 1075.

real nor objective, and the alleged violation of their legitimate expectations must be rejected.[204]

133. *Third*, even if there had been due diligence on the part of the Claimants, the Respondent argues that the contested measures do not violate the objective legitimate expectations of the Claimants.[205]

134. The Respondent argues that the ECT is not an "insurance policy" for investors against risks associated with changes of the regulatory framework.[206] For there to be a violation of the legitimate expectations of an investor, two elements are required: ***(a)*** specific commitments made to the investor that the regulatory regime in force is going to remain immutable; and, ***(b)*** objectively reasonable and justified expectations on the part of the investor, which requires an assessment of the background information the investor knew or should reasonably have known at the time the investment was made.[207] These requirements are not satisfied in the case at hand.[208]

135. The Respondent argues first that it made no specific commitments to the investor. As recognized by the tribunal in *Charanne*, none of the regulations (*i.e.* RD 436/2004, RD-Act 7/2006, RD 661/2007, RD 1578/2008 and RD-Act 6/2009) contained a commitment not to modify the remuneration system, the hours or years of subsidized production, or the tariff updating regime.[209] The only guarantee given was that the facilities would achieve a

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204 Resp. C-Mem., ¶ 1075.

205 Resp. C-Mem., section IV.L.(2.4), p. 236.

206 Resp. C-Mem., ¶ 1076.

207 Resp. C-Mem., ¶ 1076; Resp. Rej., ¶¶ 1101-1103; Resp. PHB, ¶¶ 95-98; Tr. Day 5 [Ms. Ruiz Sánchez] [146:15-147:15]; *citing, inter alia, Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 219 (RL-0060); *Charanne B.V. and Construction Investments S.A.R.L v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2016, ¶¶ 495, 499, 505, 507 (RL-0075), *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 217 (RL-0035); *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, Award, 23 September 2010, ¶ 9.3.29 (RL-0065); *Electrabel S.A. v. Republic of Hungary*, ICSID No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.78 (RL-0028); *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Award, 12 July 2016, ¶¶ 771, 775, 781 (RL-0101); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶¶ 154-155, 157, 162 (RL-0074).

208 Resp. C-Mem., ¶ 1077; Resp. Rej., ¶¶ 1079, 1104; Tr. Day 5 [Ms. Ruiz Sánchez] [147:16-24].

209 Resp. C-Mem., ¶¶ 1078-1079; *citing Charanne B.V. and Construction Investments S.A.R.L v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2006, ¶¶ 504-508 (RL-0075).

reasonable rate of return during their useful lives. As such, the renewable energy sector was fully aware that the regulatory framework was subject to changes.[210]

136. Further, the Respondent contends that the Claimants' alleged expectations are neither objective nor reasonable. According to the Respondent, no diligent and informed investor would have expected the framework to be petrified simply because the investor had fulfilled the regulatory requirement of registration with the RAIPRE.[211] In addition, the Claimants have not provided conclusive proof that Spain agreed not to make future reforms that could affect the PV plants in operation.[212] A diligent and informed investor would have been aware of the existing regulatory risk, which had been recognized by the main associations in the renewable energy sector and the Spanish Supreme Court.[213]

137. In the Respondent's view, no diligent investor would have been unaware of the essential principles of the Spanish regulatory framework,[214] including the need for its economic sustainability, and would have expected that if a deficit or economic imbalance affecting the sustainability of the SES had arisen, Spain would refrain from adopting macroeconomic control measures to address such a situation.[215] In this case, the measures adopted by Spain sought to guarantee the sustainability of the system, while maintaining the principle of a reasonable return to the investors, in accordance with the clear and consistent case-law of the Spanish Supreme Court.[216] In support of this argument, the Respondent contends that the relevant players in the renewable energy sector did not share the Claimants' alleged

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210 Resp. C-Mem., ¶¶ 1078-1081; Resp. Rej., ¶¶ 1116, 1121, 1127, 1129-1130; Resp. PHB, ¶¶ 113-114; *citing Charanne B.V. and Construction Investments S.A.R.L v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2006, ¶¶ 504-508 (RL-0075); AEE allegations before the CNE during the Consultive Council of Electricity public information process on the draft RD which regulates and modifies certain aspects of the special regime, p. 6 (R-0155); *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Award, 12 July 2016, ¶ 807 (RL-0101).

211 Resp. C-Mem., ¶ 1082.

212 Resp. Rej., ¶ 1080.

213 Resp. C-Mem., ¶¶ 1082-1088.

214 *See* Resp. C-Mem., ¶ 1085 for the list of these principles.

215 Resp. C-Mem., ¶ 1086. *See also* Resp. Rej., ¶¶ 1122-1123, 1125-1126, 1133.

216 Resp. C-Mem., ¶¶ 1087-1088, 1092.

expectations and these players knew of the possibility of regulatory reform within the limits of a reasonable rate of return.[217]

138. In addition, the Respondent argues that for an obligation to exist in international law, the obligation must also exist under the applicable norms of the host State: "[i]nternational law does not make binding that which was not binding in the first place, nor render perpetual what was temporary only."[218] In the case at hand, a Royal Decree, which is a governmental regulation, can never generate a binding obligation that there will never be a future Royal Decree that would amend the first one. Such an obligation would violate the Spanish Constitution and the principle of hierarchy of norms. In the eyes of the Respondent, therefore, no Royal Decree can give rise to legitimate expectations.[219]

139. For the Respondent, the following elements should also be taken into account when assessing the objective expectations of the Claimants:[220]

a. The contracts entered into by the Claimants show that they knew and assumed the regulatory risk, as illustrated by the Claimants' loan agreements and investment prospectuses;

b. The Claimants did not participate in any specific negotiations or agreements so that general regulations are applicable to them;

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217 Resp. Rej., ¶¶ 1104-1110, 1113-1115, 1137; Resp. PHB, ¶ 102; *citing*, *inter alia*, Iberdrola PowerPoint Presentation, "Renewable targets in Spain," 5 April 2006 (R-0271); Submissions from APPA concerning the Draft RD 661/2007, 3 April 2007 (R-0287); APPA Report, 30 April 2010 (R-0255). The APPA also reiterates this in its appeal against RD 1565/2010; APPA Appeal against RD 1565/2010 before the Supreme Court, 8 June 2011, p. 9 (R-0281); AEE Press release on RD 661/2007, 9 May 2007 (R-0289); Submissions from AEE to the CNE during the hearing process before the Electricity Advisory Council on the draft of RD 1565/2010, which regulates and modifies certain aspects of the special regime, p. 6 (R-0140); Arthur D. Little, Report for ASIF and APPA: "The role of photovoltaic generation in Spain," 2007, p. 32 (R-0279); "The risk of retroactive modification of the tariff for solar photovoltaic facilities (especially those regulated by Royal Decree 1578/2008)," Castro Sueiro y Varela Abogados, Newspaper La Ley, 13 July 2010, article prepared by Ms. Yurena Medina, current Senior Associate of the firm KPMG Abogados (R-0308 and R-0315); Interview of Cuatrecasas and PROMEIN lawyers collaborating on the Photovoltaic Legal Platform (PLF) in the magazine Suelo Solar, 22 December 2010 (R-0316); Suelo Solar, Opinion of PROMEIN Abogados on Reasonable Rate of Return, 1 June 2010 (R-0262).

218 Resp. PHB, ¶¶ 107-108; *citing Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 371 (RL-0123).

219 Resp. PHB, ¶¶ 109-111.

220 Resp. C-Mem., ¶1095; Resp. Rej., ¶¶ 1108-1112; Resp. PHB, ¶¶ 104-105; *citing Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶¶ 250-258 (RL-0045); Alcolea Investment Offer Prospectus, 3 March 2008, p. 105 (C-237).

c. No exhaustive due diligence process regarding the operation of the Spanish regulatory framework was conducted;

d. The Respondent's regulatory framework and case-law do not admit the Claimants' position;

e. The Respondent signed international agreements regarding the bailout of the financial sector, which included the obligation to adopt macroeconomic control measures; and

f. The Spanish Government and Parliament are competent to adopt amendments to the regulatory framework, as is the Supreme Court to interpret them.

140. The Respondent emphasizes that the Claimants base their expectations on Article 44.3 of RD 661/2007, which deals only with the periodic mandatory reviews of tariffs and not with other amendments necessary to guarantee the economic sustainability of the system.[221] Further, the Respondent argues that the Claimants are basing their legitimate expectations argument on decisions in cases that do not deal with the ECT or even similar regulations and facts.[222]

141. *Fourth,* the Respondent argues that there was no "aggressive campaign" to attract foreign investors on the basis of which the Claimants could have formed legitimate expectations;[223] no regulations targeting foreign investors were enacted by Spain. With respect to the particular presentations and statements submitted by the Claimants, the Respondent argues that the Claimants have not provided any evidence that they had any knowledge of them,[224] and, in any case, these could not create objective expectations because:[225]

[221] Resp. C-Mem., ¶ 1089.

[222] Resp. C-Mem., ¶¶ 1090-1092, 1118; Resp. Rej., ¶ 1076; *citing Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶¶ 108, 109, 1278, 151 (CL-062); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 36, 42, 49, 51, 53 (CL-063); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 53-54, 58 (CL-050); *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 160-175 (CL-077).

[223] Resp. C-Mem., ¶¶ 1057, 1110-1112. *See also* Resp. C-Mem., ¶¶ 720-751.

[224] Resp. C-Mem., ¶ 1113.

[225] Resp. C-Mem., ¶¶ 1096, 1111-1116; Resp. Rej., ¶ 1136; Tr. Day 5 [Ms. Ruiz Sánchez] [166:3-20].

a. generic statements and parliamentary debates cannot create expectations of an immutable regime, ignoring the evolution of the applicable regulations and case-law;[226]

b. as accepted by both Parties, the CNE's duties do not include organising promotional campaigns for foreign investors. The presentations referred to by the Claimants in support of their case are part of courses given to CNE staff, which were not targeted at foreign investors. In any event, the Supreme Court ratified the legality of the measures adopted on the basis of its case-law which the CNE cited in its report on RD 661/2007;[227] and

c. the presentations and brochures by IDEA and InvestSpain submitted by the Claimants do not guarantee that the tariffs cannot be modified and, when they refer to the applicable regulatory framework, they link RD 661/2007 to Act 54/1997 and the Renewable Energy Plan 2005-2010.[228]

142. *Fifth,* (and at the time when both the DSG and TS Claimants were Parties to the case) the Claimants cannot at the same time recognize that they have made investments in 2007, 2008, 2009, 2010, 2011 and 2012, under different rules and economic circumstances, and also claim that they had the same reasonable and objective expectations with respect to these investments.[229] The Respondent contends that investments were made, on the Claimants' own case,

> *(i) subsequent to 2006 following the enactment of RD-Act 7/2006; (ii) subsequent to RD 1578/2008, whose Fifth Additional Provision announced a review of the remunerations for PV Facilities in 2012; (iii) subsequent to RD-Act 6/2009, which required reducing the tariff deficit and laid the foundations for a new regulatory framework; (iv) subsequent to March 2010, when the willingness to apply measures affecting PV plants in operation was public; (v) subsequent to December 2010 when the measures contested in the present case were adopted; (vi) subsequent to December 2011 when a structural reform of the SES regulatory framework was announced.*[230]

143. *Sixth*, the Respondent argues that the obligation relating to legitimate expectations cannot imply the immutability of the regulatory framework, irrespective of the economic

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226 Resp. C-Mem., ¶ 1112(a).

227 Resp. C-Mem., ¶ 1112(b).

228 Resp. C-Mem., ¶ 1112(c).

229 Resp. Rej., ¶¶ 1093-1094, 1097.

230 Resp. Rej., ¶ 1095. *See also* Resp. Rej., ¶¶ 1140-1148; Resp. PHB, ¶ 101; Tr. Day 1 [Mr. Elena Abad] [271:14-21]; Tr. Day 5 [Ms. Ruíz Sánchez] [126:14-21].

circumstances faced by the State.[231] As confirmed by the case law, the "stable conditions" referred to in the ECT allows the adoption of "reasonable and proportionate macroeconomic control measures."[232]

144. The Respondent emphasizes that an arbitral tribunal has already decided that the measures adopted by Spain in 2013 did not violate the ECT,[233] and Spanish Courts have ruled on the legality of the same measures, including their non-retroactivity.[234] The measures adopted by the Respondent were based on the need to ensure the sustainability and balance of the SES, while guaranteeing to investors a reasonable rate of return on the investments in line with the cost of money on the capital market.[235]

145. Further, the Respondent says that no retroactive measures that breach the ECT have been adopted with respect to the RD 661/2007 regime.[236] In order for a measure to be retroactive, it has to affect acquired rights, as recognized by international tribunals and the Spanish courts.[237] The Claimants, however, never had an acquired right to future remuneration by means of a fixed, unchanging regime, or because of the registration of their investments in

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231 Resp. C-Mem., ¶¶ 1118-1119.

232 Resp. C-Mem., ¶¶ 1121-1123; *citing Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 219 (RL-0060); *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 9.3.29-9.3.30 (RL-0065); *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶¶ 617-618 (RL-0072); *Charanne B.V. and Construction Investment S.A.R.L. v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2016, ¶ 499 (RL-0075).

233 Resp. C-Mem., ¶¶ 1129, 1140; *citing* Article of IA Reporter: "A second Arbitral Tribunal at Stockholm weighs in with an ECT verdict in a Spanish renewables dispute," 13 July 2016 (R-0096); "El Periódico de la Energía: A second international arbitral award rules in favour of the Government in its dispute with renewable energies," 13 July 2016 (R-0117).

234 Resp. C-Mem., ¶ 1142-1144; *citing* Judgement of the Spanish Supreme Court of 9 December 2009 (R-0137). The opinion of the Standing Committee of the Council of State 937/2013, of 12 September 2013 is also cited and set out. General Observation VI (R-0111); Constitutional Court ruling of 17 December 2015, delivered in the appeal of unconstitutionality No. 5347/2013 (R-0151); Judgement of the Constitutional Court of 18 February 2016, issued in the appeal of unconstitutionality No. 5852/2013 (R-0152) and Judgement of the Constitutional Court of 18 February 2016, issued in the appeal of unconstitutionality No. 6031/2013 (R-0153).

235 Resp. C-Mem., ¶¶ 1124-1128.

236 Resp. C-Mem., ¶¶ 1131-1132; Resp. Rej., ¶ 1150.

237 Resp. C-Mem., ¶¶ 1133-1145.

the RAIPRE.[238] Further, RD-Act 9/2013 expressly respects the remuneration received by facilities, in accordance with the 2013 Law on the Electricity Sector, and the new framework applies to future events while guaranteeing the reasonable rate of return.[239]

146. Based on the foregoing, Spain submits that it has not violated the legitimate expectations of the Claimants.[240]

(ii) Transparency and consistency

147. Contrary to the Claimants' allegations, the Respondent argues that it "has acted at all times in a transparent and consistent manner" towards the Claimants and their investments.[241]

148. *First*, the Respondent contends that the awards referred to by the Claimants in support of its position are of no relevance. The tribunals in these awards, except for one, do not apply the ECT; and the only award in which the tribunal does apply the ECT does not include a ruling on the lack of transparency.[242]

149. *Second*, the Respondent opposes the Claimants' argument according to which the ECT would guarantee "total *clarity* and *predictability* of the regulatory framework," which in practice would mean freezing that regulatory framework.[243] In the Respondent's view, no such obligation exists in the absence of a specific commitment by the State, and the obligation is not violated when the State acts "within the acceptable range of legislative and regulatory conduct."[244]

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238 Resp. C-Mem., ¶¶ 1133-1135, 1138-1139; Resp. Rej., ¶¶ 1151, 1153-1156; *citing Nations Energy Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, ¶¶ 642, 644, 646 (RL-0066); *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2016, ¶¶ 509-510, 546, 548 (RL-0075); *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Award, 12 July 2016, ¶ 814 (RL-0101).

239 Resp. C-Mem., ¶¶ 1136-1137; Resp. Rej., ¶ 1152; Act 24/2013, of 26 December, on the Electricity Sector, Third final provision.4 (*disposición final tercera.4*) (R-0062).

240 Resp. C-Mem., ¶¶ 1117, 1141, 1145.

241 Resp. Rej., ¶ 1157.

242 Resp. C-Mem., ¶¶ 1147-1148; *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 115 (RL-0074).

243 Resp. C-Mem., ¶ 1149. (Emphasis in the original.)

244 Resp. C-Mem., ¶ 1151; Resp. Rej., ¶ 1171; *citing AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.73 (RL-0065).

150. The Respondent contends that it never made specific commitments to the Claimants that it would keep RD 661/2007 framework immutable, and it has never deceived the Claimants.[245] In fact, since 2004 the Respondent has implemented a series of reforms "to maintain a balance between (i) granting a *reasonable* rate of return for investors and consumers and (ii) avoiding situations of over-remuneration and the unsustainability of the [SES]."[246]. Further, Spain has announced since 2009 the need to reform the SES due to the international crisis unfolding at the time.[247] Moreover, the Claimants were aware since the 2005 Supreme Court judgments, and even more so since the 2012 judgments,[248] that it was possible, if not probable, that the regulatory framework would change.[249] In fact, the reforms adopted were neither unexpected nor lacking in transparency; they followed the applicable procedures without delays and guaranteed the participation of all the affected agents.[250] The CNE, associations of renewable energy producers, investors, consultants, and law firms all knew of the possibility that the regulatory framework would change.[251]

151. Spain thus submits that it has not breached its obligation to act transparently and consistently under Article 10(1) of the ECT.[252]

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245 Resp. C-Mem., ¶ 1152(1); Resp. Rej., ¶ 1162.

246 Resp. C-Mem., ¶ 1152(2). (Emphasis in the original.)

247 Resp. C-Mem., ¶ 1152(3).

248 Resp. C-Mem., ¶ 1152(2).

249 Resp. Rej., ¶ 1165.

250 Resp. C-Mem., ¶ 1152(4); Resp. Rej., ¶¶ 1166-1169; *citing* Act 24/2013, 26 December 2013, Article 14.4 (R-0062); RD 413/2014, Article 20(1) (R-0095); First Witness Statement of Carlos Montoya, 27 October 2016; Judgment of the Supreme Court of 1 June 2016, 1260/2016 (Appeal 649/2014). R-0248.

251 Resp. Rej., ¶¶ 1162-1163, 1165; *citing, inter alia,* Submissions from APPA concerning the Draft RD 661/2007, 3 April 2007 (R-0287); Submissions submitted by the main Spanish Wind Energy Association AEE before the CNE against the draft of RD 1614/2010, 30 August 2010, p. 6 (R-0245); APPA Report, 30 April 2010, pp. 6-7 (R-0255); CNE Report 3/2007 (R-0116); ILEX Pöyry Report "Current and future state of wind energy in Spain and Portugal", July 2007, P. 58 (R-0270); Suelo Solar, Opinion of PROMEIN Abogados on Reasonable Rate of Return, 1 June 2010 (R-0262); "The risk of retroactive modification of the tariff for solar photovoltaic facilities (especially those regulated by Royal Decree 1578/2008)," Castro Sueiro y Varela Abogados, Newspaper La Ley, 13 July 2010. Article prepared by Ms. Yurena Medina, current Senior Associate of the firm KPMG Abogados (R-0308).

252 Resp. C-Mem., ¶ 1153; Resp. Rej., ¶¶ 1169-1172; *citing* First AMG ER, section 4.3; Second AMG ER, sections 3.4, 3.6; *AES Summit Generation Limited and AES-Tisza Erömü Kft vs. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.73 (RL-0065).

(iii) Good faith

152. The Respondent argues that it has acted at all times in full compliance with the principle of good faith.[253] In the Respondent's view, this obligation cannot be interpreted as an unconditional protection to the investors under any economic circumstances.[254] The Respondent further argues that the measures adopted were imposed as a result of the severe economic crisis that hit Europe between 2009 and 2014 and that these measures do not discriminate against the Claimants or the renewable energy sector: they affect all actors in the electricity production sector while also guaranteeing a reasonable rate of return on the renewable energy facility projects implemented in Spain.[255]

### (2) The Tribunal's Analysis

#### *a. The relevant provisions of the ECT*

153. The first sentence of ECT Article 10 provides that

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

154. While that provision sets out obligations, albeit in very vague terms, they are obligations of a general nature that appear from the words of the provision to be directed primarily at creating the conditions in which investments will be made – that is, conditions subsisting in what the Respondent referred to as the "*making-investment*" phase and the title of ECT Article 10 refers to as the phase of 'promotion' of investments, as opposed to the phase that begins once the investment is made.

155. The remaining sentences of ECT Article 10(1) begin with a commitment to accord fair and equitable treatment "at all times" to Investments of Investors of other Contracting Parties,

253 Resp. Rej., ¶ 1157.

254 Resp. C-Mem., ¶ 1158; *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶¶ 165-166 (RL-0074).

255 Resp. C-Mem., ¶¶ 1156-1157.

and then proceed to set out the content of the "stable, equitable, favourable and transparent conditions" to which ECT Contracting Parties are committed. They read as follows:

> *Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*

156. These sentences do not refer expressly to legitimate expectations, transparency, or good faith; and the Tribunal shares the view that those three concepts are not independent standards of treatment secured by ECT Article 10 but are non-exhaustive examples of the manner in which the obligations that are expressly set out in Article 10 might be breached. The Tribunal does not accept that the Respondent's contention that "[t]he maximum aspiration of the ECT is ... national treatment",[256] which cannot be reconciled with the explicit terms of Article 10(1) and the structure of Article 10 as a whole.

157. ECT Article 10(1) establishes a distinction between the right to fair and equitable treatment ("**FET**") and the rights (such as the right to "most constant protection and security") which, according to the next sentence in Article 10(1), "Investments shall <u>also</u> enjoy" (emphasis added). In the circumstances of the present case, however, the Tribunal is satisfied that it makes no material difference to questions of liability or quantum whether the alleged breaches of the ECT are analyzed as potential breaches of the FET obligation or of other obligations resulting from ECT Article 10.

### ***b. The main issue concerning FET***

158. The main disagreement between the Parties as to the content of the FET standard, which bears directly upon the application of the standard in the context of the doctrine of legitimate expectations, concerns its implications for the scope of the regulatory power of

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[256] *See* ¶ 122 above.

the State. The Respondent, citing the *Saluka* and *Philip Morris* Awards, maintains (i) that the FET standard requires a balancing exercise, with the Claimants bearing the burden of proving the alleged breaches, and (ii) that there will never be a breach of the FET standard if the host State exercises in a reasonable manner its regulatory power in pursuance of a public interest.[257] The Claimants maintain that the Respondent's formulation of its right to regulate is 'grossly overstated'.[258]

159. The Tribunal does not disagree with the descriptions of the FET standard in cases such as *Philip Morris*: but they must be read in context. Thus, paragraph 423 of the *Philip Morris* Award, quoted by the Respondent, must be read in the light of paragraphs 422–426 of that Award. That section of the *Philip Morris* Award reads as follows:

> *422. It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.*[259]
>
> *423. On this basis, changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment "outside of the acceptable margin of change."*
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> *424. The Tribunal in EDF v. Romania has stated in that regard:*
>
>> *"The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific*

257 E.g., Respondent's Opening Statement, slide 200; *citing Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2016, ¶¶ 305-309 (RL-0107); *Philip Morris Brands Sàrl and others v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 423 (RL-0106).

258 E.g., Claimants' Closing Statement, slides 22-25.

259 *Philip Morris Brand Sàrl and others v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶¶ 422-426 (RL-0106).

*promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."*[260]

*425. A similar view has been expressed by the tribunal in El Paso v. Argentina:*

*"There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total.*

*Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze."*[261]

*426. It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law."*[262]

160. The Tribunal regards that passage, which emphasizes the crucial role of "very specific commitments" in giving rise to legitimate expectations and engaging the application of an FET clause, as a sound and helpful description of the law on this question, and a good starting point for its analysis.

[260] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 217 (RL-0061).

[261] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 374, 372 (RL-0067).

[262] *Philip Morris Brands Sàrl and others v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶¶ 422-426 (footnotes omitted) (RL-0106).

161. The first point to be addressed is accordingly the question whether and when specific commitments were made by the Respondent, upon which some or all of the DSG Claimants could properly have relied, and whether the Respondent adhered to any such commitments.

### c. *Did the Respondent make representations upon which the Claimants were entitled to rely?*

162. The Claimants set out a list of the specific representations upon which each of the DSG Claimants relies in presenting their claims. It is headed "Claimants' Reliance on Specific Representations Made by (a) Respondent and (b) Any Other Person" ("**Claimants' Reliance**"), and was included in their Post-Hearing Brief in response to a question posed by the Tribunal.

163. Not all of the representations relied upon can be taken into account. Representations by third parties, not acting on behalf of or under the direction or control of the Respondent, cannot themselves actually create obligations for the Respondent on which the Claimants were entitled to rely. That is an elementary principle of international law.[263]

164. For that reason, the statements and advice of Ms. Mafalda Soto and Mr. Manuel Hermoso and Mr. Antonio Jiménez and other lawyers and law firms, and material in the media and specialist publications, and the opinions of the banks[264] and their legal advisors, and the experience and knowledge of individuals who had prior experience investing in Spain's PV industry, cannot form the foundation of a legitimate expectation that creates obligations binding on the Respondent.[265] Their statements and advice no doubt communicated and explained the Spanish regulatory regime and the statements made by the Respondent in the way that (as governments are fully aware) these matters are ordinarily explained to investors by professional advisers: but the statements and advice of advisors cannot add to

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263 *See*, *e.g.*, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 ("ILC Articles on State Responsibility"), Chapter II (RL-0095).

264 Notably the bank now known as Landesbank Baden-Württemberg ("**LBBW**"), and DZ Bank AG.

265 The references to the locations of the relevant passages in the pleadings and the transcript are set out in the list at Cl. PHB, ¶ 56, pp. 22-30, and will not be reproduced here.

or alter whatever representations are made by the Respondent itself in its public measures and statements. They are also relevant to the question of due diligence.

165. When these 'secondary sources' of statements are excluded, the table of 'Claimants' Reliance' rests on the following representations made by or attributable to the Respondent: (i) the text of RD 661/2007, which was enacted on 25 May 2007; (ii) the text of RD 1578/2008, adopted on 26 September 2008; (iii) the RAIPRE registration process, pursuant to RD 661/2007 and RD 1578/2008, and "Spain's pre-allocation registry for plants seeking to obtain registration under RD 1578"; and (iv) "Spain's promotional efforts discussing the stability of its incentive regime" and "announcements of the Spanish Government regarding RD 661."[266]

166. It is convenient to consider those sources of alleged representations in a broadly chronological order.

(i) The text of RD 661/2007

167. It is appropriate to begin by stating clearly that the Tribunal does not consider that a statement in a piece of legislation that a particular legal framework will last for a specified time is in every case necessarily sufficient in itself to amount to a binding commitment by the State not to amend that framework within the specified time. Quite apart from minor amendments that may be determined to be compatible with any duty to maintain the original framework, it must always be recognized that circumstances, and governments, change, and that the presumption is that a State is always free to amend its legislation in accordance with its constitutional procedures. The mere fact that a regulatory regime is set out in legislation does not imply that it will not be changed: it is necessary to point to something that clearly indicates that the State is making a commitment not to exercise its legislative power in a particular way.

168. The context in which RD 661/2007 was enacted is relevant to the understanding of its provisions. It is evident that RD 661/2007 was adopted with the intention of attracting

[266] The Tribunal has taken into account the Claimants' assertions concerning statements on which they relied and which they took into consideration, wherever in the record of this case those assertions appear, in accordance with Cl. PHB, ¶ 56.

investment in renewable energy in Spain, thus enabling Spain to achieve its targets for renewable energy, and that the stability of the regime was understood prior to the adoption of RD 661/2007, to be a crucial *desideratum* in the new regime. For example, on 14 February 2007, the CNE published Report 3/2007 on a draft of what later became RD 661/2007, in which it criticised the shortcomings of the then-current draft and drew attention to the need to minimize the uncertainty of the regulatory regime:

> ***Minimize regulatory uncertainty.*** *The NEC understands that transparency and predictability in the future of economic incentives reduces regulatory uncertainty, incentivising investments in new capacity and minimizing the cost of financing projects, thus reducing the final cost to the consumer. The regulation must offer sufficient guarantees to ensure that the economic incentives are stable and predictable throughout the service life of the facility. In each case, regulation must provide both transparent annual adjustment mechanisms, associated to robust trend indexes (such as the average or reference tariff, the CPI, ten-year bonds, etc.) and regular reviews that only affect new facilities (e.g. every four years) with regard to investment costs, which could also affect the reduction of operating costs at existing facilities.* [267]

169. The Report also noted that

> *As shown both in the scientific doctrine and case law, in a social and democratic State of Law the principles of legal certainty and protection of legitimate expectations cannot be built on insurmountable obstacles to the innovation of a body of law, nor can they be used as instruments to petrify current Law at any moment. In other words, the principle of legal certainty is not by definition an anti-evolutionary or conservative principle; it does not mean that legislation is resistant or immune to reform. In this sense, these principles do not impede dynamic innovation, nor that new regulatory provisions be applied retroactively to existing situations, but that they should continue upon entry into force of the new regulations (this is "improper" retroactivity). Thus the principles only require that regulatory innovation—especially if sudden, unpredictable or unexpected—be carried out with certain guarantees and caution (sufficient transition periods for adaptation and, where applicable, compensatory measures) that cushion, moderate and minimise as far as possible the defrauding of expectations generated by previous regulations.*[268]

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[267] CNE Report 3/2007, p. 16 (R-0116).

[268] CNE Report 3/2007, p. 18; (R-0116).

170. It accordingly recorded the view of the CNE Managing Board that "the draft Royal Decree subject to this report: (a) Should enter into force on 1 January 2008; and (b) Pursuant to Article 40 of Royal Decree 436/2004, of 12 March, the draft Royal Decree subject to analysis and report should not apply to facilities operating on 1 January 2008."[269]

171. The reasoning behind this view was explained in terms that cast some light on the kind of stability which the CNE was recommending should be adopted in the planned Royal Decree:

> *The production facilities in the special regime [are] capital-intensive and have long recovery periods. Royal Decree 436/2004 minimises the regulatory risk by granting stability and predictability to the economic incentives during the service life of the facilities. This is done by establishing a transparent annual adjustment mechanism, associating incentives to trends in a robust index such as the average or reference tariff (TMR), and by exempting existing facilities from the four-year review because only new incentives affect new facilities.*
>
> *The developers who have invested in special regime production facilities during the validity of Royal Decree 436/2004 have done so in stable regulatory conditions, fundamentally based on a secure and predictable regulated tariff during the entire service life of the facility. The guarantees covered in Royal Decree 436/2004 have allowed cheaper financing, with lower project costs and a lower impact on the electricity tariff ultimately paid by the consumer.*[270]

172. The CNE recommendations resulted in some amendments to the then-current draft, before it was enacted as RD 661/2007. For instance, the draft plan for a four-yearly review of tariffs applicable to new and existing facilities was amended to provide, in what became Article 44.3 (quoted below), that tariff revisions would not affect existing facilities.[271]

173. In RD 661/2007, as enacted, it is Articles 36 and 44 that are of particular importance. The Decree provides for the tariffs payable to facilities in various Categories, Groups, and Sub-groups of energy producers, PV plants being Sub-group b.1.1. in the Group b.1 (solar energy) of Category b (energy from renewable sources). Solar power facilities using

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[269] CNE Report 3/2007, pp.19-20, and cf. pp. 57, 61 (R-0116).

[270] CNE Report 3/2007, pp.23-24 (R-0116).

[271] Claimants' Opening Presentation, slide 45, quoting CNE Report 3/2007, section 4.d.10 (C-061).

thermal processes were in Sub-group b.1.2. The tariffs payable were set out in Article 36, which reads as follows:

> ***Article 36.*** *Tariffs and premiums for facilities in Category b).*
>
> *The tariffs and premiums corresponding to facilities in Category b) shall be as provided in Table 3, below:*
>
> *For some Sub-Groups a different compensation is provided for the first few years from commissioning.*
>
> *Table 3*[272]

| Group | Subgroup | Power | Term | Regulated tariff c€/kWh | Reference premium c€/kWh | Upper limit c€/kWh | Lower limit c€/kWh |
|---|---|---|---|---|---|---|---|
| b.1 | b.1.1 | P ≤100 kW | first 25 years | 44,0381 | | | |
| | | | thereafter | 35,2305 | | | |
| | | 100 kW<P≤10 MW | first 25 years | 41,7500 | | | |
| | | | thereafter | 33,4000 | | | |
| | | 10<P≤50 MW | first 25 years | 22,9764 | | | |
| | | | thereafter | 18,3811 | | | |

174. Article 44 reads, so far as is material, as follows:

> *Article 44. Updating and review of tariffs, premiums, and supplements*
>
> *1.* […]
>
> *The values of the tariffs, premiums, supplements, and lower and upper limits to the hourly price of the market as defined in this Royal Decree, for Category b) and Sub-Group a.1.3, shall be updated on an annual basis*

[272] RD 661/2007, Article 36, Table 3: (C-098 (improved)). The information in the "term" column, which appears in Spanish in the English version, has been translated by the Tribunal. The last three columns are blank because PV facilities did not have the option of choosing a 'market rate + premium' scheme rather than a fixed tariff scheme.

*using as a reference the increase in the RPI less the value set out in the Additional Provision One of the present Royal Decree.*

[…]

*2. The values of the tariffs, premiums, supplements and lower and upper limits to the hourly price of the market which derive from any of the updates covered in the preceding point shall be applicable to all of the facilities in each group, regardless of the date of commissioning of each facility.*

*3. During the year 2010, on sight of the results of the monitoring reports on the degree of fulfilment of the Renewable Energies Plan (PER) 2005-2010, and of the Energy Efficiency and Savings Strategy in Spain (E4), together with such new targets as may be included in the subsequent Renewable Energies Plan 2011-2020, there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to the costs associated with each of these technologies, the degree of participation of the special regime in covering the demand and its impact upon the technical and economic management of the system, and a reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets. Subsequently a further review shall be performed every four years, maintaining the same criteria as previously.*

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

*4. The National Energy Commission is hereby authorised to set out the definition of the technologies and standard facilities, in a Circular, and to gather information on the investments, costs, revenues, and other parameters of the various different actual facilities which make up the standard technologies.*[273]

175. Those provisions should be read in the context of the Preamble to RD 661/2007. It includes the following paragraphs:

[…]*The economic framework established in the present Royal Decree develops the principles provided in Law 54/1997, of 27 November, on the Electricity Sector, guaranteeing the owners of facilities under the special regime a reasonable return on their investments, and the consumers of*

[273] RD 661/2007, Article 44 (C-098 (improved)).

*electricity an assignment of the costs attributable to the electricity system which is also reasonable, although incentives are provided to playing a part in this market since it is considered that in this manner lower government intervention will be achieved in the setting of prices, together with better, more efficient, attribution of the costs of the system, particularly in respect of the handling of diversions and the provisions of supplementary services.*

*To this effect, a system which is analogous to that provided in Royal Decree 436/2004, of 12 March, is maintained, in which the owner of the facility may opt to sell their energy at a regulated tariff, which will be the same for all scheduling periods, or alternatively*[274] *to sell this energy directly on the daily market, the term market, or through a bilateral contract, in this case receiving the price negotiated in the market plus a premium. In this latter case, an innovation is introduced for certain technologies, namely upper and lower limits for the sum of the hourly price in the daily market, plus a reference premium, such that the premium to be received for each hour may be limited in accordance with these values. This new system protects the promoter when the revenue*[] *deriving from the market price falls excessively low, and eliminates the premium when the market price is sufficiently high to guarantee that their costs will be covered, thus eliminating irrationalities in the payment for the technologies the costs of which are not directly related to the prices of petroleum in the international markets.*

[…]

*As a consequence of the repeal of the costs of transition to competition (CTCs), implemented by Royal Decree-Law 7/2006, of 23 June, the premium for certain facilities in Category a) under Royal Decree 436/2004, of 12 March, were removed prior to the initially expected date of 2010. In order to mitigate this unfair impact upon facilities whose activity was not directly linked to those costs, as from the entry into effect of the cited Royal Decree-Law until the entry into force of the present Royal Decree, the value of the incentive of such facilities is increased by the sum of the premium lost, such that the total payment shall remain exactly equal to that in the situation prior to the amendment.*

176. The Spanish Government made several public statements explaining the significance of RD 661/2007, which are also relevant to understanding its provisions. On the day that the

274 The alternatives were not open to PV producers. Their only option was to accept the regulated tariff.

Decree was enacted, the Government issued a press release, which is worthy of quotation at some length:

> *This Royal Decree sets out to improve the remuneration for less mature technologies such as biomass and solar thermal, thereby being able to achieve the targets of the Renewable Energies Plan 2005-2010 as well as the targets assumed by Spain at the EU level. With the development of these new technologies, renewable energy in Spain will cover 12% of energy consumption in 2010. The new regulation ensures a 7% return for wind and hydroelectric installations that opt to assign their production to the distributors and between 5% and 9% if they take part in the electrical energy production market. The highest power photovoltaic installations practically double their remuneration, being maintained for smaller ones and the guarantee of obtaining a return of 7%. In those technologies that need to be advanced owing to their limited development, such as biomass, biogas, or solar thermoelectric, the return stands at 8% under the option involving assignment to the distributors and between 7% and 11% by taking part in the market. Every 4 years the tariffs will be revised, bearing in mind compliance with the targets set. This will allow an adjustment to the tariffs in line with the new costs and the degree of compliance with the targets. The tariff revisions carried out in the future will not affect those installations already operating. This guarantee affords legal safety to the producer, providing stability to the sector and promoting its development. The new regulations will not be of a retroactive nature. The installations operating before January 1, 2008 may continue to adopt the previous regulations under the fixed tariff option throughout their working life* […]
>
> *The establishment of a stable subsidy system that ensures an attractive return on electrical energy production activity under a special regime is the aim of the new Royal Decree approved today by the Cabinet to regulate in the forthcoming years the legal and economic regime pertaining to installations that generate electrical energy from cogeneration and those that deploy renewable energies and waste as their raw materials.*
>
> […]
>
> *Outlines of the new Royal Decree*
>
> *The new regulations determine the right to receive special remuneration for the energy produced at the installations included under the special regime, in other words, with power of less than 50 MW, and also those which have power in excess of 50 MW, i.e., cogeneration, those that use renewable energies, or waste.*

*The new regulations will not be of a retroactive nature. The installations that are operational by January 1, 2008 may continue to adopt the previous regulations under the fixed tariff option throughout their operating life. When they take part in the market, they may maintain their prior regulation until December 31, 2012. These installations may voluntarily opt to abide by this new Royal Decree as from its publication.*

*It will be in 2010 that the tariffs and premiums set out in the proposal will be revised in accordance with the targets set in the Renewable Energies Plan 2005-2010 and in the Energy Efficiency and Savings Strategy and in line with the new targets included in the following Renewable Energies Plan for the period 2011-2020.*

*The revisions carried out in the future of the tariffs will not affect those Installations already in operation. This guarantee provides legal safety for the producer, affording stability to the sector and fostering its development.*

*Renewable Energies*

*Return*

*As far as the return is concerned, the new regulation ensures a mean percentage of 7% for a wind and hydroelectric installation in the event of opting to assign their production to the distributors and a return of between 5% and 9% if it takes part in the production market.*

*For other technologies that need to be advanced owing to their limited development, such as biomass, biogas, or solar thermoelectric, the return stands at 8% for the assignment of production to distributors and between 7 and 11% if they take part in the market.*

*Increase in remuneration*

*The anticipated increase for the remuneration of biomass varies between 50% and 100%, for biogas between 16% and 40%, and for solar thermoelectric 17%.*

*With the sale to the distributor option, remuneration is increased for wind energy, biomass, solar thermoelectric, and photovoltaic installations whose power is greater than 100 kW and the remuneration is maintained for photovoltaic solar plants whose power is less than that stated.*

*Hence, any increases in the feed-in tariff with regard to that stated in Royal Decree 436/2004 are 12% for wind installations, between 7% and 13% for hydroelectric installations, 17% for thermoelectric installations, 82% for photovoltaic installations greater than 100 kW, between 56 and 113% for biomass installations (except for forest industrial waste which increases by 6%) and 16 and 40% for biogas installations.*

*When the installations opt to take part in the production market, the premium obtained will be variable in line with the resulting market price at any time. With this in mind, lower and upper limits are established for each of the technologies that are known as "cap and floor." Under this system, the premium will be adjusted in such a way that the total remuneration that a[n] installation will obtain will be situated between these limits at all times.*

*The tariffs, premiums, and upper and lower limits, as well as other complements, will be updated according to the IPC (retail price index) minus 0.25 until 2012 or minus 0.50 from that time onwards."*[275]

177. It should be recalled that this framework was a limited offer. Under Article 22.1, the scheme in RD 661/2007 was to be reviewed once 85% of the target set by the Spanish Government for each technology (371 MW for PV plants) had been reached, after which a 'sunset' period of not less than 12 months could be announced, at the close of which no further entitlements to regulated tariffs under this new regime for PV plants could arise.[276]

178. That 85% threshold was reached by September 2007. On 27 September 2007, Spain announced that the scheme would close to new investments on 29 September 2008, by which date new PV facilities must have obtained their final registration if they were to be entitled to regulated tariffs under RD 661/2007.[277] On 26 September 2008, RD 1578/2008 was enacted to modify and extend the period of application of certain provisions of RD 661/2007, for PV facilities completed after the 29 September 2008 deadline.

275 Press Release for RD 661/2007 (C-099).

276 *See* ¶ 40 above; RD 661/2007, Articles 22, 37 (C-098).

277 *See* Cl. Mem., ¶ 211.

(ii) The text of RD 1578/2008

179. The PV facilities in which the DSG Investors invested were registered under RD 661/2007,[278] and it is representations in and relating to RD 661/2007 that are material to any legitimate expectations concerning those facilities. However, the DSG Claimants' claims include later investment transactions in relation to those facilities, of which the latest is the purchase by Mr. Joachim Kruck of 43% of Claimant 57, Solarpark Tordesillas 422 GmbH & Co. KG, on 5 May 2009.[279] Representations in and relating to RD 1578/2008 are therefore potentially relevant to the DSG claims.

180. RD 1578/2008 introduced several significant modifications to the scheme as it had operated under RD 661/2007 (and continued to operate alongside and as modified by RD 1578/2008). First, grouping PV facilities into (I) roof-top installations (1) up to 20kW and (2) over 20kW, and (II) other (i.e., ground-mounted) facilities, it provided for the setting of an annual quota for each type and sub-type for the amount of electricity eligible for the regulated tariff.[280] Eligibility was to be established by entry of a PV facility first on a "compensation pre-assignment registry"[281] and then, after the meeting of certain conditions, on the Register that evidenced the entitlement to receive the regulated tariffs.

181. Second, RD 1578/2008 offered lower regulated tariffs[282] and provided for adjustments in the tariff rates each quarter, with tariffs being increased if the quotas were not being met and decreased if they were being exceeded (all within limits), in accordance with a formula set out in the Decree.[283] The scheme was explained in a Press Release that accompanied the adoption of RD 1578/2008:

> *The new remuneration is 32 cents/KWh for ground and €32 cents and €34 cents/KWh for roof (greater and less than 20 KW, respectively). This*

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278 Cl. Reply, ¶ 14.

279 Articles of Incorporation of Solarpark Tordesillas 422 GmbH & Co. KG, 5 May 2009 (C-191).

280 RD 1578/2008, Articles 3, 5 (R-0087).

281 RD 1578/2008, Articles 4-8 (R-0087).

282 RD 1578/2008, Article 11 (R-0087). The initial (2009) quota for all types of PV facility was 400MW, with two-thirds available for roof-top installations and one-third for ground-based facilities.

283 RD 1578/2008, Articles 5, 11 (R-0087).

*remuneration will be lowered every quarter in line with the using up of the quotas.*

*It determines a "pre-registration" mechanism in such a way that once certain administrative procedures have been carried out (administrative authorization, connection etc.), the projects are entered on a register at which time they are assigned a feed-in tariff which they will receive once this installation has been completed.*

*The installations may not be any bigger than 10 MW on the ground and 2 MW in buildings.*

*The "pre-registration" will have four annual convenings.*

*The feed-in tariff for each convening will be calculated in line with the demand set out in the previous convening, lowering the remuneration if the complete quota is covered. The tariff may also be raised if in two consecutive convenings 50% of the quota is not attained.*

*The reductions may be of up to 10% per annum.*

*This remuneration scheme benefits consumers by setting a remuneration which is adjusted to the learning curve of the technology which will result in a cheaper electricity cost compared with the model in force. It also benefits investors by affording the predictability of future remunerations.*

[…]

*The annual quotas will be increased by the same percentage rate as the remuneration is reduced by during the same period, up to 10%.*[284]

182. Further, it was provided that "[d]uring the year 2012, based on the technological evolution of the sector and the market, and the functioning of the compensatory regime, compensation for the generation of electric power by photovoltaic solar technology may be modified."[285] Moreover, it was provided that "[t]he Ministry of Industry, Tourism and Commerce shall be authorized to issue any rules or regulations necessary for expanding on this royal degree and to modify the contents of the appendices thereto if the development

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[284] Press Release for RD 1578/2008 (C-138 (improved)).

[285] RD 1578/2008, Fifth additional provision. Modification of the compensation for generation by photovoltaic technology (R-0087).

of this technology or the functioning of the preassignment of compensation makes a such [sic] advisable."[286]

183. Third, the time during which the regulated tariffs were to be available was limited to "a maximum period of twenty-five years."[287] The Press Release accompanying RD 1578/2008 gave a slightly different impression. It stated that "[t]he remuneration period for each facility is 25 years and the annual updating of the remuneration [is] in line with the IPC-0.25 or 0.50, in both cases the same as in the previous Royal Decree."[288] The unequivocal wording of the Decree itself must, however, be given priority.

184. In these respects, RD 1578/2008 established a regime for PV facilities that was broadly comparable to that under RD 661/2007 but less advantageous in important respects. The most material point, however, is that RD 1578/2008 specifically provided, in Article 2, that

> *This royal decree shall apply to the facilities included in Group b.1.1 of Article 2 of Royal Decree 661/2007 of May 25, 2007, photovoltaic technology facilities, that obtain their permanent registration in the Administrative Registry of generation facilities under a special regime, a division of the Energy and Mining Policy Department, after September 29, 2008.*[289]

185. Thus, RD 1578/2008 stipulated that it did not apply to PV facilities registered on or before 29 September 2008, under RD 661/2007, and therefore did not alter the regulatory provisions applicable to them. Nor is it alleged that any other regulatory changes made before the DSG Claimants' final investment affected the PV facilities registered under RD 661/2007.

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286 RD 1578/2008, Second final provision. Regulatory development and modifications of the content of the appendices (R-0087).

287 RD 1578/2008, Article 11(5) (R-0087).

288 Press Release for RD 1578/2008 (C-138 (improved)). The "IPC" is the Consumer Price Index ("CPI") applicable under RD 661/2007.

289 RD 1578/2008, Article 2 (R-0087).

#### (iii) The RAIPRE Registration Process and Spain's Pre-Allocation Registry for Plants Seeking to Obtain Registration Under RD 1578/2008

186. The formality of registration of PV facilities under RD 661/2007 and RD 1578/2008 was undoubtedly a matter of great importance to investors.[290] Failure to complete the necessary formalities and to meet the deadlines for registration would have precluded a facility from benefiting from the regulated tariffs for which the Special Regime provided. The Tribunal does not, however, consider that in terms of the representations contained in the texts of RD 661/2007 and RD 1578/2008 the registration requirement adds a significantly different dimension to the other provisions of those Decrees. While the formality of registration might give greater weight to a commitment made in the Decree, it could not convert a provision that entailed no commitment into one that did, given registration was essentially an administrative mechanism for identifying the facilities entitled to the benefit of the regime established by the Decree and for monitoring and keeping some control over activity under the Special Regime.

#### (iv) Spain's promotional efforts and announcements of the Spanish Government regarding RD 661/2007

187. Reference has already been made to the CNE Report 3/2007, and to the Press Releases that accompanied RD 661/2007 and RD 1578/2008. The Claimants point to a number of other statements by Spanish Government members and officials, made in 2007, which asserted that RD 661/2007 provided "legal certainty for investors, to know what to expect" and that the Spanish Government had "publicly said already what we will do from now on."[291] Similarly, Spain's Secretary of Energy is quoted as saying that RD 661/2007 would provide "total legal certainty."[292] The Claimants also say that similar statements were made, including by the CNE Director of Electricity, in the course of promotional presentations of

[290] *See*, *e.g.*, Flachsmann WS, ¶¶ 16-17.

[291] Cl. Mem., ¶185, quoting Joan Clos i Matheu (Minister of Industry, Tourism and Trade), Appearance before the Congress of Deputies on 17 October 2007, Journal of Sessions of the Congress of Deputies. VIII Legislature, Commissions No. 928, Commission of Industry, Trade and Tourism, Presidency Excmo. Sr. D. Francisco Xabier Albistur Marín, p. 7 (C-118).

[292] Cl. Mem., ¶ 184, quoting Cinco Dias, Press Article, Nieto Says the New Wind Regulation Provides "Full Legal Certainty," 10 May 2007 (C-115).

Spain's new regulatory system.[293] Such statements appear to have been broad affirmations or confirmations of the policy set out in RD 661/2007, but there is no suggestion that they added to the scope of any commitments that it embodied or that they added materially to the strength of any such commitments.

(v) The Tribunal's conclusion regarding the alleged commitment by the Respondent

188. As the *Philip Morris* award emphasized, it is only firm commitments attributable to governments that can form the basis of legitimate expectations on which investors may rely.[294] Statements about commitments that governments intend or plan to make in future cannot be relied upon in this way, although they may bear upon the understanding of measures adopted later. The same idea is expressed in the requirement that other tribunals have identified for a "specific commitment" given directly to an investor.[295]

189. At least in circumstances where the explicitly declared purpose of legislation is to invite investors to commit capital to projects in reliance upon guarantees of stability in a regulatory regime, specific commitments can be made by provisions in general legislation. This is particularly the case in circumstances where, as here, the great majority of capital costs in an investment are incurred right at the beginning of the project and are to be recouped over the operating lifetime of the project. The Tribunal, by majority, finds that to be the case here: it is the enactment of RD 661/2007 and RD 1578/2008 that gave rise to the possibility of legitimate expectations upon which potential DSG investors could rely.

190. Considering the express language of RD 661/2007, and bearing in mind the written and oral submissions of the Parties, the Tribunal, by a majority, concludes that RD 661/2007 was indeed intended to induce investments in the renewable energy sector by promising attractive and stable regulated tariffs and premiums, and that it constituted an invitation to

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293 Claimants' Opening Presentation, slides 56-58; citing Carlos Solé Martín (CNE), Presentation, The New Regulatory Framework for Renewable Energy in Spain, 18 June 2007 (C-130); Carlos Solé Martín (CNE), Presentation, International Renewable Energy Regulation. The Spanish Case (Eilat, Israel), December 2008 (C-128). *See also* Cl. Mem., ¶¶ 194-199; Margarit ER, pp. 31-36.

294 *See* ¶ 159 above.

295 Following the language of the *El Paso* tribunal. *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 375-379 (CL-053).

potential investors to rely upon that promise. RD 661/2007 contained express assurances that its fixed tariffs would apply to qualifying, registered PV facilities for a fixed period, and that changes to the regulatory regime would not apply to facilities already registered. In press releases and presentations, RD 661/2007 was presented by Spain as doing so. RD 661/2007 was described in the Preamble to RD 1578/2008 as having established a new compensation framework "for the purpose of achieving in 2010 the goals set in the 2005-2010 Renewable Energy Plan and the Spanish Energy Savings and Efficiency Strategy",[296] after previous regulatory regimes had failed to attract the necessary investment. The Tribunal does not consider that RD 661/2007 could reasonably be understood to have guaranteed only that the tariff and premium regime would remain unchanged unless and until it was changed by law. Nor does it consider that references to a 'reasonable return' could be understood to have indicated that the precise tariffs and premiums specified in RD 661/2007 were merely temporary and variable instantiations of a 'reasonable return' which was the only true commitment made in that Decree. The precise tariffs and premiums no doubt represented what Spain considered reasonable at that time: but it was their stability that was the essential key to their intended effect in attracting investments.

191. The Tribunal has reached this conclusion on the basis of its reading of RD 661/2007, and other materials relating to that Decree. It does, however, consider that investors must undertake appropriate due diligence before relying on assurances and commitments of this kind. This need not involve detailed analysis by national or international experts in the relevant field. Part of the point of transparency, as enshrined in ECT Article 10(1) is that the regulatory regime should be accessible and intelligible, at least to lawyers qualified to practice in the jurisdiction, as was the attorney consulted by Mr. Joachim Kruck.[297] The Tribunal notes that the bank (now part of Landesbank Baden-Württemburg) that provided over €50 million in non-recourse loans to finance the PV projects itself relied upon an assurance from Ms. Mafalda Soto that the plants could qualify for the RD 661/2007 tariff.[298]

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[296] RD 1578/2008, Preamble (R-0087).

[297] First Kruck WS, ¶¶ 11-16.

[298] First Kruck WS, ¶ 24.

192. The compensation framework in RD 661/2007 was intended to elicit investment; and it did so. Moreover, the importance of the stability of the compensation framework in attracting investment was plainly articulated, for instance in the CNE report 3/2007. The Tribunal considers that RD 661/2007 was intended to provide potential investors with an assurance concerning the stability of the framework. The statements concerning the 'legal certainty' provided by the framework, reinforcing the formality of the registration of eligible facilities, support this conclusion.

193. The Respondent's argument that legislation can always be amended, and that potential investors know that fact – or would be told by lawyers whom they consult –and can therefore never rely upon regulatory provisions remaining unchanged, misses the point. No-one questions that Spain had the legal capacity to change the regulatory regime. The question is whether it was fair and equitable to do so in a manner that caused harm to certain investors who had relied on representations that Spain would not exercise that undoubted power in relation to their investments.

194. The less advantageous terms of RD 1578/2008 no doubt signalled that the days of fixed tariffs pitched at levels considered necessary to attract early investors into the construction of PV and other renewable electricity facilities were drawing to a close.[299] It is, however, unnecessary to decide what, if any, commitments were made to potential investors in and regarding RD 1578/2008 because it did not apply to the DSG Claimants' investments. Indeed, the fact that RD 1578/2008 expressly had no application to those PV plants already registered under RD 661/2007 can only have supported the view that the stability of the regime established by RD 661/2007 was assured as far as registered facilities were concerned.

195. The Tribunal accordingly decides that RD 661/2007 set out assurances on which it was intended that potential investors could and would rely, concerning the stability of the compensation framework established by RD 661/2007. This leads to the next question

[299] Cf., Cl. Reply, ¶ 255.

which is, given the making of these assurances, what constraints fell upon Spain as a result; or, in other words, what was the scope and content of Spain's commitment?

### *d. What were the constraints accepted by Spain as a result of that commitment?*

196. The Respondent's position, that Spain's electricity laws were consistently based on the principle that producers should receive a 'reasonable return', and that there was no commitment by the State to anything more than a 'reasonable return', provides one interpretation of the documentary record. The Claimants put forward another: that there was indeed a commitment to a 'reasonable return' for producers and the 'reasonable return' was itself defined by the detailed compensation framework set out in RD 661/2007, so that the Claimants were entitled to (and did) rely upon the maintenance of that framework in all its detail.

197. The Tribunal considers that the evidence, and notably the specificity of the compensation provisions in RD 661/2007 and the emphasis placed by Spain upon the 'legal certainty' produced by RD 661/2007, supports the Claimants' view. It accepts the interpretation of RD 661/2007 set out in the expert report by Professor Aragón.[300] A compensation framework in which detailed provisions for the payment of tariffs over a specific period of 25 years or more were set out explicitly and systematically, but subject to an implicit qualification that the details – and, indeed, the whole framework – could be abandoned and replaced by the (undefined) notion of a 'reasonable return' does not, in the view of the Tribunal, correspond to the way in which RD 661/2007 was presented or to the way in which it was intended to be and was understood by the renewable energy industry. RD 661/2007 was presented as a regulatory regime that guaranteed fixed tariffs for a fixed term to investors who constructed and were allowed to register qualifying facilities before the RD 661/2007 register was closed to new investments. Those are the assurances that the Tribunal finds were made in and in relation to RD 661.

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300 Prof. Aragón's Opinion on the Successive Reforms of the Legal Framework Applicable to Renewable Energy, 7 July 2016 ("Aragón ER"), pp. 26-39.

198. The Tribunal does not consider that the assurances were wholly inflexible, leading to the effective 'petrification' of the terms applicable to facilities registered under the RD 661 regime. The sovereign power of States to regulate their economies, and the rights and duties of governments to revise and amend regulatory regimes in the face of changing circumstances and changing policies, is beyond question. Limitations on those powers must not be lightly assumed.

199. The question here, however, is not whether Spain had the right and the legal power to amend its regulatory regime. The question here is whether Spain had committed itself to refrain from exercising its undoubted power in a particular manner, so that if it chose to exercise its power in a manner that breached that commitment it may incur liability for losses suffered by those who acted in reliance upon the commitment. There is nothing particularly arcane about this question: it is essentially the mirror image of the question whether a State can, *consistently with the FET provision in ECT Article 10*,[301] bind itself to perform a contract, in a manner that cannot be undone by the State enacting legislation that purports to abrogate its contractual obligations. The Tribunal has no doubt that a State can make such commitments and may do so by way of a unilateral declaration or representation.[302] Nor does it doubt that in principle a breach of such a commitment can amount to a violation of an FET provision.[303]

200. The line that separates legitimate modifications of the regulatory regime from changes that constitute improper breaches of the commitment to stability is not easily defined. The Tribunal, like others before it, considers that the essential distinction is that between a reasonable modification of the regulatory regime in respect of which the commitment to stability is made and a repudiation or abandonment of that regulatory regime. The regime could be amended and modified, but it was intended that potential investors could and

301 A question that is entirely distinct from the question whether the State may do so under its own municipal law.

302 *See*, *e.g*., the ILC "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto" (2006), < https://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf >.

303 *See*, *e.g*, ILC Articles on State Responsibility, comment (3) on Article 12 (RL-0095).

would rely on the stability of the fundamentals of the framework when taking investment decisions.

201. The Claimants argued that

> *In summary, Spain enacted RD 661/2007 and RD 1578/2008 to guarantee specific tariff rates on all of a qualified plant's production for a defined duration, as stated in Articles 17, 24, 25, and 36. Articles 44.1 and 44.2 provided that Spain would modify those rates annually for existing and future plants based on changes in inflation. Article 44.3 provided that Spain would further modify the rates quadrennially (beginning in 2010) based on factors such as Spain's achievement of its policy objectives and changes in technology costs and the capital markets, but expressly provided that such changes would not apply to existing plants. Apart from those provisions, RD 661/2007 and RD 1578/2008 did not authorize any changes to the economic regime that qualified plants had the explicit right to receive under Articles 17, 24, 25, and 36 of the decree. There is no other reasonable interpretation of the regulatory framework that formed the basis of Claimants' investment decisions.*[304]

202. The Tribunal accepts the main thrust of that argument, subject to the qualification that modifications to the regime that did not affect its fundamental characteristics could be adopted by Spain without breaching the legitimate expectations of those who had invested on the basis of RD 661/2007. Those fundamental characteristics, in the view of the Tribunal, included the predetermined tariffs, independent of the actual amounts invested in constructing and operating each PV facility and independent of past profits derived from the facility, fixed for a definite period of time which approximated to the useful life of a PV facility,[305] and with no minimum or maximum limit on the returns for each plant.[306] Spain's commitment was that those fundamentals would not be abrogated.

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304 Cl. Reply, ¶ 240.

305 RD 661/2007 had fixed the tariffs for 25 years, after which the tariff fell to 80% of its previous level. No time limit was set for the receipt of the 80% tariff. *See* RD 661/2007, Article 36 and Table 3 (C-098 (improved)).

306 *See* Cl. Reply, ¶¶ 187, 219

### *e. To what extent did each Claimant, in making its investment, rely upon Spain's commitment?*

203. Having determined that there is a foundation for the proposition that the Respondent gave assurances concerning the stability of the regime established by RD 661/2007 on which investors were intended and invited to rely, the Tribunal now turns to the question whether the Claimants did in fact rely upon those assurances.

204. It is obvious that no investment made before the adoption of RD 661/2007 could be said to have been made in reliance upon it, and that Spain cannot incur liability based on the doctrine of legitimate expectations in relation to such an investment. While some investors, including some or all of the Claimants, may have been following the evolution of Spain's compensation framework for renewable energy for many months before the adoption of RD 661/2007 on 25 May 2007, investments made before its final adoption were necessarily speculative, and made in the hope that what became RD 661/2007 would indeed be enacted in such a form as to provide favourable and secure terms for investors.

205. That limitation excludes the following investments in respect of which compensation claims are made:

a. the purchase on 30 May 2006 by Claimant 69, Mr. Joachim Kruck, of 50% of the shares in what became[307] Solar Andaluz Grundstücks S.L.;[308]

b. the purchase on 30 May 2006 by Claimant 72, Mr. Rolf Schumm, via the Spanish company Monte Grace Paradise S.L. (in which he and his brother Mr. Frank Schumm each held a 50% share)[309] of a 25% interest in the shares in what became[310] Solar Andaluz Grundstücks S.L.;[311]

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307 Public Deed Relating to the Change of the Name, Transfer of Address, Modification of Statutes, Modifications of the Board of Directors, Appointment and Acceptance of the New Professional Positions of the Company "Solar Andaluz Grundstuecks, S.L".dated 31 October 2007(C-209).

308 Cl. PHB, p. 22; Deed of Incorporation of Solar Kruck-Schumm S.L., 30 May 2006 (C-203).

309 Cl. PHB, p. 25; .

310 Public Deed Relating to the Change of the Name, Transfer of Address, Modification of Statutes, Modifications of the Board of Directors, Appointment and Acceptance of the New Professional Positions of the Company "Solar Andaluz Grundstuecks, S.L".dated 31 October 2007(C-209).

311 Cl. Mem., ¶ 31, fn. 19; Deed of Incorporation of Solar Kruck-Schumm S.L., 30 May 2006 (C-203), Share Purchase Agreement Between Monte Grace Paradise S.L. (Seller) and Frank Schumm (Buyer) of Solar Andaluz Grundstücks S.L., 1 August 2013 (C-206). The 25% interest was reduced to 12.5% on 31

c. the purchase on 30 May 2006 by Claimant 73, Mr. Frank Schumm, via the Spanish company Monte Grace Paradise S.L. (in which he and his brother Mr. Rolf Schumm each held a 50% share)[312] of a 25% interest in the shares in what became[313] Solar Andaluz Grundstücks S.L.[314]

It is only the investments made after 25 May 2007 that may in principle benefit from a right to rely on the representations made in RD 661/2007 and subsequently.

206. The DSG investments, along with the dates on which they were made, were listed in the table following paragraph 56 in the Claimants' Post-Hearing Brief. The relevant columns of that table are reproduced below, with the surviving (post-25 May 2007) claims highlighted in yellow, and claims in respect of which no compensation is sought further highlighted in green:

| Claimant | Date of Investment and Brief Description of the Investment |
|---|---|
| Joachim Kruck | **11 Apr. 2008**<br>Purchase of 100% of the shares in Claimant Solar Andaluz 3 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-339). |
| | **30 May 2006**<br>Purchase of 50% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C 203, company renamed at C-209), which owns the land on which Project Alcolea is located (C 202). Ownership interest reduced on 15 Jan. 2008 to 25% (C-204). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (Id.). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation (C-246). |
| | **1 Dec. 2008**<br>Purchase of 50% of the shares in Claimant Solarpark Calasparra 253 GmbH & Co. KG, which owns one of the Project Calasparra PV plants (C-338). |
| | **6 Apr. 2009**<br>Purchase of 100% of the shares in Claimant Solarpark Tordesillas 414 GmbH & Co. KG, which owns one of the Project Tordesillas PV plants (C-190) |
| | **5 May 2009**<br>Purchase of 43% of Claimant Solarpark Tordesillas 422 GmbH & Co. KG, which owns one |

October 2007, Share Purchase Agreement Between Monte Grace Paradise S.L. (Seller) and Ralf Hofmann (Buyer) of Solar Andaluz Grundstücks S.L., 31 October 2007 (C-205).

312 Cl. PHB, p. 26.

313 Public Deed Relating to the Change of the Name, Transfer of Address, Modification of Statutes, Modifications of the Board of Directors, Appointment and Acceptance of the New Professional Positions of the Company "Solar Andaluz Grundstuecks, S.L".dated 31 October 2007(C-209).

314 Cl. Mem., ¶ 31, fn. 19; Deed of Incorporation of Solar Kruck-Schumm S.L., 30 May 2006 (C-203); Share Purchase Agreement Between Monte Grace Paradise S.L. (Seller) and Frank Schumm (Buyer) of Solar Andaluz Grundstücks S.L., 1 August 2013 (C-206). The 25% interest was reduced to 12.5% on 31 October 2007, Share Purchase Agreement Between Monte Grace Paradise S.L. (Seller) and Ralf Hofmann (Buyer) of Solar Andaluz Grundstücks S.L., 31 October 2007 (C-205).

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| | of the Project Tordesillas PV plants (C-191). |
| | **2008**<br>Acquisition of interest in right to profits from excess production from all three plants by way of his 57% ownership interest in Claimant DSG GmbH, which was acquired in 2006 (C-5, C-197, C-198). [This claim is forwarded by DSG GmbH, the party to the contract, rather than Mr. Kruck. It is mentioned here for sake of completeness in describing Mr. Kruck's investments.] |
| | **19 May 2008**<br>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L. (C- 210), which owns the right to purchase the Project Calasparra and Tordesillas plants after twenty-five years of operation (C-247, C-248). |
| Peter Flachsmann | **17 Apr. 2008**<br>Purchase of 100% of the shares in Claimant Solar Andaluz 2 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-193) |
| | **15 Jan. 2008**<br>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C-204), which owns the land on which Project Alcolea is located (C-202). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (*Id.*). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation (C-246). |
| | **3 Apr. 2009**<br>Purchase of 50% of the shares in Claimant Solarpark Tordesillas 418 GmbH & Co. KG, which owns one of the Project Tordesillas PV plants (C-194) |
| | **2008**<br>Acquisition of interest in right to profits from excess production from all three plants by way of his 43% ownership interest in Claimant DSG GmbH, which was acquired in 2006 (C-5, C-197, C-198). [This claim is forwarded by DSG GmbH, the party to the contract, rather than Mr. Flachsmann. It is mentioned here for sake of completeness in describing Mr. Flachsmann's investments.]. |
| | **19 May 2008**<br>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L. (C-245), which owns the right to purchase the Project Calasparra and Tordesillas PV plants after twenty-five years of operation (C-247, C-248). |
| Ralf Hofmann | **11 Apr. 2008**<br>Purchase of 100% of the shares in Claimant Solar Andaluz 1 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-195). |
| | **10 Mar. 2009**<br>Purchase of 100% of the shares in Claimant Solarpark Calasparra 251 GmbH & Co. KG, which owns one of the Project Calsaparra PV plants (C-214). |
| | **29 Dec. 2008; 31 Mar. 2009; 23 Apr. 2009**<br>Purchase of 100% of the shares in Claimant Solarpark Tordesillas 407 GmbH & Co. KG, which owns one of the Project Tordesillas PV plants (C-196). |
| | Purchase of 100% of the shares in Claimant Solarpark Tordesillas 413 GmbH & Co. KG, which owns one of the Project Tordesillas PV plants (C-336). |
| | Purchase of 1% of the shares in Claimant Solarpark Tordesillas 421 GmbH & Co. KG, which owns one of the Project Tordesillas PV plants (C-337). |
| | **27 Mar. 2008**<br>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C-205), which owns the land on which Project Alcolea is located (C-202). The company owns a right |

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| | to 30% of excess profit from the sale of electricity produced by the Alcolea plants (*Id.*). The company also owns the right to purchase the Project Alcolea PV plants after twenty-five years of operation(C-246). |
| | **31 July 2008**<br>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L. (C-249), which owns the right to purchase the Project Calasparra and Tordesillas PV plants after twenty-five years of operation (C-247, C-248). |
| Mathias Kruck | **1 Dec. 2008**<br>Purchase of 50% of the shares in Claimant Solarpark Calasparra 253 GmbH & Co. KG, which owns one of the Project Calasparra PV plants (C-338) |
| Rolf Schumm | **30 May 2006**<br>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. through the company Monte Grace Paradise, S.L. in which he owned a 50% interest (C-206), which owns the land on which Project Alcolea is located (C-202).<br>On 31 Oct. 2007, Monte Grace Paradise, S.L. reduced its ownership share in Solar Andaluz Grundstücks S.L. to 25%, with the result that Rolf Schumm owned a 12.5% interest in the real estate company (C-205). On 1 Aug. 2013, Rolf Schumm sold his interest in Monte Grace Paradise, S.L. and thereby Solar Andaluz Grundstücks S.L. (C-206). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (C-202). |
| Frank Schumm | **10 Apr. 2008**<br>Purchase of 100% of the shares in Claimant Solar Andaluz 4 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-192) |
| | **30 May 2006**<br>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. through the company Monte Grace Paradise, S.L. in which he owned a 50% interest (C-206), which owns the land on which Project Alcolea is located (C-202). On 31 Oct. 2007, Monte Grace Paradise, S.L. reduced its ownership share in Solar Andaluz Grundstücks S.L. to 25%, with the result that Frank Schumm owned a 12.5% interest in the real estate company (C-205). On 1 Aug. 2013, Frank Schumm acquired the remaining 50% interest in Monte Grace Paradise, S.L. and thereby Solar Andaluz Grundstücks S.L. (C-206), thereby owning Monte Grace Paradise, S.L.'s full 25% share of Solar Andaluz Grundstücks S.L. The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (*Id.*). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation (C-246). |
| Solar Andaluz 1-20 GmbH & Co. KG | **28 Feb. 2008**<br>Purchase by each Claimant company of the assets of one of the Project Alcolea PV plants through the Claimant companies' wholly-owned Spanish subsidiaries (20 Claimants, 20 SPVs, and 20 plants in all) (C-223). Documents demonstrating Claimants' purchase of the SPVs: C-221; C-222. |
| Solarpark Calasparra 251-265 GmbH & Co. KG | **21 Aug. 2008**<br>Purchase by each Claimant company of 100% of the shares in one of the SPVs that owned one of the Project Calasparra plants (15 Claimants, 15 SPVs, and 15 plants in all) (C-230). Documents demonstrating that the SPVs owned the plants: C-227. |
| Solarpark Tordesillas 401-430 GmbH & Co. KG | **21 Aug. 2008**<br>Purchase by each Claimant company of 100% of the shares in one of the SPVs that owned one of the Project Tordesillas plants (30 Claimants, 30 SPVs, and 30 plants in all) (C-229). Documents demonstrating that the SPVs owned the plants: C-228. |
| DSG Deutsche Solargesellschaft mbH | **27 Feb. 2008**<br>DSG GmbH owns rights to 50% of excess profit from the sale of electricity produced by the Project Alcolea PV plants (C-199). |

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| | **15 July 2008**<br>DSG GmbH owns rights to 50% of excess profit from the sale of electricity produced by the Project Calasparra PV plants (C-200) |
| | **2 Nov. 2008**<br>DSG GmbH owns rights to 50% of excess profit from the sale of electricity produced by the Project Tordesillas PV plants (C-201) |
| DSG Spanien Verwaltungs GmbH | N/A – Indirect Interests in the Alcolea, Calasparra, and Tordesillas Claimants as their General Partner |

207. The 'Claimants' Reliance' list of the specific representations upon which each of the DSG Claimants relies, included in their Post-Hearing Brief, contains entries relating to each of those investments made after 25 May 2007. They read as follows:

| **Claimant** | **Date of Investment and Brief Description ofthe Investment** | **Claimants' Reliance on Specific Representations Made by (a) Respondent and (b) Any Other Person** |
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| oachim Kruck | **11 Apr. 2008**<br>Purchase of 100% of the shares in Claimant SolarAndaluz 3 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-339).<br>**30 May 2006**<br>Purchase of 50% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C 203, company renamed at C-209), which owns the land on which Project Alcolea is located (C 202).Ownership interest reduced on 15 Jan. 2008 to 25% (C-204). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (Id.). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation (C-246).<br>**1 Dec. 2008**<br>Purchase of 50% of the shares in Claimant Solarpark Calasparra 253 GmbH & Co. KG, which owns one of the Project Calasparra PVplants (C-338). | a) Joachim Kruck relied on the text of RD 661, as discussed in sector media and by Mafalda Soto. *See* First Kruck WS ¶¶ 11–16.<br>Joachim Kruck relied on Spain's RAIPRE registration process in order to qualify for the incentives guaranteed under the Special Regime. First KruckWS, ¶¶ 25, 27–28.<br>b) Joachim Kruck relied on the advice of his Spanish legal counsel Mafalda Soto. "In late 2006, I met Ms. Mafalda Soto, a Spanish attorney fluent in German. On several occasions, she spoke with me regarding Spain's new support regime under a proposed regulation on renewables (that ultimately became RD 661/2007), which Spain had announced several months earlier and I had already read about in German media and specialist magazines discussing the PV industry." First Kruck WS, ¶¶ 16, 23. *See also* Second Kruck WS, ¶¶ 4–6, 13–14. "Q. You've referred to a 'stability guarantee in RD 661.' Can you tell me who told you that? Did you have any advice on this supposed 'stability guarantee' that you are referring to? A. That's what Ms. Soto said." Hearing Tr. Day 2, 30:18–22 (Testimony of Joachim Kruck).*See also* C-219 and C-220 (legal advice from Ms. Soto).<br>Joachim Kruck relied on the general advice of the German lawyer Manuel Hermoso. "I ... |

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| | **6 Apr. 2009**<br>Purchase of 100% of the shares in Claimant Solarpark Tordesillas 414 GmbH & Co. KG, which owns one of the Project Tordesillas PVplants (C-190) | approached Mr. Manuel Hermoso, a local Heilbronn lawyer who had Spanish roots. He confirmed that the Spanish tariffs were granted for the duration and at the rates provided in the regulation. He explained that we could rely on Spain's regulatory framework, because like Germany, Spain was a developed country in the European Union that was bound by therule of law to honor the commitments it made to investors." First Kruck WS, ¶ 13. *See also* Second Kruck WS, ¶ 4–6, 13–14. "[W]hen I talked with [Mr. Hermoso] about the legal situation in Spain, asking whether it was just as stable as in Germany, he was almost embarrassed. He looked at me and said,'Where do you think we live? Spain is a civilized country, part of the European Union, and why would be legal situation be less stable than in Germany?'" Hearing Tr. Day 2, 36:18–23 (Testimony of Joachim Kruck).<br>Joachim Kruck reviewed media and specialist publications that confirmed his understanding of RD 661. "I regularly read the trade press, from 2003 . . . onward. In Photon, the trade magazine, there were various articles on various markets in Europe, and a lot of articles on Spain." Hearing Tr. Day 2, 17:18– 21 (Testimony of Joachim Kruck). *See also* First Kruck WS ¶ 11.<br>Joachim Kruck relied on the fact that LBBW and its legal advisors shared hisunderstanding that the Spanish incentive regime was stable. "All three loans were non-recourse, *i.e.*, without any recourse liability, meaning they would be repaid only from the cash-flows generated by the facilities. LBBW sought advice from the Spanish law firm Rodriguez-Arias and also required confirmation from Ms. Mafalda Soto, who represented DSG GmbH, that the plants could qualify for the RD 661/2007 tariff. Following this due diligence,LBBW proceeded to provide the project loans, clearly indicating that LBBWconsidered the Spanish tariff regime to be stable." First Kruck WS, ¶ 24.<br>Joachim Kruck also relied on the experience and knowledge of individuals who had prior experience investing in Spain's PV industry, including KACO and its legal advisors. "I also |

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| | **5 May 2009**<br>Purchase of 43% of Claimant Solarpark Tordesillas 422 GmbH & Co. KG, which owns one of the Project Tordesillas PV plants (C-191). | contacted Ralf Hofmann at KACO to see whether he would be interested in helping us develop PV projects in Spain. Ralf informed me that KACO was already doing extensive business in Spain in the context of the distribution of inverters, and he confirmed his interesting in developing a project with Frank [Schumm] and me." First Kruck WS, ¶ 14. "I spoke to Mr. Hofmann about [the incentive regime] – KACO at that time delivered a lot of inverters to Spain – and we also had discussions with Mr. Hofmann's clients." Hearing Tr. Day 2, 18:19–22. "[W]e had some loose contacts with other legal counsels via KACO, but they were all saying the same thing, which is that Spain is a safe country, a stable country, in terms of investment, in the European Union, where the legal framework is a good one, the legislation is reliable." Hearing Tr. Day 2, 32:8–13 (Testimony of Joachim Kruck). |

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| | **2008**<br>Acquisition of interest in right to profits from excess production from all three plants by way of his 57% ownership interest in Claimant DSG GmbH, which was acquired in 2006 (C-5, C-197, C-198). [This claim is forwarded by DSG GmbH,the party to the contract, rather than Mr. Kruck. It is mentioned here for sake of completeness in describing Mr. Kruck's investments.] | |
| | **19 May 2008**<br>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L. (C-210), which owns the right to purchase the Project Calasparra and Tordesillas plants after twenty-five years of operation (C-247, C-248). | |
| Peter Flachsmann | **17 Apr. 2008**<br>Purchase of 100% of the shares in Claimant SolarAndaluz 2 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-193) | a) Peter Flachsmann relied on the text of RD 661, which he learned about on the basis of the following diligence:<br>Peter Flachsmann relied on Spain's promotional efforts discussing the stability of its incentive regime. "[O]ver the years I've gone to 50 or 60 [renewable energy] trade shows, and what I do remember is that after 2005, especially 2006, there was a buzz. […] [C]learly there was a phase where Spain was trying to convince investors in our field to come to Spain and to invest there." Hearing Tr. Day 2, 54:16–24. "Spain was, I think, the most proactive [in promoting its incentive regime. Spain was] – even if it wasn't just the Spanish Government, the Spanish Chamber would always have a certain areaof the booths [at renewable energy trade shows]. They were very active." *Id.* 65:20–24.<br>Peter Flachsmann relied on Spain's RAIPRE registration process in order to qualify for the incentives guaranteed under the Special Regime. "I was forced to cancel my honeymoon and instead focus all my efforts on obtainingall of the parts for the facilities so that they could be completed and registered under the regime before the cut-off date. That was how important it was to ensure that the facilities were properly registered in the regime." Flachsmann WS, ¶ 17. *See also* Hearing Tr. Day 2, 55:15–57:5 (Testimony of Peter Flachsmann). |
| | **15 Jan. 2008**<br>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C-204), which owns the land on which Project Alcolea is located (C-202). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (*Id.*). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation<br>(C-246). | |
| | **3 Apr. 2009**<br>Purchase of 50% of the shares in Claimant Solarpark Tordesillas 418 GmbH & Co. KG, which owns one of the Project Tordesillas PVplants (C-194) | |

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| | **2008**<br>Acquisition of interest in right to profits from excess production from all three plants by way ofhis 43% ownership interest in Claimant DSG GmbH, which was acquired in 2006 (C-5, C-197, C-198). [This claim is forwarded by DSG GmbH, the party to the contract, rather than Mr. Flachsmann. It is mentioned here for sake of completeness in describing Mr. Flachsmann's investments.].<br><br>**19 May 2008**<br>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L. (C-245), which owns the right to purchase the Project Calasparra and Tordesillas PV plants after twenty-five years of operation (C-247, C-248). | b) Peter Flachsmann relied on the advice of DSG's Spanish legal counsel, Mafalda Soto. "Joachim Kruck also introduced me to a Spanish lawyer, Ms. Mafalda Soto, who confirmed the details of the incentives to me and told me that under the regulation, any changes to the tariff rates would only apply to new facilities." Flachsmann WS, ¶ 10. *See also* C-219 and C-220 (legal advice from Ms. Soto).<br><br>Peter Flachsmann reviewed "several press articles and other [ ] literature discussing the Spanish incentives." Flachsmann WS, ¶ 9. *See also* Hearing Tr. Day 2, 65:2–3 (Testimony of Peter Flachsmann).<br><br>Peter Flachsmann relied on information Ralf Hofmann gave him regardingRD 661, which Ralf Hofmann had learned from announcements of the Spanish Government. *See* Flachsmann WS, ¶ 9.<br><br>Peter Flachsmann relied on the fact that his understanding of the RD 661 regime was shared by the rest of the industry. "There were some kinks with the environment to invest early on. About retroactivity and not having a fixed rate. But then I do remember after RD 661 came out, that's all everybody talked about, is, you know, '[Spain's] finally done it, this is a great environment, it's now bankable, we can go.' ... I did speak directly with people that had read the royal decree, that had done the analysis. My customers were the developers at the time, the installers, and they had done their due diligence. And it was a real sense of buzz that this was the place to go." Hearing Tr. Day 2, 54:25–55:12 (Testimony of Peter Flachsmann). "I relied ... [on] firsthand accounts from people who were my customers, who ... were building [PV plants] |
| Ralf Hofmann | **11 Apr. 2008**<br>Purchase of 100% of the shares in Claimant SolarAndaluz 1 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-195).<br><br>**10 Mar. 2009**<br>Purchase of 100% of the shares in Claimant Solarpark Calasparra 251 GmbH & Co. KG, which owns one of the Project Calsaparra PVplants (C-214). | a) Ralf Hofmann relied on the text of RD 661, which he learned about on the basis of the following diligence:<br><br>Ralf Hofmann relied on announcements of the Spanish Government regarding RD 661. "In mid-2006, Ralf Hofmann told me that Spain had announced it would enact a new tariff regime and that the tariffs would be even more attractive [than under RD 436], particularly with respect to PV investments. The regime would endure for the lifetime of the investment, at 100% of a specified tariff rate over the first |

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| | **29 Dec. 2008; 31 Mar. 2009; 23 Apr. 2009**<br>Purchase of 100% of the shares in Claimant Solarpark Tordesillas 407 GmbH & Co. KG, which owns one of the Project Tordesillas PVplants (C-196). | twenty-five years and then 80% for the remainder of a facility's useful life. For plants of 100 kW and under, the tariff rate was approximately €0.44 per kWh, which would be adjusted annually based upon a consumer price index." Flachsmann WS, ¶ 9.<br>b) Ralf Hofmann relied on DSG's legal counsel, Ms. Mafalda Soto. *See* First Kruck WS, ¶¶ 16, 23. *See also* C-219 and C-220 (legal advice from Ms. Soto) |
| | Purchase of 100% of the shares in Claimant Solarpark Tordesillas 413 GmbH & Co. KG, which owns one of the Project Tordesillas PVplants (C-336). | |
| | Purchase of 1% of the shares in Claimant Solarpark Tordesillas 421 GmbH & Co. KG, which owns one of the Project Tordesillas PVplants (C-337). | |
| | **27 Mar. 2008**<br>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. (C-205), which owns the land on which Project Alcolea is located (C-202). The company owns a right to 30% of excess profit from the sale of electricity produced by the Alcolea plants (*Id.*). The company also owns the right to purchase the Project Alcolea PV plants after twenty-five years of operation<br>(C-246). | |
| | **31 July 2008**<br>Purchase of 33.3% of the shares in real estate lessor Deutsche Solar Ibérica Real Estate S.L.(C-249), which owns the right to purchase the<br>Project Calasparra and Tordesillas PV plants after twenty-five years of operation (C-247, C-248). | |
| Mathias Kruck | **1 Dec. 2008**<br>Purchase of 50% of the shares in Claimant Solarpark Calasparra 253 GmbH & Co. KG, which owns one of the Project Calasparra PVplants (C-338) | a) Mathias Kruck relied on the text of RD 661, which he learned about from his son Joachim Kruck, Ms. Soto, and his other DSG business partners.<br>b) Mathias Kruck relied on DSG's legal counsel, Ms. Soto. *See* First Kruck WS, ¶¶ 16, 23. *See also* C-219 and C-220 (legal advice from Ms. Soto). |

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| Rolf Schumm | **30 May 2006**<br>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. through the company Monte Grace Paradise, S.L. in which he owned a 50% interest (C-206), which owns the land on which Project Alcolea is located (C-202).<br>On 31 Oct. 2007, Monte Grace Paradise, S.L. reduced its ownership share in Solar Andaluz Grundstücks S.L. to 25%, with the result that Rolf Schumm owned a 12.5% interest in the real estate company (C-205). On 1 Aug. 2013, Rolf Schumm sold his interest in Monte Grace Paradise, S.L. and thereby Solar Andaluz Grundstücks S.L. (C-206). The company owns aright to 30% of excess profit from the sale of electricity produced by the Alcolea plants (C- 202). | a) Rolf Schumm relied on the text of RD 661, which he learned about from his son Frank Schumm and acquaintance Joachim Kruck, as well as Ms. Soto and his other DSG business partners.<br>b) Rolf Schumm relied on DSG's legal counsel, Ms. Soto. *See* First Kruck WS, ¶¶ 16, 23. *See also* C-219 and C-220 (legal advice from Ms. Soto). |
| Frank Schumm | **10 Apr. 2008**<br>Purchase of 100% of the shares in Claimant SolarAndaluz 4 GmbH & Co. KG, which owns one of the Project Alcolea PV plants (C-192)<br><br>**30 May 2006**<br>Purchase of 25% of the shares in real estate lessor Solar Andaluz Grundstücks S.L. through the company Monte Grace Paradise, S.L. in which he owned a 50% interest (C-206), which owns the land on which Project Alcolea is located (C-202).On 31 Oct. 2007, Monte Grace Paradise, S.L. reduced its ownership share in Solar Andaluz Grundstücks S.L. to 25%, with the result that Frank Schumm owned a 12.5% interest in the real estate company (C-205). On 1 Aug. 2013, Frank Schumm acquired the remaining 50% interest in Monte Grace Paradise, S.L. and thereby Solar Andaluz Grundstücks S.L. (C-206), thereby owning Monte Grace Paradise, S.L.'s full 25% share of Solar Andaluz Grundstücks S.L. The company owns a right to 30% of excess | a) Frank Schumm relied on the text of RD 661, which he learned about on the basis of the following diligence:<br>b) Frank Schumm relied on DSG's legal counsel, Ms. Soto. *See* First KruckWS, ¶¶ 16, 23. *See also* C-219 and C-220 (legal advice from Ms. Soto).<br>Frank Schumm relied on media and specialist publications reporting on the Spanish incentive regime. "I showed Frank the literature I had reviewed that contained information regarding the Spanish support regime." First Kruck WS, ¶ 13. |

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| | profit from the sale of electricity produced by the Alcolea plants (*Id.*). The company also owns the right to purchase the Project Alcolea plants after twenty-five years of operation (C-246). | |
| Solar Andaluz 1-20 GmbH & Co. KG | **28 Feb. 2008**<br>Purchase by each Claimant company of the assetsof one of the Project Alcolea PV plants through the Claimant companies' wholly-owned Spanish subsidiaries (20 Claimants, 20 SPVs, and 20 plants in all) (C-223). Documents demonstrating Claimants' purchase of the SPVs: C-221; C-222. | The DSG Claimant companies are investment companies organized and controlled by the individual DSG Claimants discussed above. Thus, the knowledge and experience of all individuals that advised and guided their investment are relevant for the purposes of evaluating the DSG Claimant companies' expectations. This includes the individual DSG Claimants' knowledge of the Spanish regime, as well as the personal knowledge and experience of Claimants' Spanish legal advisors like Ms. Soto. |
| Solarpark Calasparra 251-265 GmbH & Co. KG | **21 Aug. 2008**<br>Purchase by each Claimant company of 100% of the shares in one of the SPVs that owned one of the Project Calasparra plants (15 Claimants, 15 SPVs, and 15 plants in all) (C-230). Documents demonstrating that the SPVs owned the plants: C-227. | |
| Solarpark Tordesillas 401-430 GmbH & Co. KG | **21 Aug. 2008**<br>Purchase by each Claimant company of 100% ofthe shares in one of the SPVs that owned one of the Project Tordesillas plants (30 Claimants, 30 SPVs, and 30 plants in all) (C-229). Documents demonstrating that the SPVs owned the plants: C-228. | |
| DSG Deutsche Solargesellschaftmbh | **27 Feb. 2008**<br>DSG GmbH owns rights to 50% of excess profitfrom the sale of electricity produced by the Project Alcolea PV plants (C-199).<br>**15 July 2008**<br>DSG GmbH owns rights to 50% of excess profitfrom the sale of electricity produced by the Project Calasparra PV plants (C-200) | |

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| | **2 Nov. 2008**<br>DSG GmbH owns rights to 50% of excess profitfrom the sale of electricity produced by the Project Tordesillas PV plants (C-201) | |
| DSG Spanien Verwaltungs GmbH | N/A – Indirect Interests in the Alcolea, Calasparra, and Tordesillas Claimants as their General Partner | |

208. It is asserted in that list and in the testimony of witnesses that reliance was placed on the text of RD 661/2007 as discussed in sector media and by the Spanish lawyer, Ms. Mafalda Soto. That assertion is made specifically by the individual DSG Claimants: Mr. Joachim Kruck, Mr. Peter Flachsmann, Mr. Ralf Hofmann, Mr. Mathias Kruck, Mr. Rolf Schumm and Mr. Frank Schumm. It is further asserted that the DSG Claimant companies were organized and controlled by the individual DSG Claimants so that their individual reliance is to be attributed to the DSG Claimant companies.

209. As was noted above, representations by third parties, not acting on behalf of or under the direction or control of the Respondent, cannot themselves actually create obligations for the Respondent on which the Claimants were entitled to rely.[315] Representations made by Ms. Mafalda Soto and by journalists and commentators cannot themselves bind the Respondent. Such representations can, however, cast light upon what statements that are attributable to the Respondent were understood to mean by some of those to whom the statements were addressed. They can corroborate and support the Claimants' assertions as to what they understood the Respondent to be promising.

210. The Tribunal accepts those assertions and accepts that investments made by the DSG Claimants after 25 May 2007 were induced by and made in reliance upon the representations and commitments made by the Respondent as to the stability of the regime established by RD 661/2007. The precise object of RD 661/2007 was, in the words of the

[315] *See* ¶¶ 163-164 above. Cf., *e.g.*, the ILC Articles on State Responsibility, Chapter II (RL-0095).

*El Paso* tribunal, to give a real guarantee of stability to the investor,[316] and the DSG Claimants understood and relied upon it as such.

### *f. Was that commitment breached by Spain?*

211. It was indicated above that the Tribunal considers that the essential distinction that serves to identify an unfair and inequitable breach of a commitment is that between a reasonable modification of the regulatory regime and a repudiation or abandonment of the fundamentals of that regime. The fundamentals of the regime in this case included predetermined tariffs, independent of the actual amounts invested in constructing and operating each PV facility and independent of past profits derived from the facility, fixed for a definite period of time which approximated to the useful life of a PV facility, and with no minimum or maximum limit on the returns for each plant.[317]

212. The Claimants identify a series of measures that, they submit, breached the commitments relating to the stability of the regime established by RD 661/2007. They are:[318]

a. the 'duration cap' imposed by RD 1565/2010 (23 November 2010) amended by RDL 2/2011;

b. the 'annual production cap' imposed by RDL 14/2010 (23 December 2010);

c. the 7% TVPEE tax imposed by Law 15/2012 (28 December 2012);

d. the CPI amendment imposed by RDL 2/2013 (1 February 2013); and

e. the New Regulatory Regime established by RDL 9/2013, Law 24/2013, RD 413/2014, Ministerial Order IET/1045/2014 (13 July 2013 – 21 June 2014[319]).

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316 *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 377 (CL-053).

317 *See* ¶¶ 37-44 above.

318 Claimants' Opening Presentation, slide 112.

319 Ministerial Order IET/1045/2014 (dated 16 June 2014) was published in the *Boletín Oficial del Estado* ("BOE") on 20 June 2014 and provides that it shall be effective as of the day following its publication in the BOE. *See* C-179 ENG partial improved translation; C-179 SPA.

213. The Tribunal has already decided that the 7% TVPEE tax is not within its jurisdiction,[320] and it will not be considered further.

214. RD 1565/2010[321] imposed a limit of 25 years on the entitlement to regulated tariffs, effectively abolishing the right of registered PV facilities under Article 36 and Table 3 of RD 661/2007 to receive 80% of that tariff after 25 years. The imposition of this 'duration cap' was, as the Claimants observed,[322] mitigated by the extension of the full tariff entitlement first to 28 years in 2010[323] and then to 30 years in 2011.[324]

215. The Tribunal recalls that the CNE, in its Report 3/2007, had written that

> […] *the study considers a service life of 15 years in general, except in the case of photovoltaic and hydroelectric facilities which are considered at 25 years. In turn, the investment is generally amortised at 15 years, except in the case of photovoltaic and hydroelectric facilities which are amortised at 20 and 25 years respectively.*[325]

216. While Mr. Reiss gave evidence that he expected a PV facility to be in operation for at least 35 to 40 years,[326] and Mr. Kruck referred to an operating life of at least 35 years,[327] Mr. Matuschke (the head of accounting and the customer relations manager at DSG GmbH and at Kruck & Partner) based his calculations of income from the facilities on a period of 25 years,[328] which is also the period given for the 'service life' of PV facilities in the Renewable Energy Plan for Spain 2005-2010.[329]

217. The imposition of a 30-year cap in place of the '25 years + operating life' entitlement under RD 661/2007 can thus be seen as the replacement of an actual operating life with a notional

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320 Decision 1, ¶ 326(2).

321 RD 1565/2010 (C-129).

322 Claimants' Opening Presentation, slide 113.

323 RDL 14/2010, First final disposition (C-102).

324 Law 2/2011, First final provision (C-095).

325 CNE Report 3/2007, p. 22 (R-0116).

326 First Witness Statement of Karsten Reiss, 19 July 2016, ¶ 16.

327 First Kruck WS, ¶ 19.

328 Witness Statement of Klaus Matuschke, 28 July 2016 ("Matuschke WS"), ¶ 8.

329 Spain's Renewable Energy Plan 2005-2010, August 2005 ("Renewable Energy Plan 2005-2010"), pp. 295-298 (R-0107).

but realistic one. Furthermore, the variations were only to have effect two decades ahead, at the end of the expected working life of the investment. The Tribunal does not consider this to be a fundamental change in the compensation framework or a break with the promised regime.

218. The caps[330] imposed by RDL 14/2010 on the number of hours each year for which the full tariff was payable (sales of electricity in excess of the cap being made at market rates, which are much lower than the regulated tariff[331]) were set by reference to the estimate in the Renewable Energy Plan for Spain 2005-2010 of the annual operating hours of a standard facility.[332] It was acknowledged that the caps could entail a loss of revenue for producers, and that possibility was addressed by making compensating adjustments to the period over which the regulated tariffs would be payable:

> […] *in the actual operation of the system, it has been shown that there are more operating hours at the facilities than initially planned in some cases. There are diverse reasons for this – technical improvement, over-installation, etc. In any case, this means that for these facilities the compensation obtained is more than reasonable.*
>
> […]
>
> *In order to compensate the reduction that these measures could cause, the period for receiving compensation for photovoltaic facilities under Royal Decree 661/2007 has been extended from 25 to 28 years.*[333]

219. The Tribunal considers that this change in the regulatory framework, while more trenchant that the duration cap, maintained the essential characteristics of the framework established in RD 661/2007 and took due account of its impact upon affected producers and provided for compensation to electricity producers. The Tribunal does not consider the 2010 cap on

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330 There was a 3-year temporary or transitory cap, and a slightly higher and apparently permanent cap. *See* Cl. Mem., ¶¶ 315-321.

331 Cl. Mem. para 320.

332 Renewable Energy Plan 2005-2010, pp. 295-298 (R-0107); Regulation Impact Report for the Royal Decree Law Project by which urgent measures for correcting the tariff deficit in the electricity sector is established, 27 December 2010 ("Regulation Impact Report on RDL 14/2010"), pp. 13-15 (R-0126).

333 Regulation Impact Report on RDL 14/2010, pp. 14-15 (R-0126).

hours to be a fundamental change in the compensation framework or a break with the promised regime that constitutes a violation of ECT Article 10.

220. The manner in which the CPI was calculated was amended by RDL 2/2013.[334] The Tribunal regards this as a technical adjustment of the kind that investors must expect may occur from time to time, and does not consider it to be a fundamental change in the compensation framework or a break with the promised regime.

221. The New Regulatory Regime presaged by RDL 9/2013 (12 July 2013)[335] was very different. RDL 9/2013 repealed RD 661/2007 and replaced it with what Law 24/2013 called "new specific remuneration regimes to promote production from sources of renewable energies", describing the change as a "general overhaul of the sector based on a new income and expenses' regime for the electric system which is seeking to give back to the system a financial sustainability which it lost a long time ago and whose eradication has not been achieved to date through the adoption of partial measures."[336]

222. The New Regulatory Regime was established by a series of measures including RDL 9/2013 (12 July 2013);[337] Law 24/2013 (26 December 2013);[338] RD 413/2014 (6 June 2014);[339] and Ministerial Order IET/1045/2014 (16 June 2014).[340] The details of the new regime were settled only in June 2014. By that date it was evident that the regime established by RD 661/2007 had been completely replaced by the new regime which abandoned the previous guaranteed price mechanisms and replaced it with a regime in which prices were set so as to deliver a "reasonable rate of return" to electricity producers, calculated for each PV installation according to its installed capacity. The calculation of the remuneration for an actual PV facility was made by reference to the deemed costs of operating costs of one of the hundreds of hypothetical 'standard facilities' defined in

334 Resp. C-Mem., ¶¶ 837-845.
335 RDL 9/2013 (C-091).
336 Law 24/2013 (C-180).
337 RDL 9/2013 (C-091).
338 Law 24/2013 (C-180).
339 RD 413/2014 (R-0095/C-090).
340 Ministerial Order IET/1045/2014 (R-0101/C-179).

Ministerial Order IET/1045/2014. The hypothetical standard facility would be selected to correspond to the installed capacity of the actual plant. The remuneration was also linked to the historic ten-year average yield of ten-year Spanish treasury bonds. The New Regulatory Regime provided that its investment incentives were to be reviewed every six years.

223. Tying the remuneration of plants to that of hypothetical 'standard facilities' meant that the New Regulatory Regime was, in the words of one of the Claimants' experts, "based on the installed power instead of on the production" of actual PV facilities:[341] As he said, "[w]ith the new regulatory framework, the remuneration parameters are not linked to the actual production of each plant but to the production assigned to the standard facility assigned to the plant. The high investment and maintenance costs of facilities that sought greater efficiency and returns do not have any impact on the remuneration of renewables."[342] The rate of return "has turned out to be the same for all facilities under the new framework, including all technologies with different degrees of development."[343] That is not entirely accurate: an operator could increase its return by operating more efficiently than was assumed in the calculation of the 'standard' rate, or reduce its return by operating less efficiently. Nonetheless, the new regime indisputably made a fundamental shift in the economic basis of the PV facilities by abolishing the fixed tariffs that had been guaranteed by RD 661/2007 when the investment in the PV facilities were made, and replacing them with what Spain considered to be a "reasonable rate of return" for the PV facility in question.

224. The Tribunal emphasizes that it does not dispute that the New Regulatory Regime and its target 'reasonable rate of return' were perfectly reasonable when viewed in their own terms and in isolation from the history of investment in PV plants in Spain. The New Regulatory Regime was reasonable: and in particular it was a reasonable response to the economic difficulties that continued to beset Spain's market for electricity. What was not reasonable was the imposition of the New Regulatory Regime upon investors who had already

[341] Margarit ER, p. 56

[342] Margarit ER, p. 57.

[343] Margarit ER, p. 57.

committed the large up-front capital expenditures necessary to construct and commission PV plants and had done so in reliance upon the commitment by Spain to offer fixed, pre-determined Feed-In Tariffs for the whole of their electricity production over a period of 25 years (with 80% of that tariff payable thereafter).

225. That denial of the legitimate expectations of the DSG Claimants amounts to a breach of their right to Fair and Equitable Treatment under Article 10 of the ECT. To the extent that they suffered financial losses as a result of that breach, the Respondent is liable to compensate them. This element of the DSG Claimants' claim is upheld. The question of the amount of compensation is addressed below.

## B. IMPAIRMENT THROUGH UNREASONABLE OR DISCRIMINATORY MEASURES

### (1) The Parties' Positions

#### *a. Claimants' Position*

226. According the Claimants, a State is prohibited under Article 10(1) of the ECT from "'impair[ing] by unreasonable or discriminatory measures' the 'management, maintenance, use, enjoyment or disposal' of an investment."[344] As stated by previous tribunals applying impairment standards identical to the ECT's, this obligation "sets forth a low threshold" according to which impairment covers "any negative impact or effect" and requires only the existence of either unreasonable or discriminatory measures.[345]

227. A measure is unreasonable when it affects investments "without engaging in a rational decision-making process", i.e. a process that includes taking into consideration the potential negative effects the measure may have on foreign investments and balancing the

[344] Cl. Mem., ¶ 440.

[345] Cl. Mem., ¶ 442; Cl. Reply, ¶¶ 483, 485; *citing Saluka Investments BV v. Czech Republic*, UNCITRAL Partial Award, 17 March 2006, ¶¶ 458-459 (CL-055); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 292 (CL-066); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶¶ 391, 393 (CL-078); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 ¶ 163 (CL-063); Thomas Roe & Matthew Happold, Settlement of Investment Disputes Under the Energy Charter Treaty, Cambridge University Press 2011, pp. 116-117.

interests of the State with the burden imposed on the investments.[346] Such reasonableness, the Claimants submit, must be assessed from the standpoint of the expectations the parties had when deciding to invest.[347]

228. The Claimants contend that the measures adopted by the Respondent unlawfully impaired their investments in an unreasonable or discriminatory manner. This based on the following two arguments.[348]

229. *First,* the measures significantly harmed the Claimants' investments without serving a legitimate purpose. The Claimants argue that it is not sufficient for the Respondent to point to any reason for its policy choice; such choice must be justified in light of the Respondent's duty to protect the investors, their expectations and its duty to encourage investment.[349] The Respondent decided to back out of the explicit promises made to the Claimants because it decided that renewable energy producers should bear the burden of the tariff deficit Spain created. The State chose to target renewable energy producers because of the adverse political implications of addressing the deficit by raising prices for the end-consumers.[350]

230. *Second*, the measures adopted by the Respondent violate fundamental principles of non-retroactivity and single out renewable energy investors. By doing so, without reason, the Respondent imposed the burden of the tariff deficit on the renewable energy investors.[351] The 2009 APPA proposal, which the Respondent alleges was similar to the New Regulatory Regime, in reality dealt with future facilities and did not involve retroactive

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[346] Cl. Mem., ¶ 443; *citing LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 ¶ 158 (CL-063).

[347] Cl. Mem., ¶ 444; *citing BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 342-346 (CL-077).

[348] Request for Arbitration, ¶ 64; Cl. Reply, ¶ 484.

[349] Cl. Reply, ¶ 488; *citing BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 342-343 (CL-077).

[350] Cl. Reply, ¶¶ 485-489; *citing BG Group Plc. v. Argentine Republic,* UNCITRAL, Final Award, 24 December 2007, ¶¶ 342-344 (CL-077).

[351] Cl. Reply, ¶¶ 491-492; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 315 (CL-053); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case. No. ARB/01/3, Award, 22 May 2007, ¶ 282 (CL-062).

changes to RD 661/2007 or RD 1578/2008 that could affect facilities already in operation.[352]

231. The Claimants further disagree with the Respondent's argument that most investors accept the new regime and that the investment boom that took place after the reform shows the stability and predictability of the new regime. In the Claimants' view, most investors do not want regulatory modifications that destroy their expected returns. In addition, the main reason behind the boom was "the desire of certain investors to get rid of distressed assets."[353] What Spain portrays as an approval of its regulatory changes by international institutions are in fact nothing more than "general statements about the desirability of eliminating the Tariff Deficit."[354]

232. The Claimants offer the following ten additional arguments in support of its view that all the measures adopted by Spain were unreasonable and not the result of a rational decision-making process.

233. *First*, the Respondent's measures all violated the commitments and guarantees contained in RD 661/2007, in RD 1578/2008 and in the repeated assurances given by Spain's officials, all of which induced the Claimants to invest. For example, it was unreasonable for the Respondent to adopt measures imposing operating hour limits on plants that could not be shut down; to impose a so-called tax on incentive revenues; and to manipulate routine adjustments based on the CPI.[355]

234. *Second*, it was unreasonable for the Respondent to treat the Claimants and other investors in the renewable energy sector as the cause of Spain's tariff deficit, making them bear the burden of the solution.[356]

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[352] Cl. Reply, ¶ 493; *citing* APPA and Greenpeace, Proposal for draft Bill for the Encouragement of Renewable Energy, May 2009, Articles 20.1 and 27 (C-368).

[353] Cl. Reply, ¶ 495; *citing* Brattle Rebuttal Regulatory Report, "Changes to the Regulation of Photovoltaic Installations in Spain Since November 2010," 26 April 2017 ("Second Brattle Regulatory Report"), ¶ 145.

[354] Cl. Reply, ¶ 496; *citing* Second Brattle Regulatory Report, ¶ 138.

[355] Cl. Mem., ¶ 445.

[356] Cl. Mem., ¶ 446; *citing* Margarit ER, pp. 45-47.

235. *Third,* the new remuneration methodology applicable to renewable energy facilities is based on production capacity and not on actual generation. This affects the manner in which plants were and are going to be designed given that higher performance by the introduction of photovoltaic panels with greater performance will not be rewarded.[357]

236. *Fourth,* such remuneration methodology based on production capacity may be more beneficial for existing "bad projects" than for existing "good projects". Projects that were designed to maximize production above the standard facility's production will receive lower prices per kWh generated than those facilities that produce less energy.[358]

237. *Fifth*, it is unreasonable to link the reasonable return to the 10-year State bond's yield. Once the investment is made, the investor's leeway is reduced, which makes it inappropriate to modify the target return throughout the project's useful life. In any event, if such modification is intended, there is no reason to link it to variations of a financial instrument that is sensible to factors that may have nothing to do with the generation of electricity.[359]

238. *Sixth,* the New Regulatory Framework provides for regulatory periods of six (6) years, divided in semi-periods of three (3) years over which the main regulatory parameters remain valid. This affects the long-term predictability of the investment and the project's returns, and the capacity of the investor to adapt to new situations becomes almost non-existent.[360]

239. *Seventh*, the reasonable return expected from the renewable energy producers is not required from other energy generation technologies (e.g. nuclear and large hydro). If the rationale of the reform is to correct the economic imbalance of the electricity sector, it is irrational not to "rationalize the remuneration of old ordinary regime nuclear plants and large hydro plants."[361]

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357 Cl. Mem., ¶ 446; *citing* Margarit ER, p. 51.
358 Cl. Mem., ¶ 446; *citing* Margarit ER, p. 51.
359 Cl. Mem., ¶ 446; *citing* Margarit ER, p. 52.
360 Cl. Mem., ¶ 446; *citing* Margarit ER, p. 52.
361 Cl. Mem., ¶ 446; *citing* Margarit ER, p. 52.

240. *Eighth,* there is no justification for the definition of standard facilities and parameters used to determine the remuneration of each facility. The IDAE had commissioned two studies to collect information on the operating parameters of renewable plants. However, one study was never completed and the other was completed after the issuance of Ministerial Order IET/10452014 which set the standards to be used. Therefore, the procedure and methodology used to determine the parameters for standard facilities and remuneration were not transparent and also lacked rationality.[362]

241. *Ninth*, the economic impact of the reform focuses only on producers of renewable energy without making an adequate cost-benefit analysis. The positive externalities created by the production of renewable energy, such as the reduction of the market price and costs associated with $CO_2$, were not taken into consideration.[363]

242. *Tenth*, the New Regulatory Regime, which affected the Claimants' cash-flow, failed to take into account their financial commitments, which were based on a considerably higher level of fixed remuneration. [364]

243. The Claimants therefore argue that the unreasonable and discriminatory measures adopted by the Respondent impaired their use and enjoyment of their investments in Spain, in violation of the ECT's impairment clause.[365]

#### ***b. Respondent's Position***

244. The Respondent disagrees with the Claimants' "low threshold" argument and argues that the Claimants have failed to provide a single ECT case that supports their position.[366]

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362 Cl. Mem., ¶ 446; *citing* Margarit ER, pp. 52-53.

363 Cl. Mem., ¶ 446; *citing* Margarit ER, p. 53.

364 Cl. Mem., ¶ 447; *citing* First Brattle Regulatory Report ¶¶ 210-211; Matuschke WS ¶ 17.

365 Cl. Mem., ¶ 448; Cl. Reply, ¶ 498.

366 Resp. C-Mem., ¶¶ 1160-1161.

Similarly, the Respondent argues that the overall position of the Claimants is not supported by precedents that apply the ECT.[367]

245. The Respondent contends that the Claimants have the burden of proving that the measures adopted are irrational or discriminatory, which they have failed to do. In any event, the Respondent argues that the contested measures were reasonable and proportionate.[368]

246. The Respondent submits that there are three relevant tests to determine whether the measures adopted by the Respondent were irrational or discriminatory in light of the ECT's objectives and standards:[369] ***(1)*** the *EDF* Test; ***(2)*** the *AES* Test; and ***(3)*** the *Total* Test.

247. <u>The *EDF* Test</u>: Under this test, in order to determine whether the Respondent adopted discriminatory measures against the Claimants, the Tribunal must consider whether the measures: ***(a)*** inflict "damage on the investor without serving any apparent legitimate purpose"; ***(b)*** were based on "discretion, prejudice or personal preference"; ***(c)*** were adopted for reasons different than those announced by the decision maker; and ***(d)*** were "taken in wilful disregard of due process and proper procedure."[370]

248. In the case at hand: ***(a)*** the measures served the legitimate purpose of resolving the unsustainability and imbalance of the electricity market while avoiding the imposition of an excessive burden on the consumers and an unjustified over-remuneration;[371] ***(b)*** the reform was implemented in compliance with the applicable laws, and was of general scope and applicable to all the agents in the electricity system;[372] ***(c)*** the need to guarantee the sustainability of the electricity system, on which the contested measures were predicated, was previously announced in the explanatory statement of RD-L 6/2009, RD-L 14/2010 and the main sections of RD 1614/2010;[373] and ***(d)*** the measures were adopted in full

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[367] Resp. C-Mem., ¶¶ 1162-1165.

[368] Resp. C-Mem., ¶¶ 1166, 1172; *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 154 (RL-0074).

[369] Resp. C-Mem., ¶¶ 1182-1183; Resp. Rej., ¶¶ 1173-1174; Resp. PHB, ¶ 117.

[370] Resp. C-Mem., ¶ 1184; Resp. Rej., ¶¶ 1175-1176; citing *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303 (RL-0061).

[371] Resp. C-Mem., ¶ 1185(a).

[372] Resp. C-Mem., ¶ 1185(b).

[373] Resp. C-Mem., ¶ 1185(c).

observance of the applicable legislative procedures, with the participation of the interested parties.[374]

249. <u>The *AES* Test</u>: Under this test, the Tribunal determines if the measures were unreasonable and compliant with the FET standard enshrined in the ECT. Two elements are required: ***(a)*** the existence of a rational policy; and ***(b)*** the reasonableness of the State's actions in relation to that policy.[375]

250. In the case at hand, ***(a)*** in the context of a severe economic crisis and in light of the commitments entered into by Spain with the other Member States of the EU, the Respondent sought to fix the imbalance that favoured the producers which, in addition to placing an excessive burden on the Spanish consumers, was creating a tariff deficit. This has been recognized as a valid rational policy by previous tribunals.[376] As to ***(b)***, the reform is reasonable because it affects all the agents of the SES (e.g. consumers, producers, distributors and transmitters), follows the proposals made by the renewable energy sector's main association, and enables the producers to achieve a reasonable rate of return while correcting the imbalance.[377]

251. As recognized by the tribunal in the *Isolux* case, the existence of other alternative measures is not enough to conclude that the measures adopted were exorbitant or unreasonable.[378] In

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374 Resp. C-Mem., ¶ 1185(d).

375 Resp. C-Mem., ¶ 1187; Resp. Rej., ¶¶ 1177-1178; *citing AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010., ¶¶ 10.3.7-10.3.9 (RL-0065).

376 Resp. C-Mem., ¶¶ 1173-1174, 1188-1196; Resp. Rej., ¶¶ 1186, 1188; *citing AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010., ¶¶ 10.3.31, 10.3.34 (RL-0065); *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2012, ¶ 78 (RL-0068); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 179 (RL-0074); *Charanne BV and Construction Investment S.A.R.L. v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2006, ¶ 510 (RL-0075).

377 Resp. C-Mem., ¶¶ 1198-1203; Resp. Rej., ¶¶ 1189-1194.

378 Resp. Rej., ¶¶ 1181, 1183; *citing Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Award, 12 July 2016, ¶¶ 823, 825 (RL-0101).

fact, the Claimants have not demonstrated the viability of the proposed alternative measures, as confirmed by the AMG Experts.[379]

252. <u>The *Total* Test:</u> If the *AES* Test is not met, the Respondent argues that the Claimants' case must still be rejected based on the *Total* Test. The Respondent argues that, on the basis of the decision of the tribunal in *Total v. Argentina*, this Tribunal should determine whether the Respondent's reform allows the investor to recover its costs of operation, amortise its investments and obtain a reasonable rate of return.[380] The Respondent submits that this is the case and that the equilibrium required was maintained.[381]

253. In addition to these tests, the Respondent submits the following three arguments show that the measures were reasonable and proportionate.

254. *First,* the remuneration method that Spain adopted in 2013 was proposed in 2009 by the APPA, the main association in the renewable energy sector, with legal expert support from Cuatrecasas and Gonçalves Pereira.[382] This proposal shows that the measures were the best option to achieve reasonable rates of return, provide security and stability for the investments, and enable the renewable energy sector to fully develop in a sustainable and lasting manner.[383]

255. *Second,* because of the stability and security offered by the New Regulatory Regime, more than €5,000 million were invested in Spain in the renewable energy sector. This boom in the renewable energy sector demonstrates that the new regulations guaranteed a reasonable rate of return.[384]

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379 Resp. Rej., ¶¶ 1183, 1185; *citing* Second AMG ER, Annex X: Brattle proposed alternatives to the SES unsustainability.

380 Resp. Rej., ¶¶ 1196-1198; *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶¶ 165, 313 (RL-0074).

381 Resp. Rej., ¶¶ 1199-1202; *citing* Second AMG ER, ¶ 79.

382 Resp. C-Mem., ¶¶ 1175-1176; *citing* APPA and Greenpeace, Proposal for draft Bill for the Encouragement of Renewable Energy, May 2009, Articles 23.3-23.4 (R-0233).

383 Resp. C-Mem., ¶¶ 1177-1178.

384 Resp. C-Mem., ¶¶ 1179-1181; *citing* Article from the newspaper "El Mundo," "'Boom' of operations in the renewable sector after the reform," 22 July 2015 (R-0224).

256. *Third,* the new measures received favourable assessments from the European Commission, the IMF and the International Energy Agency in 2015 and 2016.[385]

257. Based on the above, the Respondent argues that the measures adopted were not irrational or discriminatory and did not violate the ECT.[386]

**(2) The Tribunal's Analysis**

258. The Tribunal finds no evidence whatever that suggests that the Spanish measures were discriminatory.

259. As to the question of unreasonableness, the Tribunal considers that the regulatory regime introduced to replace that established by RD 661/2007 and RD 1578/2008 was, in its own terms and viewed in isolation, completely reasonable. The regime established by RD 661/2007 had been very successful in attracting investment in renewable energy production in Spain, and in propelling Spain towards the fulfilment of its renewable energy goals. It was, however, not sustainable as a continuing basis for attracting such investment. The incentives offered by the RD 661/2007 scheme were not compatible with the (equally reasonable) Spanish policy on prices to be charged to electricity consumers and on the balancing of the budget. Something plainly needed to change; and the new regulatory regime was in its own terms an inherently reasonable and pragmatic response to the exigencies of the urgent and unsustainable position.

260. The new regulatory regime cannot, however, be viewed in isolation. The Spanish renewables regimes were both instrumental and regulatory: they were intended both to attract necessary investment and to regulate it after the investment had been made. In so far as concerns electricity produced from PV sources the regime established by RD 661/2007, on the basis of which all of the DSG Claimants' investments were made, had as its basis and most salient feature an assurance of fixed tariffs for a defined term of years to be paid in respect of qualified, registered PV facilities. The repudiation of that assurance was not reasonable. But what made it unreasonable was not the inherent character of the

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385 Resp. C-Mem., ¶¶ 1180-1181; Resp. Rej., ¶ 1182; *citing* IMF, Document "Spain: Staff Concluding Statement of the 2016 Article IV Mission," 13 December 2016, (R-0328).

386 Resp. C-Mem., ¶ 1204; Resp. Rej., ¶ 1203.

measures themselves but the fact that those measures entailed a denial of the legitimate expectations of the DSG investors.

261. The Tribunal accordingly considers that while the adoption of the measures was a breach of the right of the DSG Claimants to fair and equitable treatment, the measures did not themselves constitute an independent violation of the DSG Claimants' rights not to have the management, use, enjoyment or disposal of their investments impaired by unreasonable or discriminatory measures. This element of the DSG Claimants' claim is dismissed.

## C. UMBRELLA CLAUSE

### (1) The Parties' Positions

#### *a. Claimants' Position*

262. In the Claimants' view, to act in accordance with Article 10(1) of the ECT, the Respondent had to "observe any obligations it has entered into with [the Claimants]." Such provision, as interpreted by previous tribunals and in accordance with Article 31 of the Vienna Convention, covers <u>any</u> obligation irrespective of whether it is of a contractual, legislative or regulatory nature. If the Contracting Parties to the ECT had the intention to limit the scope of such provision, they would have done so expressly.[387]

263. According to the Claimants, the Respondent "entered into a number of legislative and regulatory obligations with regard to Claimants and their investments", by means of RD 661/2007, RD 1578/2008 and registration with the RAIPRE. These obligations,

[387] Cl. Mem., ¶¶ 449-456; Cl. Reply, ¶¶ 499-515; *citing, inter alia,* Thomas W. Wälde, Energy Charter Treaty-Based Investment Arbitration, 1(3) Transnational Dispute Management, July 2004, p. 7 (CL-080); Johan Billiet, International Investment Arbitration – A Practical Handbook (2016), p. 128 (CL-081); *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 186-187 (CL-082); *Bosh International, Inc. and B&P Ltd. Foreign Investment Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, ¶¶ 246-247 (CL-083); *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶¶ 244, 246 (CL-084); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 85 (CL-085); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, ¶ 205 (CL-086); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 257 (CL-087); *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 110 (CL-088); *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015, ¶ 366 (CL-089).

targeted at specific investors, granted specific property rights to the Claimants under Spanish law, and include the following:[388]

> *a. the obligation to pay "the compensation provided in the economic regime [of RD 661/2007 and RD 1578/2008]" to Claimants' facilities "for the total or partial sale of the net electricity generated" (Article 17 of RD 661/2007, also applicable to RD 1578/2008);*
>
> *b. the obligation to pay fixed tariffs of 44.0381 c€ to each of Claimants' PV facilities registered under RD 661/2007, per kWh of electricity produced for the first twenty-five years of those facilities' operation (Article 36 of RD 661/2007);*
>
> *c. the obligation to pay fixed tariffs of 35.2305 c€ per kWh of electricity produced for the remaining operating lives of Claimants' PV facilities registered under RD 661/2007 (Article 36 of RD 661/2007);*
>
> *d. the obligation to pay fixed tariffs of 28.6844 c€, 28.6844 c€, 27.8887 c€, and 20.3726 c€, respectively, to the TS Projects registered under RD 1578/2008 (Boguar, Henibra, Valtou, and Juan del Valle, respectively) per kWh of electricity produced for the first twenty-five years of operation (Article 11 of RD 1578/2008 and the specific resolution issued to those facilities upon enrollment in the RD 1578/2008 pre-allocation registry);*
>
> *e. the obligation to update the value of the RD 661/2007 and RD 1578/2008 tariffs "on an annual basis using as a reference the increase in the CPI" (Article 44.1 of RD 661/2007 and Article 12 of RD 1578/2008); and*
>
> *f. the obligation to ensure that "revisions to the regulated tariff…shall not affect facilities for which the deed of commissioning shall have been granted prior to January 1 of the second year following the year in which the revision shall have been performed" (Article 44.3 of RD 661/2007, also applicable to RD 1578/2008).*[389]

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[388] Cl. Mem., ¶¶ 457-459; Cl. Reply, ¶¶ 505, 507, 509, 516-517; Tr. Day 1 [Ms. Frey] [95:12-21]; *citing* RD 661/2007, Articles 17, 36, 44.1, 44.3; RD 1578/2008, Articles 11, 12 (C-046); Project Boguar Resolution in the RD 1578/2008 Pre-Allocation Registry, 9 December 2010 (C-188); Project Henibra Resolution in the RD 1578/2008 Pre-Allocation Registry, 9 December 2010 (C-189); Project Valtou Resolution in the RD 1578/2008 Pre-Allocation Registry, 28 March 2011 (C-340); Project Juan del Valle Resolution in the RD 1578/2008 Pre-Allocation Registry, 24 February 2015 (C-341); Aragón ER, pp. 16, 24, 37-39.

[389] Cl. Mem., ¶ 457.

264. According to the Claimants, since 2010, the Respondent has violated the obligations it had undertaken towards the Claimants' investments by amending them retroactively and then repealing and replacing the legal and regulatory framework. With these actions, the Respondent reduced the remuneration it had agreed to pay the Claimants, completely revoked the regulatory regime it had created and, therefore, violated the ECT's umbrella clause.[390]

#### ***b. Respondent's Position***

265. The Respondent rejects the Claimants' arguments on three grounds: ***(1)*** the Claimants' interpretation of Article 10(1) of the ECT contradicts the article's literal meaning and the interpretation provided by scholars and arbitral precedents; ***(2)*** the regulatory framework and the actions of the Respondent do not give rise to specific commitments covered by the umbrella clause; and ***(3)*** the registration in the RAIPRE does not give rise to commitments covered by the umbrella clause.[391]

266. *First*, the Respondent argues that the expression "entered into" of Article 10(1) of the ECT, as interpreted by previous tribunals, must be understood as requiring the assumption by the State of specific bilateral obligations regarding a specific investor or a specific investment.[392] Further, the fact that the umbrella clause has been debated in cases concerning contracts and the *pacta sunt servanda* principle, and not concerning *erga omnes* laws or regulations, suggests that legislative acts are excluded from the scope of such

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390 Cl. Mem., ¶¶ 457, 460-464; Cl. Reply, ¶ 517.

391 Resp. C-Mem., ¶¶ 1206-1207; Resp. Rej., ¶ 1205.

392 Resp. C-Mem., ¶¶ 1208-1209; Resp. Rej., ¶¶ 1206-1208; Resp. PHB, ¶ 121; Tr. Day 1 [Mr. Elena Abad] [292:8-13]; *citing Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 51 (RL-0052); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, ¶ 166 (RL-0050).

clauses.[393] This position is not contradicted by the arbitral decisions cited by the Claimants.[394]

267. Second, the Respondent contends that the Spanish regulatory framework, including RD 661/2007, applies *erga omnes*, "to companies that own plants and to any other producers of electrical power included in its scope of application."[395] As such, it does not target a specific group and does not generate specific obligations that could be covered by the ECT's umbrella clause.[396] Similarly, the Respondent has not included any specific commitments in informative documents such as press release or statements.[397]

268. *Third*, the Respondent denies that registration in the RAIPRE creates specific commitments between the investor and the government. This registry covers, as of 2016, "over 64,400 facilities with over 44,600 different owners."[398] The idea that the Respondent would have made specific commitments toward tens of thousands of facilities and owners would distort the wording of Article 10(1) of the ECT.[399]

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393 Resp. C-Mem., ¶¶ 1210-1215; Resp. Rej., ¶¶ 1210-1215; Tr. Day 1 [Mr. Elena Abad] [292:14-19]; *citing* The Energy Charter Treaty: A Reader's Guide, June 2002, p. 26 (RL-0079); Thomas W. Wälde, The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases. HeinOnline 6 J, World Investment & Trade 183 2005, p. 226 (RL-0081); *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.4 (RL-0065); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (RL-0060); *WNC Factoring Ltd (United Kingdom) v. Czech Republic*, Award, 22 February 2017, ¶¶ 346-347 (RL-0108).

394 Resp. C-Mem., ¶¶ 1217-1231; Resp. Rej., ¶¶ 1211, 1214, 1217; *citing, inter alia, Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 187 (RL-0060); *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015, ¶ 366 (CL-089); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 257 (CL-087).

395 Resp. C-Mem., ¶ 1232.

396 Resp. C-Mem., ¶¶ 1216, 1232-1235; Resp. Rej., ¶¶ 1218-1221;Resp. PHB, ¶ 122; Tr. Day 1 [Mr. Elena Abad] [293:1-6]; *citing Charanne B.V. and Construction Investment S.A.R.L. v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2006, ¶¶ 494, 504-505, 510-511 (RL-0075); *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC V2013/153, Award, 12 July 2016, ¶¶ 768-772 (RL-0101); *WNC Factoring Ltd (United Kingdom) v. Czech Republic*, Award, 22 February 2017, ¶ 323 (RL-0108).

397 Resp. PHB, ¶ 122.

398 Resp. Rej., ¶ 1209.

399 Resp. Rej., ¶¶ 1209, 1216, 1223-1225; Tr. Day 1 [Mr. Elena Abad] [293:1-15]; *citing* Report of the Sub-DirectorateGeneral of Electricity on the number of owners registered in Section 2 of the RAIPRE, , 26 April 2016 (R-0291); Submissions from the APPA concerning the Draft Electricity Sector Act, 26 July

269. Accordingly, the Respondent has not entered into specific obligations with the Claimants or their investments that could be covered by the umbrella clause. Therefore, it has not breached the umbrella clause contained in Article 10(1) of the ECT.[400]

#### (2) The Tribunal's Analysis

270. The Tribunal regards this plea in the present case as the legal equivalent of a hanging buttress. If (as is the case) the plea based on the FET provision and legitimate expectations succeeds, the plea based on obligations the Respondent has entered into with the Claimants is duplicative and unnecessary. If the plea based on the FET provision and legitimate expectations fails, the plea based on obligations the Respondent has entered into with the Claimants fails, because it has no basis other than that said to underly the legitimate expectations argument. This element of the DSG Claimants claim is dismissed.

### D. EXPROPRIATION

#### (1) The Parties' Positions

##### *a. Claimants' Position*

271. The Claimants argue that under Article 13 of the ECT, they are protected from the unlawful expropriation, in whole or in part, of their investments.[401] Article 13 forbids ECT Contracting States to expropriate an investment without paying "prompt, adequate, and effective compensation."[402]

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2013, p. 7 (R-0292); *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2016, ¶¶ 590-510 (RL-0075).

400 Resp. C-Mem., ¶ 1236; Resp. Rej., ¶ 1226; Resp. PHB, ¶ 120.

401 Cl. Mem., ¶¶ 465, 470; *citing* Guidelines on the Treatment of Foreign Direct Investment Issued by the Development Committee, 7 ICSID Rev.—F.I.L.J. 295 (1992), § IV (CL-100).

402 Cl. Reply, ¶ 518.

272. The Claimants contend that, consistent with the interpretation made by previous tribunals,[403] this provision protects "discrete legal rights",[404] including "'tangible and intangible property,' 'any property rights,' 'forms of equity participation in a company or business enterprise,' 'claims to money,' and 'any right conferred by law or…permits,'" even if the investor's overall business operation is not expropriated.[405]

273. In the Claimants' view, a measure is expropriatory if it "significantly or substantially deprives the investor of the use, benefit, or value of the investment, to an extent that is more than ephemeral."[406] Such measures can take different forms, including but not limited

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403 Cl. Mem., ¶¶ 467-468; *citing Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007 ¶ 267 (CL-086); *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005 ¶ 17 (CL-092); *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015 ¶ 118 (CL-093); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 (CL-094); *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 ¶¶ 126-127 (CL-095); *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶¶ 239-241 (CL-084); *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, Award, 3 February 2006 ¶¶ 172-179, 182-183 (CL-096).

404 Cl. Mem., ¶ 469; *citing* Lone Wandahl Mouyal, International Investment Law and the Right to Regulate, A Human Rights Perspective (2016), p. 45, (CL-097); *German Interests in Polish Upper Silesia Case (Germany v. Poland)*, PCIJ Case 1926, Series A, No. 7, ¶ 42 (CL-098); Samuel Asante, International Law and Foreign Investment: A Reappraisal, in International and Comparative Law Quarterly, Volume 37, July 1988, pp. 558, 595, (CL-099).

405 Cl. Mem., ¶¶ 466, 471; Reply, ¶¶ 521, 527; *citing* G.C. Christie, What Constitutes a Taking of Property under International Law?, 38 BRIT. Y.B. INT'L L. (1963), pp. 307, 312 (CL-101); Burns H. Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation," Virginia Journal of International Law 16 (1975), pp. 103, 112-113 (who uses the term "wealth deprivation" in this context) (CL-102), Thomas Wälde & Abba Kolo, Environmental Regulation, Investment Protection and Regulatory Taking in International Law, 50 INT'L COMP. L.Q. (2001), pp. 811, 835 (CL-103); Gary H. Sampliner, Arbitration of Expropriation Cases Under US Investment Treaties - A Threat to Democracy or the Dog That Didn't Bark?, 18 ICSID Rev.—F.I.L.J. 1, 14 (2003) (CL-104), Jan Paulsson & Zachary Douglas, Indirect Expropriation in Investment Treaty Arbitrations, in Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Norbert Horn & Stefan M. Kroll eds., 2004, pp. 145, 152 (CL-105); Stanimir A. Alexandrov, Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines, 5 J. World Investment & Trade (2004), pp. 555, 559 (CL-106); *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶¶ 239-241 (CL-084); *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶¶ 126-27 (CL-095); Guidelines on the Treatment of Foreign Direct Investment Issued by the Development Committee, 7 ICSID Rev.—F.I.L.J. 295 (1992), § IV (CL-100).

406 Cl. Mem., ¶¶ 472, 474; Cl. Reply, ¶¶ 527-528; *citing, inter alia, Técnicas Medioambentales Tecmed S.A. v. United Mexican States*, Award, 29 May 2003, ¶ 115-116 (CL-056); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, 12 April 2002 ¶ 114 (CL-094); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 ¶¶ 604-605 (CL-076); Christoph Schreuer, The Concept of Expropriation Under the ECT and Other Investment Protection

to regulatory actions (e.g. taxation measures) and the refusal to honour financial commitments entered into with the investors; they can create a "direct, indirect, regulatory, creeping, *de facto*" expropriation or can have effects similar to those of an expropriation.[407]

274. Based on the above, the Claimants' case on expropriation is based on the following arguments: ***(1)*** their investments are covered by the protection granted by Article 13 of the ECT; ***(2)*** the Respondent indirectly expropriated these investments; and ***(3)*** the contested measures are not justified as an exercise of the Respondent's police powers.

275. *First,* the Claimants argue that the ECT explicitly covers indirect investments, including rights conferred upon the investor by law.[408] Upon the enrolment of the facilities in the RAIPRE, RD 661/2007 and 1578/2008 conferred specific rights to the Claimants' projects in relation to the fixed tariffs they would receive, all of which were legal rights indirectly owned by the Claimants under Spanish law.[409] The Claimants' investments include, but are not limited to, the *right* to future returns, as opposed to the future returns themselves.[410] According to the Claimants, the Claimants' rights under RD 661/2007 and 1578/2008 fall under the protection against unlawful expropriation of the ECT.[411]

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Treaties, in Investment Arbitration and the Energy Charter Treaty 126-133 (Clarisse Ribeiro ed., 2006), p. 119 (CL-107).

407 Cl. Mem., ¶¶ 473, 475-476; Cl. Reply, ¶ 527; *citing Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, ¶¶ 76-77 (CL-108); Christoph Schreuer, The Concept of Expropriation Under the ECT and Other Investment Protection Treaties, in Investment Arbitration and the Energy Charter Treaty 126-133 (Clarisse Ribeiro ed., 2006) (CL-107); Rudolf Dolzer, Indirect Expropriations: New Developments? New York University, Environmental Law Journal, Volume 11, 64 (2002), p. 79 (CL-109); Christopher F. Dugan et al., Investor State Arbitration (2008), p. 450 (CL-110); *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award, 18 July 2014, ¶¶ 1579, 1580 (CL-111); Restatement (Third) of the Foreign Relations Law of the United States (1987), section 712, p. 200, Comment g (CL-112); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, 12 April 2002, ¶ 107 (CL-094); *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (CL-108); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 168 (CL-057); *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, Award, 3 February 2006, ¶ 183 (CL-096); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 521 (CL-113).

408 Cl, Reply, ¶ 525.

409 Cl. Mem., ¶¶ 478, 480; Cl, Reply, ¶¶ 519-525; *citing* Aragón ER, pp. 16, 39-40; RD 661/2007, Articles 17, 24-25, 36 (C-098); RD 1578/2008, Articles 4, 8, 11-12 (C-046).

410 Cl, Reply, ¶ 519.

411 Cl. Mem., ¶ 480; Cl, Reply, ¶¶ 519-525.

276. *Second,* the Claimants allege that the Respondent unlawfully expropriated their investments through the modification and subsequent abrogation of RD 661/2007 and RD 1578/2008, which negatively impacted the Claimants' revenues.[412]

277. The Claimants submit that, with the measures adopted in 2010, the Respondent substantially interfered with their specific rights,[413] and with the subsequent abrogation of RD 661/2007 and RD 1578/2008, the Respondent entirely deprived them of such rights.[414] As a consequence, nearly 78% of DSG Claimants' equity (and 43% of the TS Claimants' equity) in the PV plants was destroyed.[415] In addition, the uncertainty of the New Regulatory Regime translates into uncertainty as to the investors' expected returns.[416] In the eyes of the Claimants, all of this amounts to a substantial deprivation of their investments' value.[417]

278. *Third*, the Claimants reject the argument that the adoption of the disputed measures was an exercise of the Respondent's police powers and that, as a consequence, such expropriatory actions are excused.[418] They argue that the retroactive modification of the incentive regime created for renewable energy was unreasonable, discriminatory and resulted in a substantial deprivation of their investments without serving a legitimate purpose and, therefore, does not fall under the traditional scope of a State's police powers.[419]

279. The Claimants thus conclude that Spain has unlawfully expropriated the Claimants' investments, in violation of Article 13 of the ECT.[420]

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412 Request for Arbitration, ¶ 65; Cl. Mem., ¶¶ 477, 483; Cl. Reply, ¶ 530.

413 Cl. Mem., ¶ 479.

414 Cl. Mem., ¶ 480.

415 Cl. Reply, ¶ 529.

416 Cl. Mem., ¶ 481; *citing* Matuschke WS, ¶ 18.

417 Cl. Reply, ¶ 529; *citing AES Summit Generation Ltd. and AES-Tisza Er.mü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 14.3.1 (CL-038).

418 Cl. Reply, ¶¶ 531-532; *citing* UNCTAD Series on Issues in International Investment Agreements, Expropriation, United Nations Series, New York and Geneva, 2012 ("UNCTAD Expropriation Report"), p. 79 (RL-0056).

419 Cl. Reply, ¶¶ 533-534.

420 Request for Arbitration, ¶ 65; Cl. Mem., ¶ 483; Cl. Reply, ¶¶ 526, 533, 535.

### *b. Respondent's Position*

280. The Respondent denies that there was any expropriation of the Claimants' future returns or of the Claimants' shareholdings.[421] The Respondent argues that Article 13(3) of the ECT requires the Claimants to demonstrate that they have the "ownership over the allegedly expropriated asset", and that there is a causal link between the measures adopted by the State and the effect of the measures over the asset ownership.[422]

281. The Respondent further argue that: ***(1)*** the Claimants are not the owners of future returns they were expecting to receive; ***(2)*** there was no substantial deprivation of the value of the Claimants' shareholdings; ***(3)*** the competent authority has certified that the TVPEE is not an expropriatory measure; and, ***(4)*** in any event, the measures adopted by the Respondent were an exercise of its police powers and are therefore excused.

282. *First*, the Respondent argues that the Claimants do not own, possess or control, directly or indirectly, "the returns [they] expected to receive in the future" through fixed tariffs, as required by Article 13(3) of the ECT. [423]

283. Under Spanish law, the relevant law to determine what rights are protected against expropriation,[424] it is only possible to claim ownership of acquired rights and not over future returns not yet received.[425] Similarly, under international law, there cannot be expropriation of "hypothetical and potential rights."[426] As a consequence, the future returns that the Claimants expected to receive do not fall under the definition of a protected investment under Article 1(6) of the ECT and, thus, are not protected under Article 13 of

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421 Resp. C-Mem., ¶ 1240.

422 Resp. C-Mem., ¶ 1239.

423 Resp. C-Mem., ¶¶ 1241-1242.

424 Resp. C-Mem., ¶¶ 1243-1244; Resp. Rej., ¶ 1231; *citing Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, Decision on Liability, 30 July 2010, ¶ 151 (RL-0054); UNCTAD Expropriation Report, p. 22 (RL-0056); *EnCana Corporation v Republic of Ecuador*, UNCITRAL, Award, 3 February 2006, ¶ 184 (RL-0053).

425 Resp. C-Mem., ¶¶ 1243, 1245, 1272; *citing* Judgement of the Third Chamber of the Supreme Court, 17 February 1997 (R-0130).

426 Resp. C-Mem., ¶¶ 1246-1247; Resp. Rej., ¶ 1231; *citing* Iñigo Iruretagoiena Agirrezabalaga, Arbitration in cases of expropriation of foreign investments, Bosh, 2010, p. 291 (RL-0076); *Nations Energy Inc., Electric Machinery Enterprises Inc. and Jaime Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010, ¶¶ 641-644 (RL-0066).

the ECT.[427] The only acquired right that the facilities and the Claimants had was to receive the tariffs set in RD 661/2007 for the energy already sold.[428]

284. *Second*, the Respondent argues that the measures adopted did not substantially deprive the Claimants from their shareholding, which is required for there to be a violation of Article 13 of the ECT.[429]

285. As established by previous tribunals, for a measure to be considered expropriatory under Article 13 of the ECT, it must be severe enough to "prevent operations from continuing or they must annihilate the value of the investment forever."[430] In the present case, however, the plants continue to operate and the Claimants continue to control their shares and receive a reasonable rate of return that exceeds 8.5% pre-tax.[431] A reduction of return from 10.4% to 8.5% pre-tax lacks the severity required and,[432] therefore, the contested measures do not constitute an indirect expropriation.[433]

286. *Third*, the Respondent argues that the TVPEE does not have expropriatory effects.[434] This tax is a cost that is repaid to the renewable energy producers through the applicable compensation scheme.[435] In addition, under Article 21(5)(b) of the ECT, an investor must submit to the competent national tax authorities the issue of whether a measure is

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427 Resp. C-Mem., ¶¶ 1241-1242, 1250; Resp. Rej., ¶¶ 1231, 1233; *citing Charanne B.V. and Construction Investment S.A.R.L. v. Kingdom of Spain*, SCC V 062/2012, Final Award, 21 January 2006, ¶¶ 458-459, 494 (RL-0075).

428 Resp. C-Mem., ¶¶ 1248-1249, 1255, 1272; Resp. Rej., ¶ 1230; *citing Nations Energy Inc., Electric Machinery Enterprises Inc. and Jaime Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010, ¶¶ 635-648 (RL-0066).

429 Resp. C-Mem., ¶¶ 1251-1252; Resp. Rej., ¶ 1230; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Act and Liability, 30 November 2012, ¶ 6.62 (RL-0074).

430 Resp. C-Mem., ¶ 1269; Resp. Rej., ¶¶ 1232-1235; Tr. Day 1 [Mr. Elena Abad] [293:17-19].

431 Resp. C-Mem., ¶ 1270; Resp. Rej., ¶¶ 1232, 1236, 1238-1239; Tr. Day 1 [Mr. Elena Abad] [293:20-25]; *citing* First AMG ER, section 4.3; Second AMG ER, section 3.6.

432 Resp. Rej., ¶¶ 1237, 1240; *citing* the Brattle Group Quantum Rebuttal Report, "Financial Damages to Investors," 26 April 2017 ("Second Brattle Quantum Report"), Table 10.

433 Resp. C-Mem., ¶¶ 1270-1271, 1274; Resp. Rej., ¶¶ 1254-1255.

434 Resp. Rej., ¶¶ 1241, 1244.

435 Resp. Rej., ¶¶ 1242-1243; *citing* General Directorate of Taxation's reply to the Tax Consultation V3371-14, 23 December 2014 (R-0031).

expropriatory or not, which the Claimants did.[436] The competent Spanish tax authority has already found that the TVPEE does not constitute expropriation and is not discriminatory.[437]

287. *Fourth,* the Respondent argues that even if the measures adopted affected in any manner the Claimants' alleged investments, such measures are regulatory acts that do not generate an obligation to compensate.[438] Indeed, the obligation to compensate does not exist when the measures are a consequence of the State's exercise of its police powers and are reasonable or proportionate in relation to the pursued objective.[439]

288. In this case, the contested measures are an expression of the Respondent's power to legislate on grounds of public interest and sought to resolve the tariff deficit and the economic imbalance of the electricity system.[440] Such measures were not disproportionate or unreasonable since they allowed the Claimants to obtain a reasonable rate of return,[441] and were not discriminatory since they applied to all the operators in the SES.[442] As a consequence, the contested measures cannot be considered expropriatory.[443]

289. The Respondent thus concludes that it has not unlawfully expropriated the Claimants' investment, has not violated Article 13 of the ECT, and does not have the obligation to pay any compensation.[444]

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[436] Resp. Rej., ¶¶ 1246-1247; *citing* Letter from the Claimants submitting the question as to whether or not the TVPEE is expropriatory to the competent tax authorities, 24 February 2015 (C-342).

[437] Resp. Rej., ¶¶ 1245, 1249-1251; *citing* Report of conclusions of the General Directorate of Taxation, 31 July 2015, section 4.2 (R-0329); Letter from the Spanish tax authorities to King & Spalding dated 18 August 2015, R-0341; Letter from the competent German tax authorities dated 28 October 2015, R-0342; Letter of the Spanish tax authorities, 19 November 2015 (R-0343).

[438] Resp. C-Mem., ¶ 1256.

[439] Resp. C-Mem., ¶¶ 1257-1259; *citing* UNCTAD Expropriation Report, p. 78 (RL-0056); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 240 (RL-0067); Iñigo Iruretagoiena Agirrezabalaga, Arbitration in cases of expropriation of foreign investments, Bosh, 2010, pp. 304-309 (RL-0076).

[440] Resp. C-Mem., ¶¶ 1257, 1260.

[441] Resp. C-Mem., ¶¶ 1260, 1273.

[442] Resp. C-Mem., ¶¶ 1261, 1273; *citing* UNCTAD Expropriation Report, p. 96 (RL-0056).

[443] Resp. C-Mem., ¶ 1262.

[444] Resp. C-Mem., ¶¶ 1237, 1254, 1275; Resp. Rej., ¶¶ 1252, 1256; Resp. PHB, ¶ 123.

### (2) The Tribunal's Analysis

290. The Tribunal does not consider this plea to be duplicative: an expropriation could have occurred whether or not there was any denial of legitimate expectations violating the right to fair and equitable treatment under Article 10 of the ECT. The Tribunal does, however, consider the pleas to be misconceived. ECT Article 13 provides that investments "shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation." 'Expropriation' is a term of art. While it might be said that the loss of any aspect or morsel of the value or enjoyment of an investment entirely deprives that investor of that aspect or morsel, the law would lose something of its practical value if every such deprivation were to be regarded as an expropriation.

291. Circumstances where an investor retains legal title, possession and control of its investment, and its essential complaint is that it is receiving less income from the investment than it had the right to expect, do not necessarily constitute an expropriation. 'Expropriation' connotes a taking of the whole or a substantial part of an investment or a degree of interference with the enjoyment of the rights of ownership or control that is tantamount to such a taking. To extend the notion of 'expropriation' to all instances of the impairment of the enjoyment of an investment or the disappointment of expected benefits does no service to international law and deprives the drafters of treaties and contracts of the utility of a valuable legal concept.

292. In the present case Spain did nothing that might be interpreted as an attempt to wrest control of the PV facilities from the DSG investors, and nothing beyond the amendments of the tariffs to impede their enjoyment of the benefit of owning those facilities. The claims of violations of the ECT Article 10 guarantee against treatment that is not fair and equitable were well framed, and have been upheld by the Tribunal. The claim of expropriation is not. That claim is dismissed.

## E. THE DEFENSE OF NECESSITY

### (1) The Parties' Positions

#### *a. Claimants' Position*

293. Although the Claimants note that the Respondent did not expressly invoke a necessity defense, they maintain that the Respondent did so implicitly under the guise of the right to regulate.[445] Accordingly, the Claimants reject the argument that the measures adopted by the Respondent were "'necessary macroeconomic control measures.'"[446]

294. The Claimants argue that: ***(1)*** none of the authorities referred to by the Respondent addressed the issue of necessity; ***(2)*** the necessity defense is not available to the Respondent; ***(3)*** even if such defense was available, the Respondent has not met the applicable standard; and ***(4)*** even if the Respondent had met such standard, it would still have to compensate the Claimants.

295. *First*, with respect to the authorities relied upon by Spain, the Claimants have two arguments. They argue that the statements by domestic courts are irrelevant for determining whether domestic acts are international wrongful acts.[447] In addition, none of the statements cited by the Respondent address the issue of whether the contested measures were necessary to solve a new or urgent problem.[448] Therefore, the Respondent has failed to establish that it needed to reduce the incentives that had been granted to the facilities under RD 661/2007 and RD 1578/2008 to address the tariff deficit.[449]

296. *Second,* according to the Claimants, the defence of necessity can only be invoked when there is a breach of an obligation that is owed to another State,[450] or when the applicable

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445 Tr. Day 5 [Mr. Smith] [35:2-5; 69:23-25]; Tr. Day 5 [Ms. Frey] [114:9-25].

446 Cl. Reply, ¶ 536.

447 Cl. Reply, ¶¶ 557, 561.

448 Cl. Reply, ¶¶ 556, 558-560, 562-565; *citing* Constitutional Court ruling delivered on appeal of unconstitutionality 5347/2013, 17 December 2015, p. 14 (R-0136).

449 Cl. Reply, ¶ 565.

450 Cl. Reply, ¶¶ 568-570; *citing* Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Committee, 56th Session, 28 January 2002, Article 25 (CL-175); Yearbook of the International Law Commission, Summary records of the meetings of the thirty-second session, 5 May - 25 July 1980, p. 270, Article 33 – State of Necessity (CL-176); *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, ¶ 408 (CL-077).

instrument contains an explicit necessity defence.[451] Article 24 of the ECT is the only provision that sets exceptions to Spain's duties.[452] However, none of the circumstances described therein exist in the present case.[453]

297. *Third*, even if the defence of necessity were available, the Claimants contend that such defense would require the State to meet an extremely high legal standard of proof, which Spain has failed to do.[454] The defence requires Spain to demonstrate the existence of four cumulative elements: ***(a)*** the need to protect an essential interest; ***(b)*** a grave and imminent peril threatening this essential interest; ***(c)*** that the adopted measures were the only way for the State to safeguard the essential interest; and, ***(d)*** that the State did not contribute to the situation of necessity.[455]

298. According to the Claimants, Spain has failed to establish an essential interest and a grave and imminent peril.[456] Further, Spain had other alternatives at its disposal to correct the deficit that did not entail cutting incentives to the PV facilities (e.g. raising prices to consumers or creating a $CO_2$ tax or fuel levy).[457] Finally, the contested measures were enacted to address a tariff deficit that Spain had been ignoring since 2000, which was caused by Spain's failure to set retail prices that could cover the costs of producing electricity.[458]

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451 Cl. Reply, ¶ 570; *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 409-410 (CL-077).

452 Cl. Reply, ¶ 571.

453 Cl. Reply, ¶ 572.

454 Cl. Reply, ¶ 573; Tr. Day 5 [Mr. Smith] [70:12-13]; *citing BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 408-412 (CL-077).

455 Cl. Reply, ¶ 573; *citing Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case. No. ARB/01/3, Award, 22 May 2007, ¶¶ 304, 313 (CL-062); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 247 (CL-063); *National Grid PLC v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 262 (CL-125); *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, 7-84 ¶ 51 (CL-177); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 330 (CL-066).

456 Cl. Reply, ¶ 574.

457 Cl. Reply, ¶¶ 554-555, 576; Tr. Day 5 [Mr. Smith] [71:18-72:3].

458 Cl. Reply, ¶¶ 538-539, 541-550, 575; Tr. Day 1 [Ms. Frey] [113:7-12]; *citing, inter alia,* Second Brattle Regulatory Report ¶¶ 19, 82, 85, Section III.E.3.; European Commission Report, Electricity Tariff

299. *Fourth*, the Claimants contend that, as recognized by previous tribunals, the defence of necessity does not relieve the State from the duty to compensate.[459] Therefore, even if Spain could satisfy all the required elements, it would not be relieved from the obligation to compensate the Claimants for the harm caused to them by the adoption of the contested measures.[460]

***b. Respondent's Position***

300. While the Respondent states that it is not raising a "state of necessity defence",[461] it argues that the contested measures were "necessary macroeconomic control measures that stabilise the economy."[462]

301. According to the Respondent, different institutions have assessed the contested measures and have ratified their legality, rationality and proportionality.[463] These institutions include: ***(1)*** the Spanish Constitutional Court;[464] ***(2)*** the Spanish Supreme Court;[465] ***(3)*** the

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Deficit: Temporary or Permanent Problem in the EU?, October 2014, p. 21 (BRR-75); CNE Report 39/2006, Assessing the Proposal of Royal Decree Setting 2007 Electricity Tariffs, 21 December 2006, p. 20, (BRR-147); Law 54/1997, Article 30.4, (C-066A and C-066B).

459 Cl. Reply, ¶ 577; *citing CMS Gas Transmission Company. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 388 (CL-066); *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, 7-84, ¶ 48 (CL-177); *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, ¶ 409 (CL-077).

460 Cl. Reply, ¶ 577.

461 Tr. Day 1 [Ms. Ruiz Sánchez] [225:3-5].

462 Resp. C-Mem., section IV.J; Resp. Rej., section IV.L.

463 Resp. C-Mem., ¶ 979; Resp. Rej., ¶ 1007.

464 Resp. C-Mem., ¶¶ 980-992; Resp. Rej., ¶¶ 1015-1016; *citing* Constitutional Court ruling, delivered in an appeal of unconstitutionality 5347/2013, 17 December 2015 (R-0151); Constitutional Court ruling, delivered in an appeal of unconstitutionality 5582/2013, 18 February 2016 (R-0152); Judgement of the Constitutional Court, issued in constitutional appeal no. 2391-2014, 3 March 2016 (R-0154); Constitutional Court ruling, delivered in an appeal of unconstitutionality 6031/2013, 18 February 2016 (R-0153); Constitutional Court ruling, delivered in an appeal of unconstitutionality 5347/2013, 17 December 2015 (R-0151).

465 Resp. C-Mem., ¶¶ 993-994; Resp. Rej., ¶¶ 1009-1014; *citing* Judgement 63/2016, of the Supreme Court handed down in cassation appeal 627/2012, 21 January 2016 (R-0150); Judgment of the Supreme Court, 1260/2016 (Appeal 649/2014), 1 June 2016 (R-0248); Judgment of the Supreme Court, 1266/2016, 1 June 2016 (R-0249); Judgment of the Supreme Court, 1259/2016, 1 June 2016 (R-0250); Judgment of the Supreme Court, 1261/2016, 1 June 2016 (R-0251); Judgment of the Supreme Court, 1264/2016, 1 June 2016 (R-0252); Judgment of the Spanish Supreme Court, appeal 1964/2016, 22 July 2016 (R-0322); Judgment 1730/2016 of the Supreme Court, 12 July 2016, p. 10 (R-0253).

tribunal in *Charanne B.V. v. Spain*;[466] ***(4)*** the European Commission;[467] and ***(5)*** international organizations such as the IMF and the International Energy Agency (IEA).[468] The Respondent finds further support for its position in the favourable reception by the market of the adopted macroeconomic measures,[469] and by the boom in investment in the renewable energy market.[470]

### (2) The Tribunal's Analysis

302. The Respondent is not raising a defence of necessity and it is neither necessary nor appropriate for the Tribunal to comment on what would have happened if it had. The Tribunal recalls that the legality under Spanish Law, and the rationality and proportionality of the 'new regime' introduced in 2013 have not been questioned by the Tribunal, which

[466] Resp. C-Mem., ¶¶ 995-996; Resp. Rej., ¶¶ 1017-1022; *citing* IA Reporter news: A second Arbitral Tribunal at Stockholm weighs in with an ECT verdict in a Spanish renewables dispute, 13 July 2016 (R-0096). Also, El Periódico de la Energía: A second international arbitral award rules in favour of the Government in its dispute with renewable energies, 13 July 2016 (R-0117).

[467] Resp. C-Mem., ¶¶ 997-1002; Resp. Rej., ¶¶ 1023-1029; *citing, inter alia,* European Commission Report, Spain – Post Programme Surveillance Autumn 2014 Report, p. 3 (R-0193); European Commission Report, Spain – Post Programme Surveillance, Autumn 2014 Report, p. 27 (R-0194); European Commission Report, Macroeconomic imbalances, Country Report – Spain 2015, June 2015, p. 62 (R-0196); Council Recommendation on the 2015 National Reform Programme of Spain and delivering a Council opinion on the 2015 Stability Programme of Spain, 13 May 2015: "(9) [...] The deficit in the electricity system has been effectively eliminated as of 2014" (R-0045).

[468] Resp. C-Mem., ¶¶ 1003-1006; Resp. Rej., ¶¶ 1030-1031; *citing* International Monetary Fund, 2014 Article IV consultation-Staff Report; Staff Supplement; Press Release; And Statement By The Executive Director For Spain, IMF Country Report No. 14/192 Spain, July 2014 pp. 6, 23 (R-0125); International Energy Agency, Energy Policies of IEA Countries - Spain 2015 Review, Executive summary and key recommendations, p. 10 (R-0197); International Monetary Fund, Spain: Staff Concluding Statement of the 2016 Article IV Mission, 13 December 2016 (R-0328). These findings are confirmed in the Statement by the Executive Director for Spain, 2046 Article IV Consultation, IMF Country Report No. 17/23, January 2017 (R-0325).

[469] Resp. C-Mem., ¶ 1007; Resp. Rej., ¶¶ 1032-1033, 1039; *citing* Moody's report, Spain's electricity tariff deficit is more sustainable in the medium term, but debt remains, 2 June 2015, (R-0354); Fitch, Limited risk of energy reforms reversal in Spain; political risk remains, 24 February 2016 (R-0326).

[470] Resp. C-Mem., ¶¶ 1008-1011; Resp. Rej., ¶¶ 1034-1038; *citing, inter alia,* El País, Press Article, Soria predicts a surplus in the electricity system for 2015, 16 June 2015 (R-0214); News item from the EFE agency, 9 June 2015 (R-0220); El Mundo, News, Boom in transactions in the renewables sector following the Reform, 22 July 2015 (R-0224); The Economist, Editorial, The moment to bet for wind energy, 24 July 2015 (R-0221); The Economist, Article, The boom in renewables attracts 5 billion in investment funds, 17 October 2015 (R-0223); Expansion, Article, Renewable energies are growing in Spain, 17 October 2015 (R-0222); Decision of the Directorate General for Energy Policy and Mines, which records awarded auction applications in the specific remuneration regime register with the status of advance allocation, in order to allocate the specific remuneration regime to new electricity production facilities based on biomass located in the peninsular electricity system and for wind technology facilities, 17 March 2016 (R-0102); Expansión, Article, Spain creates a secure legal framework to prevent another energy bubble, 3 May 2016 (R-0228).

has based its decision on the compatibility of Spanish regulatory measures with the assurances given by the respondent in and in relation to RD 661/2007.

## VIII. DAMAGES

303. The Tribunal has determined that Spain violated the rights of the DSG Claimants under the ECT to fair and equitable treatment by establishing the New Regulatory Regime.[471]

304. The Tribunal is aware that the New Regulatory Regime was established by a series of measures including RDL 9/2013 (12 July 2013);[472] Law 24/2013 (26 December 2013);[473] RD 413/2014 (6 June 2014),[474] and Ministerial Order IET/1045/2014 (16 June 2014).[475] It is accordingly arguable that the date of the breach used for the calculation of compensation should be earlier than 16 June 2014. Nonetheless, in circumstances where (as here) the breach consists in the repudiation and alteration of the fundamental principles of a regulatory regime upon which the claimants were entitled to and did rely in making their investment, it is the definitive adoption of the new regime that should be regarded as the occasion of the breach. That definitive adoption occurs when all of the essential components of the new regime are in place and in effect.

305. The Tribunal accordingly regards the adoption of Ministerial Order IET/1045/2014 on 16 June 2014 as the decisive step in the establishment of the New Regulatory Regime. The Order is dated 16 June 2014 and was published in the *Boletín Oficial del Estado* (BOE) on 20 June 2014. The Order provides that it shall be effective as of the day following its publication in the BOE. The Tribunal accordingly sets 21 June 2014 as the effective date of the violation. Compensation is accordingly due to the DSG Claimants for financial losses caused by that breach of the ECT. That date coincides with the valuation date

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471 *See* ¶¶ 211-225 above.

472 RDL 9/2013 (C-091).

473 Law 24/2013 (C-180).

474 RD 413/2014 (R-0095/C-090).

475 Ministerial Order IET/1045/2014 (R-0101/C-179). *See also* ¶¶ 64, 212.e, and 222 above.

adopted by the Claimants in the present case.[476] The quantification of that compensation is addressed in this section of the Award.

## A. THE PARTIES' POSITIONS

### (1) Claimants' Position

306. The Claimants argue that they are entitled to full compensation for losses caused by Spain's violations of the ECT. After describing the applicable standard of compensation, the Claimants present their arguments on the quantum of compensation owed by Spain, including pre- and post-award interest and a tax gross-up.[477] The Claimants refute the Respondent's quantum case, which they say merely "regurgitates its case on liability in the language of a quantum analysis"[478] by contending that "damages should be calculated assuming that Claimants were only entitled to a reasonable rate of return, and not the tariff rates guaranteed in RD 661/2007 and RD 1578/2008 that are the essence of Claimants' case."[479] In sum, Spain's arguments do not respond to the Claimants' case and should be disregarded.[480]

#### *a. The applicable compensation standard*

307. The Claimants argue that the compensation standard is governed by the *lex specialis*, which is to be found in the ECT, and in the absence of any *lex specialis*, by customary international law ("**CIL**").[481] The Claimants further argue that the ECT only provides for the conditions to be satisfied in order to lawfully expropriate investments and does not provide a standard for compensation of other ECT violations, thus requiring recourse to CIL to fill the *lacuna*.[482]

308. The Claimants contend that the 1928 *Chorzów Factory* PICJ case establishes the principle of full compensation applicable in this case, according to which "reparation must, as far as

476 *See* ¶ 311 below.
477 Cl. Mem., ¶¶ 484-525.
478 Cl. Reply, ¶ 579.
479 Cl. Reply, ¶ 579.
480 Cl. Reply, ¶ 590.
481 Cl. Mem., ¶ 485.
482 Cl. Mem., ¶ 485.

possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[483] According to the Claimants, *Chorzów Factory* has been followed in subsequent cases in which tribunals have confirmed that claimants are entitled to full compensation for unlawful expropriation and other treaty violations.[484] Quoting the decision of the *ad hoc* Committee in *Azurix v. Argentina*, the Claimants argue that "for breaches of BIT obligations other than the expropriation clause, the Tribunal has a discretion in determining the approach to damages."[485] The Claimants conclude as follows:

> *Claimants are entitled to full compensation for Spain's violations of the ECT's provisions relating to fair and equitable treatment, non-impairment of investments by unreasonable or discriminatory measures, the umbrella clause, and unlawful expropriation. Although Claimants contend that Spain breached each of those standards under Articles 10 and 13 of the ECT in multiple respects, a violation of any one of them would entitle Claimants to full compensation.*[486]

309. The Claimants invite the Tribunal to follow "the traditional approach adopted in *Eiser*, *Novenergia*, *Masdar*, *Antin*, *Foresight*, *Cube* and *SolEs* by assessing what the value of Claimants' investment would have been under RD 661 and RD 1578 in the absence of the illegal measures, without resort to some arbitrary and hypothetical level of reasonable return."[487]

### *b. The quantum of compensation owed by Spain*

310. Consistent with the *Chorzów Factory* compensation standard, the damages sought by the Claimants are "the diminution in the fair market value of their investments, calculated according to the discounted cash flow ('DCF') method, caused by Spain's violations of the

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483 Cl. Mem., ¶ 486 quoting *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment No. 13, PCIJ, Series A, No. 17, 13 September 1928 ("*Chorzów Factory*"), p. 47 (CL-116).

484 Cl. Mem., ¶¶ 487-490.

485 Cl. Mem., ¶ 491 quoting *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, ¶ 332 (CL-120).

486 Cl. Mem., ¶ 492.

487 Cl. PHB, ¶ 122. *See also* the Claimants' arguments as to how the RREEF tribunal addressed the issue of quantum and the notion of reasonable return, *see* Cl. PHB, ¶¶ 103-121.

ECT."[488] The Claimants' quantum experts, the Brattle Group ("**Brattle**"), calculate the amount of compensation owed to the Claimants using the difference in cash flows between a "But For Scenario" and an "Actual Scenario", i.e. the difference between "(a) the value that the Claimants' investments in Spain would have had if Spain had not introduced the measures that Claimants contend in this arbitration violated the ECT (the 'But For Scenario'); and (b) the value of those investments after the introduction of those measures (the 'Actual Scenario')."[489] The investments that Brattle thus values are:

> *[…] (1) the shareholder Claimants' equity interests in, and shareholder loans to, the operating companies that own the thirteen PV Projects in Spain (the "Shareholder" or "Ownership Investments"); and (2) the expected contractual returns of DSG GmbH and (through their respective ownership interests in real estate companies, Solar Andaluz Grundstücks S.L. and Deutsche Solar Ibérica Real Estate S.L.) Joachim Kruck, Peter Flachsmann, Ralf Hofmann, and Frank Schumm (the "Contract Investments").*[490]

311. The valuation date that the Claimants have instructed Brattle to use to measure the impact of the disputed measures on the value of the Claimants' investments is June 2014 ("**Valuation Date**"). According to the Claimants "that is when the impact of the final and most significant measure at issue in the dispute – the New Regulatory Regime – was fully known."[491]

312. Contrary to Spain's allegations, the Claimants assert that the DCF method is appropriate to calculate the damages owed by Spain in this case. If anything, the fact that most of a PV plant's costs are fixed makes a DCF calculation less speculative because it makes future cash flows less sensitive to assumptions about future operating costs.[492] So does the fact that cash flows are generated by tangible assets.[493] In fact, PV plant cash flows are "highly

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[488] Cl. Mem., ¶ 493.

[489] Cl. Mem., ¶ 495; Brattle Group Quantum Report, "Financial Damages to Investors," 27 July 2016 ("First Brattle Quantum Report"), ¶ 12.

[490] Cl. Mem., ¶ 495; First Brattle Quantum Report, ¶¶ 11, 13.

[491] Cl. Mem., ¶ 496. *See also* Tr. Day 4, 6:11-17; 127:16-25 (Mr. Caldwell).

[492] Cl. Reply, ¶ 593.

[493] Cl. Reply, ¶ 593.

predictable" because "[p]roducing electricity is a relatively simple business."[494] The Claimants add that "Spain itself used the DCF method when it designed the tariffs under RD 661/2007 […]."[495] Finally, the Claimants refute Spain's argument that the DCF method would be inappropriate "because of the 'disproportion between the alleged investments (and the alleged assumed risk) and the amount claimed, evidenced by the return obtained.'"[496]

313. The Claimants say that this argument is in turn based on the erroneous claim of AMG, the Respondent's quantum experts, that "Brattle's DCF valuation is unreliable because it would yield a return of 25.54% in the But For scenario […]."[497] Far from being proof of a "Cinderella effect" - i.e. that Claimants' valuation in the But For Scenario includes overly optimistic assumptions about future performance – AMG's position is weakened by calculations errors,[498] and by the fact that its 25.54% figure "is an equity return, not a project IRR [Internal Rate of Return]" and by the fact that AMG does not provide any equity IRR benchmark with which to compare this 25.54% figure.[499] AMG's 25.54% return also ignores the "valuation impact of the reduction in interest rates observed since the original investments were made."[500] Properly calculated, the Claimants say that their after-tax project IRRs in the But For Scenario average 8.1% across all of its plants.[501]

(i) Compensation owed to the Claimants owning shares in the PV projects

314. The Claimants propose, with Brattle, to adopt a two-step method, which consists in calculating, first, damages arising "from the historical effects of Spain's measures (prior to the Valuation Date)"[502] and second, those arising "from the future effects of Spain's measures."[503] To calculate the former, the Claimants and Brattle calculate "the amount of

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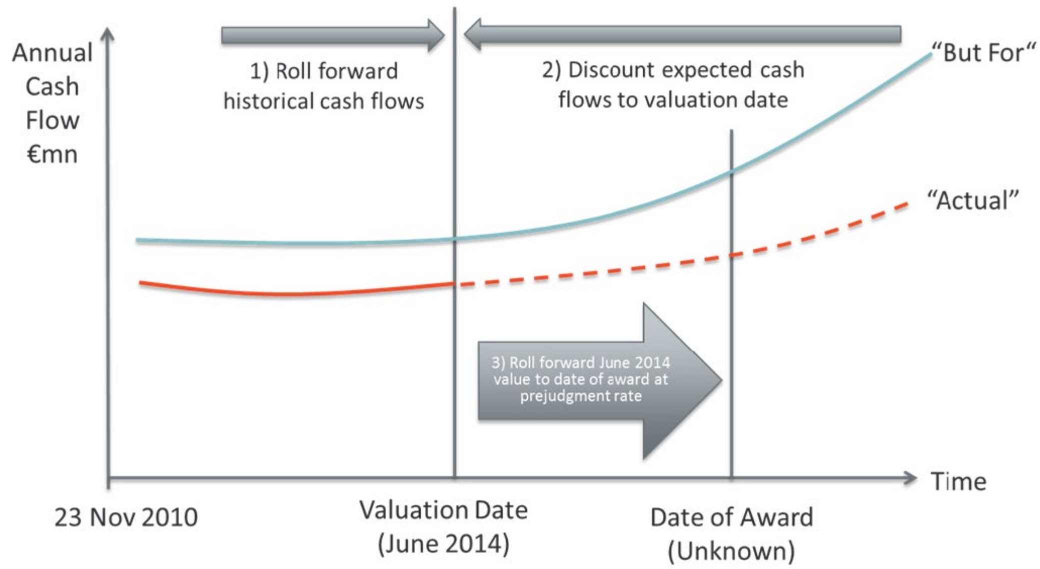
494 Cl. Reply, ¶ 594 *citing* to First Brattle Quantum Report, ¶ 46.
495 Cl. Reply, ¶ 595.
496 Cl. Reply, ¶ 596.
497 Cl. Reply, ¶¶ 584, 596.
498 Cl. Reply, ¶ 597.
499 Cl. Reply, ¶¶ 598-599.
500 Cl. Reply, ¶ 600 quoting the Second Brattle Quantum Report, ¶ 146.
501 Cl. Reply, ¶ 601; Second Brattle Quantum Report, Table 9.
502 Cl. Mem., ¶ 497.
503 Cl. Mem., ¶ 497.

additional cash flows that the investments would have generated in the But For scenario based on actual historical operating data [and] […] 'rolls forward' that amount to the Valuation Date at the rate of pre-judgment interest."[504] To determine the latter – the future effects – they calculate "the difference in the fair market value of the PV Projects in the Actual and But For scenarios as of the valuation date, using the discounted cash flow method."[505] Brattle summarized its approach in the following graph:[506]

**Figure 1: Damages Framework**




315. To calculate the historical effects of Spain's measures on the PV projects, the Claimants accordingly propose to calculate

> […] *the net amount of additional cash flow the investments would have generated had they: (1) continued to receive the feed-in tariff guaranteed by RD 661/2007 and RD 1578/2008 (adjusted for actual inflation) on all of their production; (2) not been subjected to the 7% tax; (3) continued to pay bonus payments that would have been owed to other Claimants based on the higher cash flows (as discussed in Section VII.B.2 below); and (4) continued to receive cash flows without the delay in payment introduced by RD 9/2013.*[507]

504 Cl. Mem., ¶ 497.

505 Cl. Mem., ¶ 497.

506 First Brattle Quantum Report, ¶ 11, Figure 1.

507 Cl. Mem., ¶ 498; First Brattle Quantum Report, ¶¶ 39-42.

316. Over the period December 2010-June 2014, the Claimants say that the disputed measures would have reduced the free cash flows (including interest) of the DSG Claimants' PV Projects by €3.9 million.[508]

317. As to the future effects of the disputed measures on the PV projects, the Claimants and Brattle calculate them using the DCF method, "the primary valuation tool in the power sector" because the "relatively simple business model" of operating power stations offers predictability.[509] The Claimants emphasize that Brattle provides two DCF calculations for the PV projects in each of the operating companies, one for each scenario.[510] The But For Scenario and the Actual Scenario share certain assumptions regarding variables such as future power production, inflation, the effect of RDL 12/2012, and use of the "Adjusted Present Value" ("**APV**"), which is similar to the "Weighted Average Cost of Capital" ("**WACC**").[511] Assumptions differ with respect to market revenue (the But For Scenario does not include any market revenue, only feed-in tariff revenue), financial support (in the But For Scenario there is a feed-in tariff, in the Actual Scenario it is replaced by the investment incentive and the operative incentive under RDL 9/2013), the duration of the useful life of facilities, OPEX costs (some of which vary), and "taxes" (the 7% reduction of the feed-in tariff is not imposed in the But For Scenario).[512]

318. On the basis of these assumptions, when comparing both scenarios, Brattle shows that the future effect of the disputed measures translates into a fall of €45.5 million in future free cash flows for the DSG Claimants' PV projects.[513] Then, "[t]o assess the impact of those reduced cash flows on the present value of the Claimants' Shareholder Investments, Brattle first discounts the cash flows to determine the 'base-case' or 'all-equity' value of the operating assets in the But For and Actual Scenarios, and then adjusts for certain tax, debt, and liquidity issues to arrive at the present value of the Claimants' equity interests in both

[508] Cl. Mem., ¶ 498; First Brattle Quantum Report, ¶ 43.
[509] Cl. Mem., ¶ 499; First Brattle Quantum Report, ¶¶ 44-46.
[510] Cl. Mem., ¶ 500.
[511] Cl. Mem., ¶ 500.
[512] Cl. Mem., ¶ 501.
[513] Cl. Mem., ¶ 502.

the But For and Actual scenarios."[514] The Claimants point out that Brattle first uses a 4.84% discount rate derived from the Capital Asset Pricing Model ("**CAPM**") to discount the expected free cash flows in each scenario.[515] The Claimants then underline that Brattle also applies a "revenue haircut" to account for the increased regulatory risk resulting from the disputed measures,[516] this risk - and the attendant haircut – being greater in the Actual Scenario.[517] With the application of the discount rate and the revenue haircut, the Claimants conclude with Brattle that "the disputed measures reduced the enterprise value of the DSG Claimants' PV Projects by €23.6 million (33%)."[518] After computing "the impact of Spain's measures on the shareholder Claimants' equity interests […] by adjusting for several effects related to the project debt and the illiquid nature of those Claimants' interests",[519] Brattle further concludes that these measures reduced the fair market value of the DSG Claimants' Shareholder Investments on the Valuation Date by €17.5 million on the Valuation Date.[520]

(ii) Compensation owed to the Claimants holding contract rights related to the PV projects

319. The Claimants argue that some DSG Claimants have suffered damage to their "interests related to the performance and long-term viability of the Alcolea, Calasparra, and Tordesillas Projects."[521] These DSG Claimants include:

a. DSG GmbH, which according to the Claimants "is entitled to receive a bonus payment of 10% of excess proceeds received by Project Alcolea and 50% of excess proceeds received by Projects Calasparra and Tordesillas" under DSG GmbH's management contracts;[522]

b. Mr. Joachim Kruck, Mr. Peter Flachsmann, Mr. Ralf Hofmann, Mr. Frank Schumm, and Mr. Rolf Schumm, who "are entitled to bonus payments of

[514] Cl. Mem., ¶ 502.
[515] Cl. Mem., ¶ 503.
[516] Cl. Mem., ¶ 504; First Brattle Quantum Report, ¶¶ 109-112.
[517] Cl. Mem., ¶ 504; First Brattle Quantum Report, ¶ 112.
[518] Cl. Mem., ¶ 504; First Brattle Quantum Report, ¶ 113.
[519] Cl. Mem., ¶ 505.
[520] Cl. Mem., ¶ 506; First Brattle Quantum Report, ¶ 19, Table 1, ¶ 158, Table 16.
[521] Cl. Mem., ¶ 507.
[522] Cl. Mem., ¶ 507. Brattle refers to these claims as "Alcolea – Bonus," "Calasparra – Bonus," and "Tordesillas – Bonus," respectively.

> 30% of excess proceeds received by Project Alcolea" as a result of their ownership of the Project Alcolea real estate company Solar Andaluz Grundstücks S.L..[523] These same individuals, through their ownership of Solar Andaluz Grundstücks S.L., intended to exercise the right to purchase all of the shares in each of the twenty Alcolea SPVs and their PV facilities upon expiration of the twenty-five year lease;[524] and
>
> c. Mr. Joachim Kruck, Mr. Peter Flachsmann, and Mr. Ralf Hofmann, who jointly own Deutsche Solar Ibérica Real Estate S.L., the company that leases land for Projects Calasparra and Tordesillas, which was intended to exercise the company's right to purchase the forty-five Calasparra and Tordesillas SPVs and plants at the end of the twenty-five year leases.[525]

320. In order to calculate the damage allegedly suffered by the Claimants holding these contract rights, Brattle proceeds as follows:

> *Brattle assumes the same solar production in the But For and Actual scenarios, as well as the possibility of above-threshold production. The absence of bonuses in the Actual scenario caused by Spain's measures reduces the value of the facilities' excess production. Because the bonus payments are subordinate to external debt repayments, Brattle then discounts the expected bonus payments at the equity yield for each project.*[526]

321. The Claimants argue on that basis that the DSG Claimants' damages on their Contract Investments amount to €6.853 million.[527] The Claimants further argue that "in the event the Tribunal awards less total damages than Brattle calculates, however, this allocation may change in ways that are not necessarily proportional, depending on the reason for the Tribunal's departure from Brattle's calculation. […] In that instance, the best course of action would be for the Tribunal to request that the experts submit a proposed allocation based on the Tribunal's liability and quantum findings."[528]

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[523] Cl. Mem., ¶ 508. Brattle refers to this claim as "Alcolea – Land Lease."

[524] Cl. Mem., ¶ 509. Brattle refers to this claim as the Alcolea "Call Option."

[525] Cl. Mem., ¶ 510. Brattle refers to these claims as the Calasparra and Tordesillas "Call Options."

[526] Cl. Mem., ¶ 511 (footnotes omitted); First Brattle Quantum Report, ¶ 156.

[527] Cl. Mem., ¶ 511; First Brattle Quantum Report, ¶ 156, Table 15.

[528] Cl. PHB, ¶ 95.

322. In total, the Claimants sought compensation in the amount of €60.5 million in damages as of June 2014, of which €24.5 million was compensation due to the DSG Claimants.[529] They further contend that this amount should be distributed among them in accordance with their ownership interests and their respective claims, as shown in the following table:[530]

**Table 16: Damages to Particular Claimants**

| Claimant Number | Claimant Name | Ownership or Contractual Interest | Ownership | Harm<br>€ 000s |
|---|---|---|---|---|
| **DSG Claimants** | | | | |
| 1-20 | Limited Partner Solar Andaluz 1-20 GmbH & Co. KG | Alcolea | | 212 each |
| 21-35 | Limited Partner Solarpark Calasparra 251-265 GmbH & Co. KG | Calasparra | | 319 each |
| 36-65 | Limited Partner Solarpark Tordesillas 401-430 GmbH & Co. KG | Tordesillas | | 289 each |
| 66 | DSG Deutsche Solargesellschaft mbH | DSG GmbH | | 2,238 |
| 67 | DSG Spanien Verwaltungs GmbH | DSG Spain | | 0 |
| 68 | Mathias Kruck | Calasparra | | Claim through LP |
| | | DSG Spain | | 0 |
| 69 | Joachim Kruck | Alcolea | | Claim through LP |
| | | Tordesillas | | Claim through LP |
| | | Calasparra | | Claim through LP |
| | | Tordesillas | | Claim through LP |
| | | DSG GmbH | | Claim through DSG GmbH |
| | | DSG Spain | | 0 |
| | | Solar Andaluz Grundstücks S.L. | 25.0% | 529 |
| | | Deutsche Solar Iberica Real Estate S.L. | 33.3% | 868 |
| 70 | Peter Flachsmann | Alcolea | | Claim through LP |
| | | Tordesillas | | Claim through LP |
| | | DSG GmbH | | Claim through DSG GmbH |
| | | Solar Andaluz Grundstücks S.L. | 25.0% | 529 |
| | | Deutsche Solar Iberica Real Estate S.L. | 33.3% | 868 |
| 71 | Ralf Hofmann | Alcolea | | Claim through LP |
| | | Calasparra | | Claim through LP |
| | | Tordesillas | | Claim through LP |
| | | Tordesillas | | Claim through LP |
| | | Solar Andaluz Grundstücks S.L. | 25.0% | 529 |
| | | Deutsche Solar Iberica Real Estate S.L. | 33.3% | 868 |
| 72 | Rolf Schumm* | Solar Andaluz Grundstücks S.L. | 12.5% | 264 |
| 73 | Frank Schumm* | Alcolea | | Claim through LP |
| | | Solar Andaluz Grundstücks S.L. | 12.5% | 264 |
| | Total DSG Claimants' Damage | | | 24,666 |

323. The Claimants say that in contrast to the Claimants and the Brattle Group, Spain and AMG do not conduct a proper damages valuation, but rather "a circular mathematical analysis of

529 Cl. Mem., ¶ 512; First Brattle Quantum Report I¶ 158, Table 16; Cl. Reply, ¶¶ 611-612; Second Brattle Quantum Report, Table 1: Revised Damages to the DSG and TS Claimants; Brattle Hearing Quantum Presentation, Financial Damages to Investors, June 2019, slides 4, 37.

530 Second Brattle Quantum Report, Appendix C, Table 16 (corrected). *See also* Cl. Mem., ¶ 513; First Brattle Quantum Report, Annex P, Table 41. The Claimants point out that this calculation does "not include interest from the Valuation Date to the date of the award, or any applicable tax gross up." (Cl. Mem., fn. 887.)

the return that a hypothetical plant would earn under the New Regulatory Regime, and confirms unsurprisingly that such a plant would earn more than Spain's target return of 7.398% if it produced more electricity than assumed in the New Regulatory Regime."[531] In other words, as the Brattle Group puts it, "AMG does no more than find that the New Regime actually provides the allowed pre-tax return of 7.398% that it set out to provide."[532] According to the Claimants, AMG has based its valuation on the assumption that there is no liability and that the Claimants were entitled to no more than a reasonable rate of return,[533] and its attempt to compare Spain's target return of 7.398% with other return benchmarks fails because it does not ensure like-for-like comparability among the different rates. When like-for-like comparability is achieved with adjustments to the benchmarks, the results show that "the New Regime reduces the allowed return from the levels originally considered reasonable by the Ministry and the CNE in 2007, at the introduction of the Original Regulatory Regime."[534]

324. In the Claimants' view, AMG's alternative DCF valuation is equally flawed. While acknowledging in its own DCF analysis that the disputed measures reduced the plants' pre-tax cash flows,[535] Spain and AMG conclude that the disputed measures increased the value of the Claimants' investments "by applying enormous discounts for regulatory risk and illiquidity in the But For scenario, based on a theory that Claimants' PV investments were much riskier in the But For scenario […] than in the Actual scenario […]."[536] According to the Claimants, AMG's analysis is undercut by multiple errors, many of which reflect a denial of Spain's liability.[537]

325. The Claimants and Brattle offer, as an alternative and a response to AMG, a calculation of damages under a corrected reasonable return approach. Under this alternative approach, the Claimants and Brattle calculate the combined damages due to the DSG Claimants and

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[531] Cl. Reply, ¶ 586.

[532] Cl. Reply, ¶ 586, quoting Second Brattle Quantum Report, ¶ 86.

[533] Cl. Reply, ¶ 587.

[534] Cl. Reply, ¶ 590; Second Brattle Quantum Report, ¶ 106.

[535] Cl. Reply, ¶¶ 604-605.

[536] Cl. Reply, ¶ 605.

[537] Cl. Reply, ¶¶ 606-610; First Brattle Quantum Report, ¶¶ 210-251.

the TS Claimants (now no longer party to this proceeding) in the amount of €49 million with a 7% after-tax return and €63 million with an 8% after-tax return.[538]

### *c. Pre- and post-award interest on damages owed by Spain*

326. The Claimants seek an award of "pre- and post-award interest at the highest lawful rate from the Date of Assessment until the date Spain pays the award in full."[539] The Claimants further request that the interest awarded be compounded.[540] According to the Claimants, this would be consistent with a widely accepted practice, which tribunals have adopted for the following reasons: (i) far from punishing or attributing blame to the respondent,[541] compound interest ensures that the claimant receives "the full present value of the compensation that it should have received at the time of the taking"[542]; (ii) compound interest also prevents unjust enrichment of the respondent party where it has delayed compensation[543]; (iii) an award of compound interest promotes efficiency by eliminating the incentive to delay proceedings[544]; and (iv) the claimant would be awarded what it would have received "by placing its money in a readily available and commonly used investment vehicle […]."[545]

327. In the Claimants' view, the appropriate rate of interest would be Spain's cost of borrowing because "[b]y delaying compensation, Spain has exposed the DSG and TS Claimants to the same risks as investors who have loaned money to Spain."[546]

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538 Second Brattle Quantum Report, ¶ 263, Table 13.

539 Cl. Mem., ¶ 514. Claimants then cite to *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 114 (CL-118).

540 Cl. Mem., ¶ 515.

541 Cl. Mem., ¶ 517; quoting *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, ¶ 146 (CL-124).

542 Cl. Mem., ¶ 516 quoting *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, ¶ 101 (CL-108).

543 Cl. Mem., ¶ 516 quoting *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, ¶ 101 (CL-108); Cl. Mem., ¶ 520.

544 Cl. Mem., ¶ 520.

545 Cl. Mem., ¶ 516 quoting *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 ¶ 129 (CL-121).

546 Cl. Mem., ¶ 522.

#### *d. The Tax Gross-Up ("TGU")*

328. The Claimants point out that:

> *Brattle's DCF model calculates damages on an after-tax basis (i.e., the present value of the additional cash flows that would have been available to the Claimants but for Spain's measures after payment of corporate taxes). A damages award to Claimant DSG GmbH, however, will be subject to German corporate income tax. Thus, a tax "gross-up" is required to avoid double-counting the tax. Brattle has calculated the amount of that gross-up to be €1.008 million, which should be added to the award to DSG GmbH (for a total award of €3.381 million).*[547]

### (2) Respondent's Position

329. Relying on the First and Second AMG Expert Reports, Spain argues that the Claimants have no right to the compensation they seek.[548] According to Spain, the regulatory regime in place since 1997 has always provided a reasonable rate of return ("**RRoR**"), which shows that the Claimants' claims for damages are baseless.[549] In addition, Spain submits that it has proved that it has not violated the provisions of the ECT.[550] Spain's arguments on quantum are presented as alternative arguments, in the event that the Tribunal were to uphold jurisdiction and find Spain liable for breach of the ECT.[551] Spain presents the following eight arguments on quantum:

a. The Claimants' alleged damages are "completely and absolutely speculative";[552]

b. The DCF method is not appropriate in this case, as is confirmed by cases and scholarly commentary;[553]

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547 Cl. Mem., ¶ 525 (footnotes omitted).

548 Resp. C-Mem., p. 280 and ¶ 1280; Resp. Rej, p. 301 and ¶ 1257 (where Spain states that it "ratif[ies] each and every one of the points made in this regard in the Counter-Memorial of 31 October 2016"); Resp. PHB, ¶ 124.

549 Resp. C-Mem., ¶ 1277.

550 Resp. C-Mem., ¶ 1278.

551 Resp. C-Mem., ¶ 1279.

552 Resp. C-Mem., ¶ 1282.

553 Resp. C-Mem., ¶ 1282.

c. The return rates calculated by the Claimants are "abnormal" and their accounting records do not take into account the loss of value of their assets;[554]

d. Using the DCF method, AMG calculates that the dispute measures have resulted in an increase in value of €15.3 million for the Claimants;[555]

e. If the Tribunal holds that all of the disputed measures adopted by Spain are unlawful, it will have to determine the "stand alone impact of the different measures";[556]

f. The pre- and post-award interest rate claimed by the Claimants is excessive;[557]

g. There is no basis for the Claimants to claim the so-called "Tax Gross-Up";[558] and

h. Documentation is lacking to support the findings of the Brattle Group.[559]

***a. The Claimants' alleged damages are "completely and absolutely speculative"***

330. Spain opposes what it describes as the Claimants' speculative claim for compensation on the grounds that the June 2014 valuation date was "randomly chosen"[560] and that the Claimants' approach distinguishing historical and future cash flows is flawed.[561] Spain argues that:

> *By Law, photovoltaic plants are guaranteed a reasonable rate of return, protected from market uncertainty and fluctuations. Precisely for this reason, it seems paradoxical that, with respect to an investment with reasonable rate of return guaranteed by Law, a privilege enjoyed by very few investors, the Claimant claims a violation of the FET standard.*
>
> *With regard to said guarantee, the Claimant attempts to base their claim on a simplistic comparison of scenarios ("actual" and but for), assuming that the "real" scenario will be maintained over the coming decades and*

554 Resp. C-Mem., ¶¶ 1305, 1307-1308.

555 Resp. Rej., ¶ 1284.

556 Resp. PHB, ¶ 155.

557 Resp. Rej., ¶ 1290.

558 Resp. Rej., ¶ 1298.

559 Resp. C-Mem., ¶ 1282.

560 Resp. C-Mem., ¶ 1284.

561 Resp. C-Mem., ¶ 1285.

*ignoring the fact that the guarantee of reasonable profitability is the guiding principle of the system. It is because of all this that the projection of the existing parameters is hypothetical and illusory.*[562]

331. Spain finds further support for its position in numerous decisions of the Supreme Court of Spain, which it submits have addressed changes made to the remuneration regime in the renewable energy sector. According to Spain, the Supreme Court has consistently held in similar circumstances that damages have not been proven in cases where they were calculated based on extrapolations over a thirty-year period and there was no guarantee that the remuneration would remain the same (though the applicable regime ensured a RRoR).[563] Spain endorses the Supreme Court's view that the determination of these extrapolations "lack[ed] the necessary rigour and security", and according to Spain these extrapolations are the same ones that the Brattle Group had to determine.[564] In addition, the Supreme Court's statements were not an interpretation of Spanish law on the energy sector, but rather an assessment of the factual evidence before it.[565] In the present case, Spain says, the Claimants have also failed to meet the burden of proof.[566]

#### *b. The DCF method is equally speculative and inappropriate in this case, as confirmed by cases and scholarly commentary*

332. In Spain's view, a number of factors caution against the use of the DCF method in this case and suggest that a method based on the cost of assets is more reliable and appropriate, "particularly when the investment is very recent" (i.e. when the date of acquisition of the investment is close to the valuation date).[567] Spain mentions the following factors militating against the DCF method in this case:

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562 Resp. C-Mem., ¶¶ 1286-1287; Resp. Rej., ¶ 1261.

563 Resp. C-Mem., ¶¶ 1288-1289; Resp. Rej., ¶¶ 1262-1263; Judgement from the Third Chamber of the Supreme Court, 24 September 2012, Sixth Legal Basis (R-0143).

564 Resp. Rej. ¶ 1265.

565 Resp. Rej., ¶ 1265.

566 Resp. C-Mem., ¶ 1290; Resp. Rej., ¶ 1264; Resp. PHB, ¶ 127.

567 Resp. C-Mem., ¶ 1301. *See also* Resp. C-Mem., ¶¶ 1292-1296, 1299-1302; Resp. Rej., ¶¶ 1274-1276.

> *a) The fact that it involves a capital-intensive business, with a significant asset base. Practically all its costs arise from investing in tangible infrastructure. There are no relevant intangible assets to analyse.*
>
> *b) The high dependency of the cash flows on external, volatile and unpredictable elements, such as the price of the pool, inter alia.*
>
> *c) The long-term nature of the forecasts.*
>
> *d) The disproportion between the alleged investments (and the alleged assumed risk) and the amount claimed, evidenced by the return obtained.*[568]

333. Spain submits that tribunals have rejected the DCF method on similar grounds.[569]

#### c. The return rates calculated by the Claimants are "abnormal" and their accounting records do not take into account the loss of value of their assets

334. Relying on the First and Second AMG Expert Report, Spain contends that "the DCF method used by Brattle provides abnormal results", which should be disregarded.[570] According to the First AMG Expert Report, "in the But-for scenario calculated by Brattle the IRR obtained for the Claimants would be 25.54%. A rate significantly higher than the reasonable rate in a regulated and subsidised sector."[571] In addition, the financial statements of the DSG and TAUBER Groups show no accounting impairment due to a loss of value of their assets over the 2007-2014 period.[572] In its Second Expert Report, AMG states that it has updated its assessment of the IRR and, using the parameters of CAPEX and OPEX set by the OM 1045/2014, concludes that "the [Claimants'] Plants broadly attain the RRoR, with the weighted average of the pre-tax IRRp for all of them being 7.749% […]."[573] AMG further concludes that "[…] the DSG plants (Alcolea, Calasparra and Tordesillas) obtain a project IRR of between 8.47% and 10.21%, well above the RRoR."[574]

568 Resp. C-Mem., ¶ 1297.

569 Resp. C-Mem., ¶ 1298; Resp. Rej., ¶¶ 1267-1272. *See also* Resp. PHB, ¶¶ 139-140.

570 Resp. C-Mem., ¶ 1305; First AMG ER, ¶¶ 265 *et seq*.; Resp. Rej., ¶¶ 1278-1279.

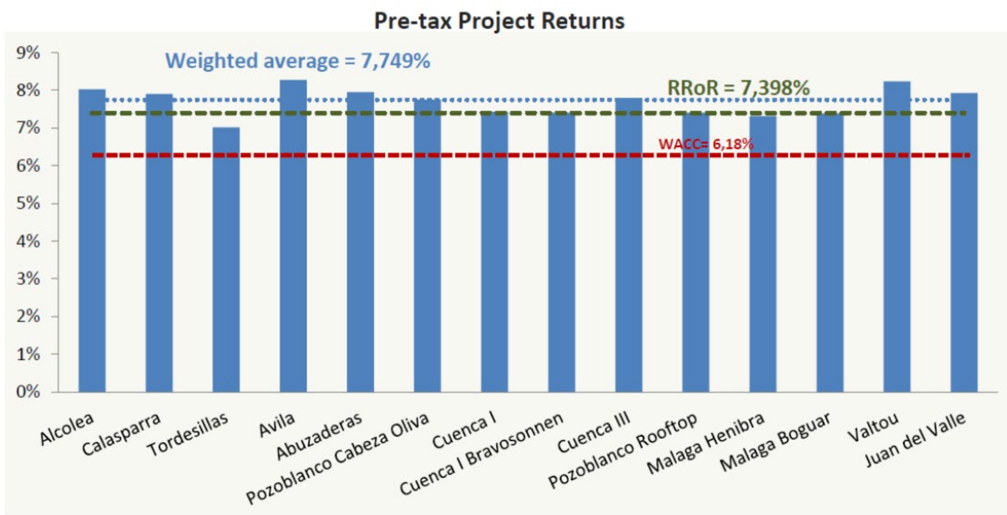
571 Resp. C-Mem., ¶ 1306 (footnote omitted).

572 Resp. C-Mem., ¶¶ 1307-1308.

573 Resp. Rej., ¶ 1279; *citing* to Second AMG ER, ¶ 28.

574 Resp. Rej., ¶ 1279; *citing* to Second AMG ER, ¶ 29.

Spain argues that AMG's calculations reflected in the graph below[575] show that "the plants are obtaining, after the [disputed] measures, returns that are even higher than the benchmark returns."[576]




***d. Using the DCF method, AMG calculates that the dispute measures have resulted in an increase in value of their investments of €15.3 million for the Claimants***

335. "[U]sing the Brattle outline as far as possible", AMG calculated in its First Expert Report the financial impact of the disputed measures in an alternative DCF simulation and has found that the disputed measures provided the Claimants with an economic benefit in the amount of €17.8 million.[577] In its Second Expert Report, AMG updated this figure to €15.3 million.[578] The discrepancies between the Brattle Group and the AMG calculations have to do with the parameters they each used. Spain contends that:

> *AMG has considered a useful life of plants in the But-for scenario of 30 years, which is the maximum according to the available information. Also, AMG has taken into account (as opposed to Brattle) that the conditions of the but-for scenario would obviously have a greater risk and greater uncertainty than the current scenario. The revenue would be subject to greater risk in the But-for scenario. In fact, in the Actual scenario, under*

575 Resp. PHB, ¶ 131 and graph p. 42.

576 Resp. Rej., ¶ 1280. *See also* Resp. PHB, ¶ 131 and graph p. 42.

577 Resp. C-Mem., ¶¶ 1309-1311; First AMG ER, ¶ 304, table 15.

578 Resp. Rej., ¶ 1284; *citing* to Second AMG ER, ¶ 220.

> *the current regulations, we find a stable, more predictable framework with less risk. This is undoubtedly proved by the valuations of the market agents and the numerous transactions that have taken place since the adoption of the challenged measures. These considerations, logically, will have their impact on the different discount rates to be taken into account and on the various marketability discounts to apply.*[579]

336. Spain concludes that even when one uses a DCF method, the financial impact of the disputed measures is either positive or inexistent.[580] Spain also dismisses the Claimants' alternative calculation under its corrected reasonable return approach as "a clumsy DCF exercise in reverse engineering" that is "simply frivolous."[581]

#### *e. Stand-alone impact of the disputed measures*

337. Spain argues that if the Tribunal were to hold that "the first disputed measures are lawful, and/or the TVPEE lies outside its jurisdiction, […] it should be extremely careful not to erroneously deduct the impact of those measures from the total amount claimed in this case, as other Tribunals regrettably have done because of the lack of transparency of the experts acting for the Claimants."[582] If the Tribunal were to hold that all of the disputed measures adopted by Spain are unlawful, the Respondent would then request "that it directs both parties' experts to provide the stand alone impact of the different measures and to do so considering the lawful (or outside its jurisdiction) measures until the end of the useful life of the plants in the But-For Scenario."[583]

#### *f. Interest*

338. Spain contends that the Claimants' request for a pre- and post-award interest rate of 1.16% is excessive.[584] While noting that both Parties agree that post-award interest should not be higher than pre-award interest, Spain argues that the following factors point to a lower interest rate: the 2011-2013 average interest of the 1-year Treasury bills (0.61%); and the

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579 Resp. C-Mem., ¶ 1313. *See also* Resp. Rej., ¶¶ 1285-1286.

580 Resp. C-Mem., ¶ 1314; Resp. Rej., ¶ 1287; Resp. PHB, ¶¶ 143-150.

581 Resp. PHB, ¶ 151.

582 Resp. PHB, ¶ 152.

583 Resp. PHB, ¶ 155.

584 Resp. Rej., ¶¶ 1288, 1290.

fact that interest rates are currently negative.[585] In its Post-Hearing Brief, Spain argues as follows:

> *In respect to the claim for interests, there are no grounds for compensating for risks that the Claimants have not bear. Therefore, the interest rate has to be free from risk and with a maximum time limit (a shorter term rate could be taken given that a priori the final term is unknown) of 3 years, which could be a reasonable estimate in this case between the Date of Valuation and the date of the award.*[586]

#### g. There is no basis for the Claimants to claim the so-called "Tax Gross-Up"

339. Spain first notes that the TGU is not expressly included in the Claimants' request for relief.[587] Further, the claim is made without any justification whatsoever, a failure which the Brattle Group highlights when it confesses that it has "not analysed the tax consequences of an award…"[588] In addition, the TGU is "vetoed in Article 21 of the ECT",[589] which establishes a "TGU carve-out."[590] In Spain's view, no taxation measures taken by Germany could create any obligation for Spain under the ECT.[591] This, according to Spain, is fully consistent with the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, including Article 2.[592] For all of these reasons, Spain cannot be held liable for taxation measures applied by a different State, in this case Germany.[593]

340. Alternatively, Spain submits that "no tax obligation to pay taxes on the amount granted on an estimated Award would ever arise in Germany"[594] because of the "participation

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585 Resp. Rej., ¶¶ 1289-1290; First AMG ER, ¶ 311.

586 Resp. PHB, ¶ 156. (Footnote omitted).

587 Resp. C-Mem., ¶ 1315, referring to Cl. Mem., ¶ 526.

588 Resp. C-Mem., ¶ 1316 referring to the First Brattle Quantum Report, ¶ 185.

589 Article 21 of the ECT provides that "[e]xcept as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties" (RL-0032).

590 Resp. C-Mem., ¶¶ 1318-1319; Resp. Rej., ¶ 1293.

591 Resp. C-Mem., ¶ 1319.

592 Resp. C-Mem., ¶ 1320.

593 Resp. C-Mem., ¶ 1321.

594 Resp. C-Mem., ¶ 1322; Resp. Rej., ¶ 1294.

exemption" under EU law, which is designed to eliminate double taxation among companies and subsidiaries of different EU Member States.[595]

341. Finally, if it could be claimed, the TGU would still be "excessively speculative, uncertain and contingent",[596] as confirmed by the tribunal in *Venezuela Holdings v. Venezuela*.[597]

##### *h. Documentation is lacking to support the findings of the Brattle Group*

342. Spain argues that "[t]he Brattle report is obscure, not disclosing or providing the information used"[598] and places Spain in a position of "utter and manifest defencelessness."[599]

### B. THE TRIBUNAL'S ANALYSIS

343. Once it is determined that a breach of a claimant's rights has occurred the first and most important question is what form the relief should take.

344. The DSG Claimants' Request for Relief, as set out in paragraph 614 of their Reply, reads as follows:

> *Claimants respectfully request an Award granting them the following relief:*
>
> - *a declaration that the Tribunal had jurisdiction under the ECT and the ICSID Convention;*
> - *a declaration that Spain has violated Part III of the ECT and international law with respect to Claimants' investments;*
> - *compensation to Claimants for all damages they have suffered as set forth in this Reply and Claimants' Memorial on the Merits and as will be further developed and quantified in the course of this proceeding;*

[595] Resp. C-Mem., ¶ 1322.

[596] Resp. C-Mem., ¶ 1323; Resp. Rej., ¶¶ 1295-1298.

[597] Resp. C-Mem., ¶¶ 1324-1325; *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Award, 9 October 2014, ¶ 388 (RL-0096).

[598] Resp. C-Mem., ¶ 1327.

[599] Resp. C-Mem., ¶ 1328.

- *all costs of this proceeding, including (but not limited to) Claimants' attorneys' fees and expenses, the fees and expenses of Claimants' experts, and the fees and expenses of the Tribunal and ICSID;*

- *pre- and post-award compound interest at the highest lawful rate from the Date of Assessment until Spain's full and final satisfaction of the Award; and*

- *any other relief the Tribunal deems just and proper.*

345. There is no difficulty with the ordering of declaratory relief. It follows practically automatically from a finding by a tribunal that a claimant's rights have been violated. Compensation is less straightforward.

346. Reference to the *Chorzów Factory* decision of the Permanent Court of International Justice[600] as a prelude to discussion of quantum has become almost a matter of politesse in investor-State arbitration. The much-quoted passage from *Chorzów Factory* asserts that

> *The essential principle contained in the actual notion of an illegal act–a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals–is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it–such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*[601]

347. It is important to recall that the passage occurred in the course of the Court's reasoning on an unlawful seizure of property.[602] Monetary compensation was treated by the Court as an appropriate form of reparation if restitution of the seized property was not possible. In that context the determination of the value of the property that has been unlawfully seized is a natural and obvious point of reference for reparation. It compensates the former owner for

[600] *Chorzów Factory*, pp. 46-47 (CL-116).

[601] *Chorzów Factory*, p. 47 (CL-116).

[602] *Chorzów Factory*, p. 46 (CL-116).

the value of what was lost, and it prevents the seizing State from benefiting from the unlawful seizure. And it will be noted that the Court also contemplated "the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place." That is, any losses in addition to the loss of the property seized, which were also caused by the unlawful act, could be compensated by damages awarded in addition to the value of the property.

348. In the present case there has been no taking of property. The Tribunal has determined that no expropriation occurred. The breaches of the rights of the DSG Claimants were breaches of their right to fair and equitable treatment. In terms of the *Chorzów Factory* analysis, this is not a case where the 'loss sustained' could be covered by restitution. There was no suggestion in this case that the Claimants already had legal title to the monies that they expected to be paid as tariffs by Spain, so that non-payment might arguably have been tantamount to the seizure of the Claimants' property. Any loss sustained as a result of the breach of the Claimants' rights to fair and equitable treatment is, in *Chorzów Factory* terms, a "loss sustained which would not be covered by restitution in kind or payment in place."

349. That being the case, the Tribunal does not consider that reference to the value of the Claimants' investments is necessarily the appropriate form of reparation. To use the words of the Request for Relief, such reference is not necessarily the basis for relief that the Tribunal deems "just and proper." Compensation based on the value of the Claimants' investments – or more precisely, on the effect of Spain's action on the value of those investments – is not necessarily the only or best way to "make reparation in an adequate form", to borrow the phrase used by the Permanent Court of International Justice in an earlier phase of the *Chorzów Factory* case.[603] That is particularly true where the valuation is established on the basis of valuations of 'actual' and 'but for' scenarios.

[603] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Jurisdiction, Judgment No. 8, PCIJ, Series A, No. 9, 26 July 1927, p. 21.

350. The difficulties of using the 'But-for' approach to the quantification of damages for breach of an FET obligation are evident. The Respondent has argued that if Spain had not removed the fixed tariffs and introduced the New Regulatory Regime, it is very probable that it would still have had to take some measures to address the persistent budget deficit. The Tribunal agrees. There was plainly a need to deal with the deficit. The FET obligation is an obligation not to treat investments unfairly or inequitably: it is not an obligation to do nothing that has the slightest impact upon the value of the investment. If Spain had taken different measures, consistent with all of its ECT obligations including the FET obligation, it seems likely that the measures would have had an impact on the valuation of the investments.

351. The uncertainty works both ways. If the Claimants had been able to maximise their returns by arranging their commercial and financial transactions and relationships in the manner that would have derived the optimum benefit from the prompt and full payment of tariffs in accordance with RD 661/2077, that too would probably have impacted the value of the investments.

352. That said, the Tribunal does not agree with the Respondent's suggestion that the 'But-for' scenario is entirely and irredeemably speculative. The breach of the FET obligation in the ECT in the present case was constituted by the wrongful disappointment of what was a legitimate expectation that the promised fixed tariffs would be paid for the promised period. That is another way of saying that the Claimants were entitled to rely upon the stability *grosso modo* of the promised regime: that is an assumption concerning the 'But-for' scenario that the Claimants were by definition entitled to make. The very purpose of the commitment in RD 661/2007 was to enable qualified investors who were registered under the RD 661 regime to remove the future income flow deriving their investment from the realm of pure speculation and to make it at least approximately predictable.

353. Furthermore, there is a question of practical justice. The Claimants are claiming not only in respect of tariffs that would have been paid up to the date of the Award in this case but also in respect of payments of tariffs that have yet to fall due. That is implicit in the concept of the loss of the present value of investments caused by the 2013-2014 reforms, for which

they claim. While it is theoretically arguable that it should not be assumed that future payments by the Respondent will be below the FIT level to which it has found the Claimants are entitled, that is the practical reality and is the basis on which both Parties have approached the case. There is no reason to suppose that the current Spanish law might be amended to provide for the payment in future of what would be the exceptional tariffs the Claimants in this case had a right to expect. The claim must be settled now by the payment of appropriate compensation. That, too, points to a focus upon redressing the failure to maintain the payment regime in RD 661/2007.

354. The Tribunal has no right to decide the dispute *ex aequo et bono*. It must identify the basis upon which reparation is to be determined, and then decide as best it can what sum constitutes adequate compensation. It does so on the basis of the fundamental principle on which the Parties and the practice of tribunals in ISDS cases are agreed: that is, the respondent is liable to compensate the claimant for the damage that the claimant can show was caused by the breach(es) by the respondent of a legal duty that the respondent owed to the claimant. (It is to be noted that the liability is not for all 'damage' resulting from conduct of the respondent, but only for damage resulting from conduct that constitutes a breach of the respondent's obligations to the claimant.) That combination of basic principles relating to causation and to the evidential burden in arbitration[604] must be the starting point.

355. In the present case the breach has been found to be constituted by the repudiation of the commitment by Spain to maintain the stability of features of the regulatory regime established by RD 661/2007, under which the Claimants' PV facilities were registered.[605] Those features were the Feed-In Tariffs for PV plants, fixed and index-linked. Those tariffs were initially applicable for 25 years, with 80% of the tariff payable thereafter for the remainder of the operational life of the facility. That scheme was modified in 2010 by ending the right to 80% of the tariff after 25 years[606] and extending the period for which

[604] *See, e.g.*, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States,* ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, ¶ 12.56 (RL-0109).

[605] Cl. Reply, ¶ 14; Cl. SPHB, ¶¶ 7-8.

[606] RD 1565/2010 (C-129).

100% of the fixed tariff was payable to 28 years and later to 30 years, also capping the number of hours each year for which the tariff was payable.[607]

356. It is the repudiation of that pre-determined payment system by the introduction of the New Regulatory Regime in 2014 that constitutes the breach of the DSG Claimants' rights in this case. The Tribunal has decided that 21 June 2014, the date of the completion of the New Regulatory Regime identified by the Claimants,[608] is to be taken as the date of that breach. The Tribunal has found no other compensable breach of the DSG Claimant's rights under the ECT.

357. It follows that the measure of compensation is in principle the difference between the amount actually paid or payable to the Claimants for their electricity and the amount that would have been paid to the Claimants if key commitments in the regulatory regime under RD 661/2007, on the basis of which they made their investments, had been maintained as represented by the Respondent.

358. The investments at the heart of the present case are remarkably homogenous and made in a short period of time. They were made in three PV projects over a matter of months in 2008, and all were registered under the regime established by RD 661/2007. The PV plants still have some years of working life. In these circumstances, the Tribunal sees no reason why the compensation should not be set as an amount corresponding to the difference between the 'actual' tariffs and the RD 661/2007 'But-for' tariffs, calculated as its value on 21 June 2014.

359. If the tariffs due under RD 661/2007 had been paid (and continued to be paid) for the requisite period, the Claimants would have had no claim to any further compensation from the Respondent. Any additional effects upon contractual arrangements among the Claimants themselves would have been the result not of commitments made by the Respondent but of commitments made by the Claimants. Accordingly, the Tribunal declines to award any additional compensation in respect of the 'contractual' claims: i.e.,

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607 The Claimants noted that "[t]he permanent hours cap was established at a threshold that many plants would never reach […]". Cl Reply, ¶ 350, fn. 491.

608 Cl. Opening Presentation, slide 112.

the claims made in respect of bonus payments that would have been due under management and land rental contracts and the put and call options possessed by the real estate lessors.[609] The approach to compensation adopted here also obviates the need to consider the impact of other factors addressed in the expert reports, including the (non-justiciable) 7% tax, adjustments to OPEX costs, the operational lifetime of plants, and cash collection problems. Similarly, there will be no gross-up for taxes.[610]

360. The Tribunal has found that the 2010 modifications did not breach the ECT. It is accordingly the RD 661/2007 regime as modified by the 2010 reforms that is to be applied in calculating the damages due: i.e., with the fixed tariff payable for a total period of 30 years, and no fixed tariff payable thereafter, and the total number of hours each year for which the fixed tariff is payable capped in accordance with RDL 14/2010 but with no overall limitation on the rate of return achieved by each PV plant.

361. Interest from the date of the breach, 21 June 2014, up to the date of this Decision is payable. The Tribunal considers that as the Claimants incur no element of risk in relation to this payment it is appropriate to use Spain's borrowing rate,[611] and to award compound interest in accordance with what is now the established practice in investment tribunals.[612] It accepts the argument of Claimant's experts that the rate should be 1.16%, based on the average yield on Spanish Government 10-year bonds at June 2016, and compounded on a monthly basis.[613] 'Post-Award interest' is payable on the amount awarded at the same rate, and will be payable from the date of this Decision.

362. The Tribunal has studied the expert reports that have been submitted both by the Claimants and by the Respondent in this case, in an attempt to identify the basis for calculating the compensation due. It has not found that figure in those reports; nor has it found data from which that figure can confidently be calculated or approximated. Accordingly, the Tribunal remits this calculation to the Parties and their respective experts, to be made on the basis

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609 First Brattle Quantum Report, ¶¶ 156-157; Second Brattle Quantum Report, ¶¶ 69-72

610 First Brattle Quantum Report, ¶¶ 184-186.

611 *See* First Brattle Quantum Report, ¶¶ 178-183.

612 The Tribunal accepts the submissions of the Claimants on this point: Cl Mem., ¶¶ 514-524.

613 First Brattle Quantum Report, ¶ 183, fn. 138.

of the principles set in paragraphs 356-361 above, which the Tribunal has decided will afford appropriate compensation to the DSG Claimants. The Tribunal has decided that the calculation is to be based upon the data that formed the basis of the First Brattle Quantum Report,[614] including the data on MWhs of electricity production,[615] discount rates, and inflation. That data reflects the DSG Claimants' expectations on matters such as electricity production, and has proved to be a reasonable estimate.[616]

363. The Parties are requested to consult and to report to the Tribunal within 60 days of the date of this Decision on an agreed sum of compensation payable to each of the 73 DSG Claimants in accordance with the principles set out above, including the interest payable up to the date of this Decision. In the event that the Parties are unable to agree upon such sums, each Party shall within the same 60 days of the date of this Decision submit its own estimate together with a very brief summary of the reasons for its inability to agree with the other Party upon the quantum of compensation due. The Tribunal will determine the amount of compensation payable.

364. The Tribunal will then proceed to issue an Award incorporating this Decision and setting out the amount of compensation payable.

365. The Parties are requested to submit their respective detailed claims for costs along with the responses pursuant to paragraph 363 above on quantum, within the same 60-day period. They are invited to make brief written submissions on costs, addressing in particular the significance of the dismissal of the TS Claimants claims following the 'multi-party' objection. The Tribunal's decision on costs also will be set out in the Award.

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[614] And in particular Tordesillas Financial Models (BQR-070), Calasparra Financial Models (BQR-071) and Alcolea Financial Models (BQR-072).

[615] First Brattle Quantum Report, ¶¶ 54-59.

[616] First Brattle Quantum Report, ¶ 54.

## IX. DECISION

366. For the reasons set forth above, the Tribunal decides as follows:

(1) The Tribunal's earlier decisions on jurisdiction, set out in paragraph 326 (1) to (3) of the Decision on Jurisdiction and Admissibility, are affirmed;[617]

(2) The Tribunal has jurisdiction under the ECT and the ICSID Convention over all of the claims made by the DSG Claimants [see paragraphs 85-91, above];

(3) The issues in dispute are to be decided in accordance with the ECT and applicable rules and principles of international law [see paragraph 82, above];

(4) The Parties are invited to make their final submissions on costs, and the Tribunal will make its decision on costs in the Award, in accordance with paragraph 365 above.

The Tribunal decides by a majority as follows:

(5) The Respondent has violated Part III of the ECT with respect to the Claimants' investments, and specifically the Respondent violated the rights of the DSG Claimants under Article 10 of the ECT to fair and equitable treatment by establishing the New Regulatory Regime [see paragraphs 211-225 and 303, above];

(6) The Respondent is obliged to make reparation to the DSG Claimants in accordance with the principles stipulated in paragraphs 356-363 of this Decision;

(7) The amount due to the DSG Claimants by way of reparation will be decided by the Tribunal and set out in an Award, in accordance with paragraphs 363 and 364 above.

617 Paragraph 326 of the Decision on Jurisdiction and Admissibility is set out at paragraph 4, above.

Professor Douglas KC has delivered a Partial Dissenting Opinion, appended to this Decision.

Dr. Michael Pryles AO, PBM
Arbitrator

Prof. Zachary Douglas KC
Arbitrator

Subject to the attached Partial
Dissenting Opinion

Prof. Vaughan Lowe KC
President of the Tribunal