INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE +1 (202) 458 1534 | FACSIMILE +1 (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

CERTIFICATE

EURUS ENERGY HOLDINGS CORPORATION

v.

KINGDOM OF SPAIN

(ICSID CASE NO. ARB/16/4)

I hereby certify that the attached document is a true copy of the English version of the Tribunal's Award dated 14 November 2022, which was rendered in the English and Spanish languages.

Gonzalo Flores
Acting Secretary-General

Washington, D.C., 14 November 2022

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

EURUS ENERGY HOLDINGS CORPORATION
Claimant

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/16/4

AWARD

Members of the Tribunal
Ms. Anne K. Hoffmann, LL.M., President
Mr. Oscar M. Garibaldi, Arbitrator
Prof. Andrea Giardina, Arbitrator

Secretary of the Tribunal
Ms. Veronica Lavista

Date of dispatch to the Parties: 14 November 2022

REPRESENTATION OF THE PARTIES

Representing Eurus Energy Holdings Corporation:

Mr. Nicholas Lingard
Mr. Joaquín P. Terceño
Mr. Daniel Allen (until March 2019)
Ms. Ewa Kondracka
Ms. Karen Kong
Freshfields Bruckhaus Deringer LLP
Akasaka Biz Tower 36F
5-3-1 Akasaka, Minato-ku
Tokyo 107-6336
Japan

Mr. Peter Turner, KC
Mr. Yuri Mantilla
Freshfields Bruckhaus Deringer LLP
9 avenue de Messine
75008 Paris
French Republic

Ms. Samantha Tan
Freshfields Bruckhaus Deringer LLP
10 Collyer Quay 42-01
Ocean Financial Centre
Singapore 049315

Mr. Ignacio Borrego
Ms. Ana Calvo
Freshfields Bruckhaus Deringer LLP
Torre Europa
Paseo de la Castellana, 95
28046 Madrid
Kingdom of Spain

Representing Kingdom of Spain:

Ms. María del Socorro Garrido Moreno
Ms. Irene Bonet Tous
Ms. Gabriela Cerdeiras Megias
Ms. Lorena Fatás Pérez
Mr. Antolín Fernández Antuña
Ms. Patricia Elena Fröhlingsdorf Nicolás
Mr. Rafael Gil Nievas
Mr. José Manuel Gutierrez Delgado
Ms. Lourdes Martínez de Victoria
Ms. Mónica Moraleda Saceda
Ms. Elena Oñoro Sainz
Ms. Amaia Rivas Kortazar
Mr. Diego Santacruz Descartín
Ms. Alicia Segovia Marco
Mr. Luis Vacas Chalfoun
Ms. Amparo Monterrey Sánchez
Abogacía General del Estado
Ministerio de Justicia del Gobierno de España
c/ Marqués de la Ensenada, 14-16, 2ª planta
28004 Madrid
Kingdom of Spain

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Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BDO	Respondent's quantum expert
BDO Expert Report	Expert report of BDO, entitled "Expert economic-financial report on the EURUS wind farms" of 11 April 2017
Brattle	Claimant's regulatory and quantum experts
Brattle Quantum Report	"Financial Damages to Investors" of 18 November 2016
Brattle Rebuttal Quantum Report	Rebuttal report of Brattle, entitled "Financial Damages to Eurus" of 29 September 2017
C-[#]	Claimant's Exhibit
Cl. Cost Submission	Claimant's Submission on Costs of 30 May 2022
Cl. Mem.	Claimant's Memorial of 18 November 2016
Cl. Quantum Submission	Claimant's Legal Submission on Quantum Issues of 10 December 2021
Cl. Rej.	Claimant's Rejoinder on Jurisdiction of 8 February 2018
Cl. Reply	Claimant's Reply of 29 September 2017
Cl. Reply Cost Submission	Claimant's Reply Submission on Costs of 16 June 2022

Cl. Response	Claimant's Response to the Tribunal's Questions on Quantum Issues dated 8 February 2022
CL-[#]	Claimant's Legal Authority
DCF	Discounted cash flow
Decision	Decision on Jurisdiction and Liability issued on 17 March 2021
ECT	Energy Charter Treaty
EU	European Union
EUR	Euros
FET	Fair and Equitable Treatment
FIT	Feed-in tariff
Hearing	Hearing on jurisdiction and merits held on 18-23 July 2018
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Joint Memorandum	Brattle-BDO Joint Memorandum presented on 10 December 2021
R-[#]	Respondent's Exhibit

RD	Royal Decree
RD 1432/2002	Royal Decree 1432 of 2002, enacted on 27 December of 2002
RD 2818/1998	Royal Decree 2818 of 1998, enacted on 23 December 1998
RD 413/2004	Royal Decree 413 of 2004, enacted on 6 June 2004
RD 436/2004	Royal Decree 436 of 2004, enacted on 12 March 2004
RD 661/2007	Royal Decree 661 of 2007, enacted on 25 May 2007
RE	Renewable Energies
Resp. C-Mem.	Respondent's Counter-Memorial of 12 April 2017
Resp. Cost Submission	Respondent's Submission on Costs of 30 May 2022
Resp. Quantum Submission	Respondent's Legal Submission on Quantum Issues of 10 December 2021
Resp. Rej.	Respondent's Rejoinder of 22 December 2017
Resp. Reply Cost Submission	Respondent's Reply Submission on Costs of 16 June 2022
Resp. Response	Respondent's Answers to the Arbitral Tribunal's Questions of 8 February 2022

RL-[#]	Respondent's Legal Authority
RPI	Retail price index
Second BDO Expert Report	Expert report of BDO, entitled "Expert report duplicating Brattle's Rebuttal Report: Financial Damages to EURUS" and "Rebuttal Report: Changes to the Regulation of Wind Installations in Spain Since December 2012" of 21 December 2017
SPC	Special Purpose Company(ies)
Tribunal	Arbitral tribunal constituted on 2 May 2016 and reconstituted on 4 October 2021

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ('**ICSID**' or the '**Centre**') on the basis of the Energy Charter Treaty, which entered into force for Spain on 16 April 1998 and for Japan on 21 October 2002 (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 Claimant is Eurus Energy Holdings Corporation ('**Eurus**' or '**Claimant**'), a limited liability company incorporated under the laws of Japan.

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

4. The Claimant and the Respondent are collectively referred to in this ruling as the '**Parties**', and the term '**Party**' is used to refer to either the Claimant or the Respondent. The Parties' representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 17 March 2021, the Tribunal issued a decision on jurisdiction and liability (the '**Decision**') to which was attached a partial dissenting opinion by arbitrator Oscar M. Garibaldi, both of which are incorporated by reference and attached as Annex A. The procedural history of the Decision is set out in detail in Part II of the Decision and the Tribunal finds it unnecessary to restate it here.

6. On 27 May 2021, the Tribunal reminded the Parties of the deadline of 17 June 2021, set out at paragraph 469 of the Decision, for the Parties to reach an agreement on the amount payable in accordance with the Decision. On that same date, the Claimant wrote to the Tribunal, out of an abundance of caution, to reserve Eurus's rights with respect to potential grounds for seeking annulment of the eventual Award.

7. On 1 June 2021, following the passing away of arbitrator James Crawford, the Secretary-General of ICSID notified the Parties of the vacancy on the Tribunal and the proceeding was suspended pursuant to ICSID Arbitration Rule 10(2).

8. On 4 October 2021, the Tribunal was reconstituted, and the proceeding was resumed pursuant to ICSID Arbitration Rule 12. As of 4 October 2021, the Tribunal is composed of Ms. Anne K. Hoffmann, a German national, President, appointed by the Secretary-General of ICSID pursuant to the Parties' agreement; Mr. Oscar M. Garibaldi, a United States and Argentine national, appointed by the Claimant; and Professor Andrea Giardina, an Italian national, appointed by the Respondent.

9. On 8 October 2021, the Parties submitted their proposed steps for the next phase of these proceedings.

10. By letter of 20 October 2021, the Tribunal requested that, in accordance with ICSID Administrative and Financial Regulation 14(3) and Section 9 of Procedural Order No. 1, each Party make an advance payment of US$100,000.00 to cover the costs of the proceeding. ICSID received payment from each Party on 24 November 2021.

11. On 25 October 2021, the Parties submitted a proposed limited reading list for the President of the Tribunal.

12. By letter of 28 October 2021, the Tribunal confirmed its agreement with the Parties' proposed steps and directed the Parties to file a joint expert report reflecting the points of agreement between the *quantum* experts on the calculation of damages, as well as any points of disagreement between them, together with a single round of submissions by the Parties addressing certain *quantum* issues.

13. On 9 November 2021, the Parties submitted a joint request to the Tribunal regarding the proposed timetable for the next phase of these proceedings. The Tribunal confirmed its agreement with the proposed timetable by letter of 10 November 2021.

14. On 10 December 2021, the Parties filed a joint expert report by Brattle Group, the experts retained by the Claimant, and BDO, the experts retained by the Respondent, together with Exhibits JER-1, JER-2 and JER-3, which responds to paragraphs 459 and 460 of the - Decision.

15. On the same date, pursuant to the Decision and the Tribunal's directions as set out in its letter dated 28 October 2021, the Parties filed their respective legal submissions on *quantum* issues. The Claimant filed its legal submission together with Legal Authorities CL-0121 to CL-0125 (the '**Claimant's Quantum Submission**'), and the Respondent filed its own legal submission (the '**Respondent's Quantum Submission**'). The Claimant's Quantum Submission and the Respondent's Quantum Submission will be collectively referred to as the '**Quantum Submissions**'.

16. On 14 January 2022, each Party filed translations of its Quantum Submission, as well as an amended version of the joint expert report (the '**Joint Memorandum**'). A translation of the Joint Memorandum was filed by the Parties on 17 January 2022.

17. By letter of 21 January 2022, the Tribunal posed questions to the Parties on *quantum* issues, in accordance with the approach agreed in the Parties' letter dated 9 November 2021.

18. On 8 February 2022, the Claimant filed its response to the Tribunal's questions, accompanied by Legal Authorities CL-0126 to CL-0130 (the '**Claimant's Response**'). On the same date, the Respondent filed its response to the Tribunal's questions, accompanied by Legal Authorities RL-0104 to RL-0106 (the '**Respondent's Response**'). The Claimant's Response and the Respondent's Response will be collectively referred to as the '**Responses**'.

19. On 17 February 2022, the Claimant sent a letter to the Tribunal in relation to the Respondent's answers to the Tribunal's questions. On the same date, the Respondent commented on the Claimant's letter.

20. On 7 March 2022, each Party filed a translation of its answers to the Tribunal's questions.

21. By letter dated 2 May 2022, the Tribunal informed the Parties that it did not require any further submissions from the Parties on the issue of *quantum* and invited the Parties to make their submissions on costs.

22. The Parties filed their submissions on costs on 30 May 2022 (the '**Cost Submission**').

23. On 6 June 2022, the Tribunal requested that each Party make an additional advance payment of US$125,000.00 to cover the costs of the proceeding. ICSID received payment from both Parties.

24. On 16 June 2022, the Parties filed reply cost submissions (the '**Reply Cost Submission**').

25. On 27 June 2022, the Respondent filed translations of its Submission on Costs and Reply Submission on Costs.

26. On 1 July 2022, the Claimant filed translations of its Submission on Costs and Reply Submission on Costs.

27. The proceeding was closed on 24 October 2022.

III. FACTUAL BACKGROUND

28. The factual background of these proceedings has been set out in Section III of the Decision. As those facts remain unchanged, the Arbitral Tribunal will not restate them here.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

29. In its Quantum Submission, the Claimant requests:

(a) an award of damages (including appropriate interest) to compensate the Claimant for the loss it has suffered as a result of Spain's breach of the ECT as calculated by Brattle, in the amount of EUR 106,200,000;
(b) an award of costs of the arbitration, on a full indemnity basis;
(c) an award of interest on sums awarded up to the date of payment; and
(d) such other relief as the Tribunal determines to be appropriate.[1]

30. In its Response, the Claimant confirmed that it seeks the relief as set out in its Quantum Submission.[2]

[1] Cl. Quantum Submission, ¶ 64.
[2] Cl. Response, ¶ 62.

31. The Respondent's Quantum Submission did not contain prayers for relief. In answer to a question from the Arbitral Tribunal, the Respondent states that 'Respondent's main prayer for relief regarding compensation is that Claimant is not awarded any damages at all.'[3] And '[s]ubsidiarily, in the event that the Tribunal decided to award damages to Claimant, which the Respondent with all due respect insists would be unjustified, Respondent's subsidiary prayer for relief is €41.6 million euros as calculated by BDO.'[4]

V. DAMAGES

A. INTRODUCTION AND GENERAL REMARKS

32. In the Decision, the Tribunal determined, by majority, that the Claw-Back Feature of the Disputed Measures implemented by Spain in and after 2013 breached the fair and equitable treatment standard enshrined in the first and second sentences of Article 10(1) of the ECT. In general, the Claw-Back Feature of the Disputed Measures is an aspect of those measures pursuant to which subsidies paid earlier at levels in excess of what otherwise would have been payable under the Disputed Measures are to be credited to subsidies that would be payable going forward. Mr. Garibaldi, the partially dissenting arbitrator, concurred in this result, on different grounds.[5] Accordingly, the Tribunal's ruling concerning the Claw-Back Feature of the Disputed Measures was unanimous.

33. In the Decision, the Tribunal directed that the Parties seek to reach agreement, within three months, on the monetary impact of the Claw-Back Feature of the Disputed Measures.[6]

34. The Tribunal notes that, while the Parties have been able to agree on certain points, there are also points of disagreement that remain. These points concern three main topics and sub-issues, as follows:

    1. The determination of the Revised July 2013 Net Asset Value ('**NAV**') or, more specifically, the extent to which the estimated cash-flows and implicit capital

[3] Resp. Response, ¶ 26.

[4] Resp. Response, ¶ 36, with reference to the Joint Expert Report of 10 December 2021, Joint Table 2.

[5] See Mr. Garibaldi's Partial Dissent, ¶ 1.

[6] See Decision, ¶¶ 468, 469.

recovery in the July 2013 NAV of a standard installation must be amended to eliminate the effects of the Claw-Back Feature of the Disputed Measures. This topic consists of four sub-issues which are the subject of disagreement between the Parties, namely:

(a) the scope of the claw-back effect;
(b) the assumed target return for the construction of the Revised Past Cash-Flows;
(c) whether the Revised Past Cash-Flows should be constant or should assume an indexation over time; and
(d) the impact of regulatory life on the calculation of the notional capital recovery prior to July 2013.

2. The appropriate methodology to determine the present value of the series of forecast cash flows for the Claimant's plants with and without the Claw-Back Feature of the Disputed Measures. This disagreement comprises two sub-issues, namely:

(a) the appropriate valuation date; and
(b) the applicable discounting assumptions.

3. The appropriate length of the Spanish Government bond to calculate pre- and post-award interest on the historical cash-flow impact of the Claw-Back Feature of the Disputed Measures on the Claimant's plants.[7]

The Tribunal will discuss and resolve these points of disagreement in the following sections of this Award. Before doing so, however, two preliminary issues must be addressed.

35. The first preliminary issue is whether the Claimant is entitled to any damages at all. The Claimant calculates damages on the basis of the discounted cash-flow method ('**DCF**'). The Respondent asserts that the Claimant is not entitled to any compensation at all, on the

[7] Joint Memorandum, ¶ 15.

ground that it has suffered no damage.[8] The Respondent submits, referring to paras. 332, 333, 356 and 357 of the Decision, that (i) the Claimant's only legitimate expectation was that its plants would obtain a reasonable return and (ii) the Claimant's plants did obtain a reasonable return.[9] More particularly, the Respondent argues that the claw-back effect:

> […] means that in order to ensure that the wind farms would receive a reasonable return though [sic] their useful life, as they had already perceived higher subsidies in the past they would consequently receive lower subsidies in the future. In other words, the wind farms received higher subsidies sooner and lower subsidies latter [sic] during their usef [sic] life to, ultimately, obtain the reasonable return that Spain had promised every plant would receive in their useful life.[10]

36. The Tribunal disagrees. While the Tribunal found, by majority, that the Claimant's legitimate expectation to a reasonable return has not been violated,[11] it also found, unanimously, that the Claw-Back Feature of the Disputed Measures constitutes a breach of Article 10(1), first and second sentences, of the ECT.[12] The Tribunal also explicitly stated that it '[…] does not take any position on the exact amount of the reasonable return.'[13]

37. More generally, the Tribunal notes that, following its above-mentioned determination that the Claw-Back Feature of the Disputed Measures breached the ECT, the Tribunal stated, with regard to the effect of this Feature, that '[…] the question is how to value that amount.'[14] The Tribunal further observed that it had not been able to quantify that amount and that the different results obtained by the Parties' experts were a result of the different calculation methods applied, and then it invited the Parties to reach agreement on the impact of the Claw-Back Feature of the Disputed Measures.[15] If the Tribunal had shared the Respondent's position that the Claimant was not entitled to damages at all because it had received reasonable returns on its investment, the Tribunal could have said so, and gone on to issue a final award resolving the issue of damages and ending the case. In other

[8] Resp. Response, ¶ 26.
[9] *Ibid.*, ¶¶ 28, 29.
[10] *Ibid*., ¶ 30.
[11] Decision, ¶ 369.
[12] *Ibid.*, ¶ 355.
[13] *Ibid.*, ¶ 366.
[14] *Ibid.*, ¶ 459.
[15] *Ibid.*, ¶ 460.

words, there would have been no need for the Tribunal to direct the Parties to reach agreement on the amount payable as damages if the Tribunal had concluded, as the Respondent would have it, that the Respondent's breach of the ECT did not cause the Claimant any damage at all. Given the Tribunal's ruling in its Decision, it is apparent that it considered the issue of the quantification of damages to be outstanding.

38. The second preliminary issue to be addressed is the applicable standard of compensation. Although the ECT sets out the standard of compensation to an investor in case of lawful expropriation, it does not address the standard of compensation in cases of any (unlawful) violation of the substantive standards of protection, such as the FET standard in Article 10(1). Article 26(6) of the ECT prescribes that a tribunal shall decide the issues in dispute in accordance with the Treaty and applicable rules and principles of international law. Consequently, under the principles of international law set out in the *Chorzów Factory* case, the Claimant is entitled to full reparation, *i.e.*, a reparation that:

> […] as far as possible, wipe[s] out all the consequences of the illegal act and reestablish the situation 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 would serve to determine the amount of compensation due for an act contrary to international law.[16]

39. Applied to the present circumstances, this principle means that, in accordance with the Decision, the Claimant must be put financially in the position it would have been in but for the effects of the Claw-Back Feature of the Disputed Measures. It does not mean that the Claimant should be compensated as if the Disputed Measures as a whole did not exist. The Parties and their respective experts do not appear to be in disagreement about these points.

[16] **Exhibit CL-0054**, *Case Concerning the Factory at Chorzów* (Permanent Court of International Justice, Judgment No. 13), Claim for Indemnity – Merits, 13 September 1928, p. 47. This standard has been applied to the compensation owed by a state to an investor for breach of a treaty obligation, in the absence of a different standard imposed by the treaty. See, *e.g.*, **Exhibit CL-0064**, *Quiborax S.A. and others v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015, ¶¶ 370-337; **Exhibit CL-0123**, *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. The Republic of Indonesia* (ICSID Case No. ARB/81/1), Award in Resubmitted Proceeding, 31 May 1990, ¶¶ 183-186; **Exhibit CL-0049**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011, ¶¶ 704, 705.

Rather, their disagreement relates to the precise application of the international law principle of full reparation, a matter to be discussed in the following sections.

B. THE CALCULATION OF THE REVISED JULY 2013 NAV

40. The Parties have confirmed their experts' agreement that the first step in the calculation of damages resulting from the Claw-Back Feature of the Disputed Measures is to estimate a Revised July 2013 NAV for the Wind Farms concerned.[17] The experts further agree that, in order to do so, an estimate of the Revised Past Cash Flows and the implicit notional capital recovery for each standard installation between its year of construction and July 2013 must be established.[18]

41. The experts disagree, however, on the assumptions necessary to estimate the Revised Past Cash-Flows and the notional capital recovery to derive the Revised July 2013 NAV.[19] They agree that the previous regulatory regimes calculated the incentives to renewable energy producers based on certain parameters – target returns, tariff indexation over time, and lifetime of regulatory support – which are different from those applied by the Disputed Measures. The experts further agree that these inputs affect the profitability of a plant and hence the investment income generated by capital investment.[20] Finally, they also agree that, in order to eliminate the effects of the Claw-Back Feature of the Disputed Measures, a portion of the past profits that the Respondent used to calculate the July 2013 NAV must be removed from the revised calculation. The experts do not agree, however, on the exact portion of the past profits to be removed.[21]

42. In order to compute the July 2013 NAV for each standard installation under the New Regulatory Regime, the June 2014 Ministerial Order started with an assumed amount of capital investment. From this assumed amount of capital investment, the June 2014 Ministerial Order made two deductions ('**First Deduction**' and '**Second Deduction**'), both

[17] Joint Memorandum, ¶ 17.
[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid*., ¶ 18.
[21] *Ibid.*, ¶ 19.

of which were based on the assumption that, prior to July 2013, wind projects were only entitled to earn 7.398% pre-tax over a 20-year regulatory lifetime.[22] The Claimant considers that both of these deductions are effects of the Claw-Back-Feature; the Respondent considers that only the First Deduction is a component of the Claw-Back Feature of the Disputed Measures.[23] As only the Second Deduction is in dispute between the Parties, the Tribunal will not further address the First Deduction.

(1) The Scope of the Claw-Back Effect

a. The Parties' Positions

(i) The Claimant's Position

43. The Claimant submits that the claw-back effect of the Disputed Measures is more extensive than would be captured by the simple comparison of past cash-flows with cash-flows under the Disputed Measures. In its view, eliminating the claw-back effect also requires revisiting each of the elements of Spain's calculations under the New Regulatory Regime as compared with the Original Regulatory Regime, and adjusting the resulting inputs to eliminate the effect of a retroactive application of the Disputed Measures.[24]

44. The Claimant asserts that the Second Deduction made by the June 2014 Ministerial Order is also part of the Claw-Back Feature of the Disputed Measures, because (i) it ignores the actual profile of remuneration and thus ignores the capital recovery provided for under the Original Regulatory Regime in the period prior to July 2013, and (ii) it retroactively imposes instead a new and alien profile of remuneration and notional capital recovery consistent with the New Regulatory Regime. Spain, the Claimant contends, set FITs under the Original Regulatory Regime in the period prior to July 2013 assuming higher returns than 7.398% pre-tax, by applying different forms of indexation over time, and by recognising a longer period of financial support.[25]

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[22] *Ibid*., ¶ 20.

[23] *Ibid*.

[24] Cl. Quantum Submission, ¶ 9.

[25] Joint Memorandum, ¶ 27, with reference to ¶ 36 thereof.

45. The Claimant contends further that, by assuming past remuneration based on a 7.398% pre-tax return, a constant annual profile, and a reduced 20-year period of financial support, the June 2014 Ministerial Order artificially increased the notional capital recovery achieved prior to July 2013. This had the effect of clawing back prior earnings and reducing the July 2013 NAV.[26] Therefore, to eliminate the Claw-Back Feature of the Disputed Measures, and in addition to the First Deduction, a Second Deduction must be made based on the actual returns, remuneration indexation, and regulatory lifetime which were in force under the Original Regulatory Regime.[27]

46. The Claimant also submits, referring to paragraph 355 of the Decision[28], that both of the deductions made by the June 2014 Ministerial Order inherently count the amounts previously earned against the subsidies going forward. While the First Deduction concerns the cash-flow generation of different plants and plant vintages under the Original Regulatory Regime as one element of profitability, the Second Deduction concerns another aspect, namely the assumed extent of capital recovery and investment return provided for under that regulatory regime.[29] The Claimant submits that, in order to eliminate the impact of the Claw-Back Feature of the Disputed Measures, both elements must be addressed, namely by eliminating the First Deduction and recalculating the Second Deduction to eliminate its contribution to the negative effect of the Claw-Back Feature of the Disputed Measures.[30]

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[26] *Ibid*., ¶ 27.

[27] *Ibid*., ¶ 28.

[28] 'The Tribunal takes note of this analysis and considers that the subsidies paid in earlier years were duly paid and duly taken into account in the operation of the SPCs, in their financing and (presumably) their taxation arrangements. To claw back those profits on the basis of a subsequent judgment that they were "excessive" would seem inconsistent with the principle of stability in Article 10(1) of the ECT and has not been shown to have been necessary to resolve the tariff deficit problem, which would have been solved in any event by the Disputed Measures without much further delay and without the element of claw-back. It may have been reasonable to take into account, in calculating subsidies going forward, the 7.398% pre-tax that the Plants were deemed to be entitled to under the Disputed Measures. To count against them the amounts previously earned would be to penalise the Plants for their successful operation during those years. For these reasons, the Tribunal holds that, insofar as the claw-back operation is concerned, Spain breached Article 10(1) of the ECT.' Decision, ¶ 355 (footnotes omitted).

[29] Joint Memorandum, ¶ 31.

[30] *Ibid*.

47. In reply to the Respondent's arguments that the Claimant's proposed approach contradicts the Tribunal's Decision, the Claimant submits that paragraph 467(c) of the Decision[31], which summarises the Tribunal's finding of breach, does not provide an exhaustive list, or any list at all, of the factors relevant to reversing the effects of the Claw-Back Feature of the Disputed Measures.[32] The Claimant also submits that the Respondent's position ignores the purpose behind the Tribunal's finding on liability in respect of the Claw-Back Feature of the Disputed Measures, as the Tribunal was clear that the Respondent's breach goes to '**the effects** of the "retroactive reduction in the allowed return"' for which the Claimant is entitled to damages.[33]

48. Finally, the Claimant submits in this regard that the Second Deduction inherently counts future remuneration against the amounts previously earned and reduces the Claimant's allowed return by clawing back profits as it concerns the assumed profile of notional capital recovery and investment returns estimated for the Wind Farms in the period before July 2013.[34] The aim of the Claimant's calculations, it argues, is to estimate a notional amount of capital recovery free from the retroactive effects of the New Regulatory Regime, which is separate from, and does not contradict, the Tribunal's conclusion as to the reasonableness of the application of a 7.398% pre-tax return after the introduction of the Disputed Measures.[35]

(ii) The Respondent's Position

49. The Respondent asserts that (i) the NAV calculation is a financial concept defined in the New Regulatory Regime which depends upon a regulatory period and a given target return that changes in each regulatory period, and (ii) the Tribunal did not find that either the

[31] 'For these reasons, the Tribunal finds, by majority: […] (c) that the retro-active claw back by Spain, in and after 2013, of subsidies earlier paid at levels in excess of the amounts that would have been payable under the Disputed Measures, had they been in force in previous years, did breach the obligation of stability under Article 10(1), first and second sentences, of the ECT.' Decision, ¶ 467(c).

[32] Cl. Quantum Submission, ¶ 24(a).

[33] *Ibid.*, ¶ 24(b), with reference to the Decision, ¶ 459 (emphasis in original).

[34] *Ibid*., ¶ 24(c).

[35] *Ibid*.

mechanism to calculate the NAV, or the target return, or the regulatory period defined in the New Regulatory Regime breached the ECT.[36]

50. The Respondent contends further that the Tribunal found:

> […] that the portion of the past profits that must be removed in order to eliminate the Claw-Back Feature of the Disputed Measures is equal to the excess of what an installation would have received under the New Regulatory Regime in previous years. Had the Disputed Measures been in force in previous years, an installation would have been entitled to receive a constant annuity to earn a 7.398% pre-tax return over a 20-year regulatory life. These are the parameters that must be considered to follow the Tribunal's instructions.[37]

Consequently, calculating the Revised July 2013 NAV on the basis of a different target rate of return (*i.e.,* 7% post-tax) or different regulatory period would contradict the Tribunal's decision.[38]

51. In response to the Claimant's view that the tariff evolution indexation, the target return, and the regulatory lifetime of the Original Regulatory Regime are an inherent part of the Claw-Back Feature of the Disputed Measures, *i.e.,* the Second Deduction, the Respondent submits that neither the Tribunal nor the Respondent's experts, BDO, have identified those inputs (target return, CPI indexation, and lifetime) to be a claw-back that requires correction.[39] The Respondent disagrees with the Claimant's interpretation of para. 355 and contends that the Tribunal found inconsistent with the ECT to claw back the subsidies paid in earlier years. However, this paragraph of the Decision, the Respondent submits, does not support the Claimant's view of the inherent retroactivity features of the Disputed Measures.[40] The Respondent also asserts that, because the Claimant's approach concerning the retroactivity effect of the capital recovery profile was not discussed during the arbitration, the Tribunal could not have reached any conclusions in this regard.[41]

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[36] Joint Memorandum, ¶ 38; Resp. Quantum Submission, ¶ 13.

[37] Joint Memorandum, ¶ 40.

[38] Resp. Quantum Submission, ¶ 12.

[39] Joint Memorandum, ¶ 42.

[40] *Ibid*., ¶ 44.

[41] *Ibid*., ¶ 45; Resp. Quantum Submission, ¶ 12.

52. Further, the Respondent submits that the Claimant's view is unfounded and lacks objective evidence.[42] The Respondent argues that paragraph 467 of the Decision indicates how to calculate the Revised July 2013 NAV, *i.e.*, that the Revised Past Cash-Flows should be aligned to what would have been payable under the Disputed Measures, had they been in force prior to July 2013.[43]

b. The Tribunal's Analysis

53. The Tribunal has carefully reviewed the Parties' submissions on the issue of the Second Deduction. Having done so, it has arrived at the conclusion that, in order to calculate the damage resulting from the Claw-Back Feature of the Disputed Measures, a task anticipated in the Tribunal's Decision, the impact of both deductions originally made by the Respondent must be considered. The damages to be calculated at this stage of the proceedings are a function of the breach which the Tribunal established in paragraph 459 of the Decision, in which it held that '[…] the breach of Article 10(1), first and second sentences, of the ECT is limited to the effects of the "retroactive reduction in the allowed return" (the "Claw-Back Feature of the Disputed Measures"), and the question is how to value that amount.'[44]

54. The Respondent and its expert rely heavily on paragraph 467(c) of the Decision, in which the Tribunal stated 'that the retro-active claw back by Spain, in and after 2013, of subsidies earlier paid at levels in excess of the amounts that would have been payable under the Disputed Measures, had they been in force in previous years, did breach the obligation of stability under Article 10(1), first and second sentences, of the ECT.'[45] On the basis of this statement, the Respondent and its expert argue, in effect, that the Decision requires that the monetary impact of the Claw-Back Feature of the Disputed Measures be calculated within the general framework of the Disputed Measures, retroactively applied. The Tribunal

[42] Joint Memorandum, ¶ 46.
[43] *Ibid.*, ¶ 48.
[44] Decision, ¶ 459 (footnote omitted).
[45] *Ibid.*, ¶ 467(c).

disagrees. The Respondent's argument has no basis in the paragraph on which it relies, or elsewhere in the Decision.

55. As a first approximation, it is to be noted that paragraph 467(c) of the Decision is part of a set of final conclusions. The Tribunal's analysis of the Claw-Back Feature of the Disputed Measures and its conclusion that it breached Article 10(1) of the ECT are set out in paragraphs 346 to 355 of the Decision, with its holding restated in paragraph 459. Thus, the conclusory statement on which the Respondent relies was intended to summarize the conclusions reached in the earlier analysis, especially in paragraphs 355 and 459.

56. Second, in terms, the conclusory statement in paragraph 467(c) is consistent with the analysis and conclusions of paragraphs 346 to 355; it does not modify or expand those conclusions – particularly in the absence of any elaboration, reasoning, or support for any such modification or expansion – nor was it intended to do so. It merely restates the conclusion that the Disputed Measures breached the principle of stability of Article 10(1) of the ECT by retroactively clawing back past subsidies in excess of those that the Disputed Measures retroactively consider adequate. Having thus decided that the retroactive effect of one aspect of the Disputed Measures (the Claw-Back Feature) breached the principle of stability of Article 10(1) of the ECT, it would have been inconsistent for the Decision to require that the effects of that Claw-Back Feature be calculated on the basis of the retroactive application of the Disputed Measures as a whole.

57. Third, the Decision did not provide directions on the method for calculating the *quantum* of compensation owed to the Claimant or on specific aspects or parameters to take into account in that calculation. The Decision merely states in this regard that the evaluation of the impact of the Claw-Back Feature of the Disputed Measures shall take 'in due account the reasoning and findings in the present Decision.'[46] In fact, the Tribunal specifically stated that, despite its best efforts, it had not been able to quantify the amount of the retroactive reduction attributable to the Claw-Back Feature of the Disputed Measures.[47] If the Tribunal had wished to provide the Parties with a general methodology or a set of

[46] *Ibid*., ¶ 468.

[47] *Ibid*., ¶ 460.

criteria to be taken into account in the calculation of *quantum*, it could have done so. It did not.

58. Nor is the Tribunal persuaded by the Respondent's argument that the retroactivity effect of the capital recovery profile cannot be argued at this stage of the case because it was not discussed at an earlier stage. Notably, the submissions of the Parties during the previous phase of these proceedings focused upon the Disputed Measures as a whole, rather than individual parts of those Measures, such as the particular components of the Claw-Back Feature of the Disputed Measures. As a result, no discussion took place about how to quantify the impact of the Claw-Back Feature of the Disputed Measures or what factors should be taken into account for such purpose. The absence of such a discussion cannot be used as a basis for arguing that the Tribunal considered and rejected the position that the Claimant is now espousing concerning the Second Deduction. Those issues were not considered simply because there was no need to address them at that time.

59. In addition to the points of principle discussed above, the Respondent did not submit any specific arguments as to why the approach suggested by the Claimant regarding the Second Deduction would be wrong as a matter of methodology. Indeed, the Respondent does not appear to dispute that it retroactively applied a different remuneration profile to its calculations. The Tribunal is persuaded that the Second Deduction forms part of the Claw-Back Feature of the Disputed Measures, because it retroactively imposes a new remuneration profile based on the New Regulatory Regime. Therefore, in order to eliminate all the effects of the Claw-Back Feature of the Disputed Measures, it is not sufficient simply to compare the past cash-flows with the cash-flows under the Disputed Measures. Rather, it is necessary to revisit the elements of the calculations under both regulatory regimes and to adjust the resulting inputs to eliminate all effects of the Claw-Back Feature of the Disputed Measures. The Tribunal therefore turns to address, in turn, the factors underlying the Second Deduction, *i.e.*, the target return, the tariff indexation, and the regulatory life.

(2) The Assumed Target Return for the Construction of the Revised Past Cash-Flows

a. The Parties' Positions

(i) The Claimant's Position

60. The Claimant states that the Respondent calculated the pre-July 2013 notional capital recovery without reflecting the actual returns targeted by Spain under the Original Regulatory Regime.[48] While initially Spain targeted a return of at least 7% after taxes, the New Regulatory Regime targets a pre-tax return of 7.398%, the equivalent of 5.5% after taxes.[49] The Claimant argues that the calculation of the July 2013 NAV in the June 2014 Ministerial Order ignored the actual returns targeted by Spain under the Original Regulatory Regime and instead assumed that wind farms should have earned past remuneration of 7.398% pre-tax. This led to the two deductions previously described.[50]

61. Moreover, the Claimant submits that, by retroactively assuming remuneration in the past based on a 7.398% pre-tax return as under the New Regulatory Regime, the June 2014 Ministerial Order effectively assumes a capital recovery deduction equal to 32.66, while the capital recovery implicit in the remuneration applicable at the time was only 30.18. This results in a claw-back of 2.48 of historical earnings (32.66 minus 30.18), with the effect of reducing the July 2013 NAV and, accordingly, the resulting investment incentives per MW.[51] The Claimant argues that the calculation of notional capital recovery prior to July 2013 should reflect the actual return targeted by Spain under the Original Regulatory Regime, rather than a retroactive application of the target 7.398% pre-tax return under the New Regulatory Regime.[52]

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[48] Cl. Quantum Submission, ¶ 21(a).
[49] Joint Memorandum, ¶¶ 49, 50.
[50] *Ibid*., ¶ 50.
[51] *Ibid*., ¶ 52.
[52] *Ibid*., ¶ 53.

(ii) The Respondent's Position

62. The Respondent submits that 'the Tribunal's instructions indicate that the Experts should ignore the profits received by the installation under the previous regimes "[…] not to penalise the Plants for their successful operation during those years".'[53] Accordingly, the Respondent contends that, by ignoring the profits that have been effectively received by the Plants and estimating Revised Past Cash-Flows using a 7.398% pre-tax return, as indicated in the New Regulatory Regime, the Tribunal's instructions will be applied and the Plants will not be penalised by their successful past performance.[54] The Respondent argues that modifying the rate of return to calculate the Revised July 2013 NAV is inconsistent with the Tribunal's Decision, as the Tribunal did not find the rate of return of the New Regulatory Regime to breach the ECT or to be retroactive.[55] Specifically, the Respondent points out that the Tribunal did not conclude that the 7% post-tax target return was guaranteed in the previous regulatory regimes.[56]

b. The Tribunal's Analysis

63. Having considered the Parties' positions, the Tribunal concludes that an after-tax return of 7% should be applied when calculating the impact of the Claw-Back Feature of the Disputed Measures. In doing so, the Tribunal does not share the view that modifying the target rate of return to calculate the Revised July 2013 NAV would be inconsistent with its Decision. It is correct that the Tribunal did not specifically find the rate of return of the New Regulatory Regime to breach the ECT or to be retroactive. Nevertheless, the Tribunal did find that the Claw-Back Feature of the Disputed Measures breached the Respondent's obligations under the ECT and the Claimant was entitled to compensation for the impact of this feature. In this context, it did not rule upon the issue of which target return should be assumed in the calculation of the Revised July 2013 NAV.

[53] Joint Memorandum, ¶ 55, with reference to Decision, ¶ 355 (emphasis omitted).
[54] *Ibid*., ¶ 56.
[55] *Ibid*.
[56] *Ibid*., ¶ 58.

64. In fact, in arriving at the conclusion that the Claw-Back Feature of the Disputed Measures breached Article 10(1) of the ECT, the Tribunal stated in paragraph 355 of the Decision that:

> [i]t **may** have been reasonable to take into account, **in calculating subsidies going forward**, the 7.398% pre-tax that the Plants were deemed to be entitled to under the Disputed Measures. To count against them the amounts previously earned would be to penalise the Plants for their successful operation during those years.[57]

By using the word 'may', the Tribunal indicated that it was not expressing a definite view on the reasonableness of using the 7.398% pre-tax target to calculate subsidies going forward. Indeed, the Tribunal explicitly refrained from taking any position on the exact amount of the reasonable return.[58] More important, the Tribunal was referring (without taking a definitive position) to the reasonableness of applying the 7.398% pre-tax target to subsidies *going forward*, not to the issue of applying that target to past subsidies for the purpose of calculating the amount of prior earnings to be clawed back. On that point, the Tribunal made it clear that '[t]o count against [the Plants] the amounts previously earned would be to penalise the Plants for their successful operation during those years.'[59] The Tribunal perceives no basis for the Respondent's argument that this statement requires ignoring the profits received by the Plants under the previous regimes. It is precisely by ignoring the amounts previously earned that the Plants are penalised for their successful operations before the Disputed Measures. Therefore, there is nothing in the Decision that would preclude taking into account the prior target rate of return in calculating the effects of the Claw-Back Feature of the Disputed Measures.[60]

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[57] Decision, ¶ 355 (emphasis added).

[58] *Ibid*., ¶ 366.

[59] *Ibid*., ¶ 355.

[60] As pointed out above, that the Tribunal left this point open is further reflected in the fact that when directing the Parties to seek agreement, respectively revert to the Tribunal, regarding the amount payable to Claimant, the Tribunal did not set out specific parameters that needed be considered when quantifying the damages payable to Claimant. (See ¶ 53).

(3) Constant Annuities or Tarif Indexation of the Revised Past Cash-Flows

a. The Parties' Positions

(i) The Claimant's Position

65. The Claimant states that under the Original Regulatory Regime, Spain updated the FITs annually. In contrast, the June 2014 Ministerial Order casts back in time the remuneration profile under the New Regulatory Regime, involving a constant annual remuneration without any indexation.[61] The Claimant argues that the failure to account for the historical indexation of the FITs under the Original Regulatory Regime contributes to the Claw-Back Feature of the Disputed Measures, in much the same way as the June 2014 Ministerial Order's assumption of remuneration according to a 7.398% pre-tax return in the pre-July 2013 period.[62]

66. The Claimant submits further that by retroactively imposing constant annual remuneration in the past, the June 2014 Ministerial Order effectively assumes a capital recovery deduction equal to 32.66, when the capital recovery implicit in the indexed remuneration that actually applied at the time was only 23.67. As a result, an additional 9.20 of historical earnings are being clawed back, thereby reducing the July 2013 NAV and in turn the resulting investment incentives per MW.[63]

67. The Claimant also argues that, in respect of past returns, the calculation of historical capital recovery should reflect the actual indexation applied by Spain under the Original Regulatory Regime as well as the returns targeted by Spain, and not retroactively assume that past remuneration should have reflected the constant annual remuneration provided under the New Regulatory Regime.[64] Only by tracking the actual indexation it is possible

[61] Joint Memorandum, ¶¶ 59, 60.
[62] *Ibid*., ¶ 60.
[63] *Ibid.*, ¶ 62.
[64] *Ibid*., ¶ 63.

to eliminate the consequences of the Claw-Back Feature of the Disputed Measures in their entirety.[65]

68. In response to arguments raised by the Respondent, the Claimant states that it agrees with the Respondent that the actual extent of historical capital recovery did not depend solely on the target return and indexation levels of the FITs in force, but also on other factors, such as for example pool prices.[66] In order to eliminate installation-specific or group-specific aspects of the Claw-Back Feature of the Disputed Measures or pool price effect, the calculation should consider only the FITs in place and the implicit target returns, indexation, and regulatory lifetime. The Claimant submits that the aim is to calculate a notional capital recovery based on the inherent design of the FITs in force, and not based on the actual capital recovery of any particular types of installation.[67]

69. The Claimant contends that, in order to remove all the consequences of the Claw-Back Feature of the Disputed Measures, the calculation of historical capital recovery should ignore the actual year-to-year fluctuations in production, pool prices, and other factors underlying the June 2014 Ministerial Order's cash-flow estimates for standard installations.[68] Rather, the calculation must focus on the design of the remuneration system itself, and assume the same level of factors such as tariff indexation, historical production, and pool price realisations for all standard installations.[69]

(ii) The Respondent's Position

70. The Respondent disagrees with the Claimant's view and submits that modifying the constant annuity to determine the Revised Past Cash-Flows and thus the Revised July 2013 NAV is not consistent with the Tribunal's view of the retroactivity. It argues that pursuant to the Tribunal's Decision, 'retroactive' means 'profits in excess of the amounts that would have been payable under the Disputed Measures, had they been in force in previous

[65] *Ibid*., ¶ 64.
[66] *Ibid*., ¶ 67.
[67] *Ibid*., ¶ 70.
[68] *Ibid*., ¶ 73.
[69] *Ibid*., ¶ 74.

years.'[70] Therefore, removing a different portion of the past profits, so the Respondent asserts, would be inconsistent with the Tribunal's instructions.[71]

71. The Respondent further submits that the Claimant's tariff indexation theory ignores that the cash-flows (annuities) depend on many other elements besides tariffs and, while it recognises that, the Claimant only looks at the indexation of the incentive and applies this indexation to the past profit. The Respondent argues that it is not correct to look only at tariffs to estimate the capital recovery profile.[72]

72. In summary, the Respondent argues that the Claimant's tariff indexation does not accurately represent the capital recovery that the standard installations would have had and it is inconsistent with the Tribunal's view of retroactivity.[73]

b. The Tribunal's Analysis

73. Having considered the Parties' positions on this point, the Tribunal is of the opinion that, in order to eliminate the effect of the Claw-Back Feature of the Disputed Measures, it is necessary to modify the constant annuity and to account for the historical indexation of the FITs under the Original Regulatory Regime. While the Tribunal in its Decision directed the Parties to seek agreement on the impact of the Claw-Back Feature of the Disputed Measures, it did not take a position on the parameters necessary to determine this impact.

74. The Tribunal is also persuaded that the failure to account for the historical indexation of the FITs under the Original Regulatory Regime contributes to the effects of the Claw-Back Feature of the Disputed Measures. The Claimant has shown that, by retroactively imposing constant annual remuneration in the past, an additional 9.20 of historical earnings are being clawed back, thereby reducing the July 2013 NAV. The Respondent has not shown this calculation to be inaccurate. Consequently, the calculation of historical capital recovery

[70] *Ibid*., ¶ 81 (emphasis omitted).
[71] *Ibid*.
[72] *Ibid*., ¶ 82.
[73] *Ibid*., ¶ 84.

should reflect the actual indexation applied by the Respondent under the Original Regulatory Regime.

(4) The Impact of Regulatory Life on the Calculation of the Notional Capital Recovery Prior to July 2013

a. The Parties' Positions

(i) The Claimant's Position

75. The Claimant states that, regarding the calculation of the Revised July 2013 NAV, the Parties' experts disagree on two main issues: (i) whether the regulatory lifetime under the Original Regulatory Regime or the New Regulatory Regime should be applied and (ii) whether, assuming that the regulatory lifetime under the Original Regulatory Regime should be applied, it should be 25 years.[74]

76. The Claimant argues that the issue should be easily determined, because the Tribunal already recognised that the Original Regulatory Regime extended beyond 20 years by noting 'that "[e]arlier regulations had been clear that **the incentives regime would last for longer than 20 years**, though possibly at a reduced level"' and by confirming that it considered a 25-year life to be adequate.[75]

77. In reply to the Respondent's distinction between a 25-year technical useful lifetime and a 20-year regulatory lifetime, the Claimant agrees that the regulatory lifetimes can differ from the technical useful lifetimes. Nevertheless, the Claimant disagrees with the Respondent's position that this change has only limited impact on the calculation of damages.[76] The Claimant contends that the retroactive application of an assumed 20-year lifetime to the calculation of pre-July 2013 capital recovery forms part of the Claw-Back Feature, just as Spain's retroactive application of a 7.398% return and no indexation assumptions to the pre-July 2013 period.[77] Therefore, the proper calculation, the Claimant

[74] Cl. Quantum Submission, ¶ 47.

[75] *Ibid.*, ¶ 49, with reference to the Decision, ¶¶ 343, 344 (emphasis in original).

[76] Joint Memorandum, ¶ 87.

[77] *Ibid*.

contends, must estimate the notional capital before July 2013 based on the remuneration framework in place at the time, as well as the target returns, indexation, and lifetimes.[78]

78. The Claimant also submits that an expectation of support beyond 20 years, which it submits was the case under the Original Regulatory Regime, impacts the notional recovery which should reflect the actual period of tariff support provided under the Original Regulatory Regime, expected to extend past the 20th year and out to the 25th year. Otherwise, the calculation of the Revised July 2013 NAV would fail to respect the tariff design in force prior to July 2013, and by so doing it would fail to eliminate all aspects of the Claw-Back Feature of the Disputed Measures.[79]

79. The Claimant points out in this regard that the additional years of remuneration also impact the timing and extent of capital recovery in the pre-July 2013 period. It explains that extending the expected term of tariff support from 20 to 25 years slows down the rate of capital recovery in the first 10 years, since the relevant calculations spread out the capital recovery all the way until 2028 rather than 2023. Ignoring the five additional years expected under the Original Regulatory Regime before July 2013 and retroactively assuming the reduced 20-year term under the New Regulatory Regime, as proposed by the Respondent, results in the claw back of 15.08. [80]

80. In any event, the Claimant contends, any distinction between the regulatory lifetime and technical useful lifetime is immaterial in the context of the Tribunal's finding that the regulatory incentives program would have applied for more than 20 years, together with the finding that the Wind Farms had a 25-year lifetime, which means that the Tribunal found that the regulatory lifetime of the Wind Farms is 25 years.[81]

(ii) The Respondent's Position

81. The Respondent submits that the Claimant's view on this issue is inconsistent with the Tribunal's findings in the Decision. More specifically, the Respondent submits that

[78] *Ibid*.
[79] *Ibid*., ¶ 89.
[80] *Ibid.*, ¶ 93.
[81] Cl. Quantum Submission, ¶ 54.

applying a 25-year period to calculate the Revised July 2013 NAV is contrary to the New Regulatory Regime, which remunerates in accordance with a rate of return over a 20-year period.[82]

82. The Respondent also contests that the Original Regulatory Regime designed tariffs for wind plants assuming a 25-year lifetime and asserts that the Claimant's submission in this regard lacks any evidence.[83]

83. Further, the Respondent states that while it agrees that the Original Regulatory Regime provided for the possibility to continue receiving incentives after 20 years, it disagrees that this Regime accounted for a 25-year lifetime. Similarly, the existence of this possibility is not evidence to (i) calculate the Revised July 2013 NAV using a 25-year period or (ii) that the Original Regulatory Regime was designed using a 25-year lifetime for wind installations.[84]

84. The Respondent also points out that the Parties' experts agree that the regulatory lifetime can differ from the technical useful lifetime. Referring to other decisions on which the Tribunal has relied, the Respondent argues that in those decisions, the tribunals reached their conclusions on the technical useful life of the plants, not the regulatory useful life. Consequently, the Respondent understands the Tribunal to have determined that the Wind Farms' operational lives will be 25 years.[85]

85. In summary, the Respondent submits that (i) the July 2013 NAV calculation should be assessed with respect to the 20-year regulatory lifetime, (ii) incentives should be forecasted for 20 years (and the Tribunal confirmed they did not violate the ECT), and (iii) the technical useful lifetime of the Wind Farms is 25 years, so the cashflows must be forecasted for 25 years.[86]

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[82] Joint Memorandum, ¶ 96.

[83] *Ibid.*, ¶ 98, with reference to **Exhibit BRR-5**, IDAE, Renewable Energy Plan in Spain 2005-2010, August 2005, pp. 283, 284.

[84] *Ibid*., ¶ 99.

[85] *Ibid*., ¶ 100.

[86] *Ibid*., ¶ 102.

b. The Tribunal's Analysis

86. The Arbitral Tribunal recalls that it found, in the Decision, that '[b]ased on the above, the Tribunal considers a 25-year life to be adequate for the wind plants.'[87] The Tribunal thus confirmed that a regulatory lifetime of 25 years shall be applied to the calculations of the notional capital recovery.

87. The Tribunal disagrees with the Respondent that the Tribunal's finding in this regard concerned the operational – rather than regulatory – life of the plants. The Tribunal arrived at its conclusion in the context of a discussion of the issue of the regulatory lifetime of a plant.[88] At the same time, it is apparent that the term 'useful life' has been used to determine how long the incentives regime should be applied to the plants at issue; in other words, this term has been used in the same manner as the term 'regulatory life'. This is illustrated for example by the statements of Spain's expert Mr. Mac Gregor, who explained that:

> […] the financial models produced by the Claimant before undertaking the investments assumed a 20-year life and that Spain's Renewable Energy plan looked at a 20-year useful life for wind farms, without there being any support for the 30-year life argued by the Claimant.[89]

88. Consequently, the Tribunal stated that it '[…] is inclined to disagree with the Respondent. Earlier regulations had been clear that the incentives regime would last for longer than 20 years, though possibly at a reduced level. There is a case for 25 years as a reasonable target.'[90]

89. Therefore, the Tribunal confirms that a regulatory life of 25 years of the plants shall be applied to the calculation of the Revised July 2013 NAV.

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[87] Decision, ¶ 344.

[88] See, *e.g.*, Decision, ¶¶ 340, 341. 'Dr. Garcia: No, I wouldn't agree with that general statement. I would say that it was the regulatory life defined in the Renewable Energy Plans, not necessarily the useful life of the plant. There's a distinction between the regulatory life and the useful life.' (¶ 340) 'Spain explains that the New Regime's remuneration system is complemented by the regulatory lifetime of a standard facility. The end of the regulatory life sets the time at which a standard facility has reached the reasonable return set by the Regulator, i.e., when the standard facility has recovered its investment and operation costs through the subsidies received.' (¶ 341)

[89] Decision, ¶ 342 (footnote omitted).

[90] *Ibid.*, ¶ 343 (footnote omitted).

C. THE APPROPRIATE VALUATION ASSUMPTIONS

(1) The Appropriate Valuation Date

a. The Parties' Positions

(i) The Claimant's Position

90. The Claimant submits that the Tribunal should adopt a current valuation date of June 2021 ('**2021 Valuation Date**') to ensure that damage calculations are accurate and to provide the required full compensation to the Claimant for the losses suffered.[91]

91. The Claimant admits that, in preparing its previous expert reports, it adopted the historical valuation date of June 2014 as this was the most pertinent date at the time, but it submits that this is no longer the case, because the previous expert reports were finalised in 2016 and 2017, when the experts, the Parties and the Tribunal had no access to the data available today.[92] The Claimant argues in this regard that the scope of its expert's previous reports was limited to computing damages relating to its claims, and they did not require the computation of the revised investment incentives per MW which is the key element for calculating the Claimant's loss resulting from the Claw-Back Feature of the Disputed Measures. The Decision required, the Claimant contends, that the experts should consider an entirely different But-For Scenario and produce entirely new calculations.[93]

92. The Claimant submits that the Tribunal should adopt the current 2021 Valuation Date, as it is entitled to full compensation for the retroactive effect of the Claw-Back Feature of the Disputed Measures.[94] In support of its submission, and referring to jurisprudence on this issue, the Claimant asserts that '[i]nternational tribunals have found that "the full reparation standard requires that the damages resulting from the unlawful act be valued on the date of

[91] Cl. Quantum Submission, ¶ 25.

[92] *Ibid.*, ¶ 27.

[93] *Ibid*.

[94] *Ibid.*, ¶ 29, with reference to **Exhibit CL-0054**, *Case Concerning the Factory at Chorzów* (Permanent Court of International Justice, Judgment No. 13), Claim for Indemnity – Merits, 13 September 1928.

the award, using information available at that point in time".'[95] The Claimant asserts that adopting the date of the award – or its closest proxy – would permit the valuation to '"reflect [ ] reality as much as possible".'[96]

93. Further, the Claimant states that adopting the 2021 Valuation Date would also permit to incorporate seven years of available historical data, such as, for example, actual production and operating costs of the Claimant's facilities, which in turn would enhance the accuracy of the damages calculations.[97] More specifically, a 2021 Valuation Date would permit the Parties' experts to incorporate the income actually obtained and expected under the New Regulatory Regime, a crucial step in determining the impact of the Claw-Back Feature of the Disputed Measures.[98]

94. Consequently, the Claimant asserts that there is no legal or economic reason why the Tribunal should ignore the past seven years of data which would make it possible to calculate the damages on the basis of more reliable and less speculative information.[99]

95. The Claimant also argues that adopting a more up-to-date valuation date would eliminate the concerns that the Respondent and its expert BDO previously raised in these proceedings regarding the reliability of long-term forecasts. Adopting a 2021 Valuation Date, the Claimant submits, reduces the degree of speculation necessary for the damage calculations by reducing the need to estimate inputs, because it requires projections of future cash-flows over a shorter period, which amounts to shortening the horizon of the forecasts.[100]

96. At the same time, the Claimant submits that the application of the 2021 Valuation Date permits to account for further changes made to the New Regulatory Regime that affected the Claimant's investment and to reflect the actual evolution of the financial support

[95] *Ibid*., ¶ 30 (emphasis omitted), with reference to **Exhibit CL-0121**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Reconsideration and Award, 7 February 2017, ¶ 326, and several other arbitral decisions.

[96] *Ibid*.

[97] *Ibid*., ¶ 31.

[98] *Ibid*., with reference to Joint Memorandum, ¶ 107.

[99] *Ibid*., ¶ 33.

[100] *Ibid*., ¶ 34, with reference to Joint Memorandum, ¶ 107.

provided to the Wind Farms since 2014.[101] Indeed, in 2017 and 2020, the Respondent updated underlying regulatory parameters and the allowed rate of return, leading to amendments to the level of investment incentives per MW provided to standard installations. These changes were unforeseeable in June 2014.[102] The Claimant also asserts in this regard that incorporating the actual evolution of financial support requires the consistent adoption of an up-to-date valuation date for all aspects of the analysis; it would be inconsistent to incorporate the actual evolution of regulatory parameters while retaining the June 2014 expectations for other parameters, such as inflation, pool prices, and interest rates.[103]

97. Moreover, the Claimant asserts that the 2021 Valuation Date results in a more accurate and higher calculation of damages which is the only way to compensate the Claimant for its loss.[104] Finally, the Claimant points out that it maintains its investment which continues to be operated subject to the Disputed Measures, including the Claw-Back Feature of the Disputed Measures. Therefore, the Claimant contends, it is imperative that the valuation of the Claimant's loss take into account the *ex-post* data relating to the Claimant's continuing investment.[105]

(ii) The Respondent's Position

98. The Respondent states that throughout this arbitration, the Claimant relied upon June 2014 as valuation date. This was the date when the Respondent breached the ECT, as it was the date when the Respondent published the remuneration parameters for each standard installation, thereby completing the new regulatory framework applicable to their investment.[106] The Respondent objects to '[…] Claimant's last-minute change of position in relation to the valuation date' as '[…] an unjustified manouver [sic] to try to increase

[101] *Ibid*., ¶ 35, with reference to Joint Memorandum, ¶¶ 8, 10, 107, 111.
[102] Joint Memorandum, ¶ 111.
[103] *Ibid*., ¶ 112.
[104] Cl. Quantum Submission, ¶¶ 36, 37, with reference to Joint Memorandum, ¶¶ 107, 113 and arbitral jurisprudence.
[105] *Ibid*., ¶ 38, with reference to arbitral jurisprudence.
[106] Resp. Response, ¶ 2.

the damages claimed in this case.'[107] The 2021 Valuation Date, the Respondent states, bears no relation to any of the historical references.[108]

99. The Respondent also disagrees with any suggestion that the standard of full reparation can only be met if the Tribunal follows an actual June 2021 valuation date. It contends that the principle of full reparation stated in the *Chorzow Factory* case, codified in the ILC Articles on Responsibility of States for Internationally Wrongful Acts, particularly in Articles 31 and 36 thereof, does not justify an assumption that only an actual valuation date can properly comply with this principle or that an actual valuation date best captures the amount of alleged damages.[109]

100. In reference to Article 31 of the ILC Articles, the Respondent asserts in this regard that the Claimant should only be compensated for the loss caused by unlawful conduct. Therefore, any difference in value originated by issues not related to the unlawful conduct should not be awarded; any such problem would be avoided by applying a valuation date of June 2014.[110]

101. The Respondent states that the Claimant's memorials and expert reports filed before December 2021 relied upon a June 2014 valuation date when calculating and claiming alleged damages. Therefore, the Claimant's change to a June 2021 valuation date contradicts the Claimant's own conduct during the entire arbitral proceeding.[111] The Respondent contends also that it is irrelevant that the experts have made new calculations considering the but-for scenario decided by the Tribunal because the valuation does not depend on the applicable but-for scenario, as the date of the alleged breach is the same in the Claimant's primary and alternative claims.[112]

102. The Respondent also contests the Claimant's argument that a June 2021 valuation date should be used because it allegedly results in damage calculations that are more reliable

[107] *Ibid*., ¶ 4.
[108] Joint Memorandum, ¶ 118.
[109] Resp. Response, ¶ 7.
[110] *Ibid*., ¶¶ 8, 9.
[111] *Ibid*., ¶ 10.
[112] *Ibid*., ¶ 11; Joint Memorandum, ¶ 124.

and less speculative. The Respondent argues that the Claimant had the opportunity but chose not to incorporate historical data to their calculations during the arbitration and to use a current valuation date.[113] When the Claimant submitted its Quantum Rebuttal Report on 29 September 2017, it had contemporaneous information regarding the production of the Plants, pool prices, and macroeconomic parameters.[114]

103. The Respondent asserts that the cash-flows considered are very similar regardless of whether a 2014 or 2021 valuation date is being applied. Indeed, the main difference between both dates is the discount rate; a current valuation date means using a discount rate which is approximately 2% lower, resulting in a higher damages calculation.[115] The Respondent submits, however, that damages resulting from changes in the interest rates – resulting in higher damages – should not be awarded to the Claimant because those damages are not caused by the Disputed Measures. In other words, the Respondent argues that using a current valuation date artificially inflates damages as a result of circumstances not related to the Claw-Back Feature of the Disputed Measures, which should not give rise to compensation.[116]

104. In reference to certain jurisprudence, the Respondent submits further that arbitral tribunals have often considered that a valuation date set on the date of the breach reflects more accurately the impact that the measures concerned have had on the investment at issue.[117] Moreover, the Respondent refers to cases in which the tribunals considered that the date of valuation should be determined by applying the 'irreversible deprivation test' to cases of non-expropriatory breaches, such as the present case. The Respondent contends that '[i]n the renewable cases against Spain, the date of the "most serious damage" and hence the valuation date under said "irreversible deprivation test" has been found to be June 2014.'[118] The Respondent submits that if the Tribunal followed the 'irreversible deprivation test', it should apply the June 2014 valuation date, because using a June 2021 valuation date would

[113] Resp. Response, ¶¶ 12, 13.
[114] Joint Memorandum, ¶ 120.
[115] Resp. Response, ¶¶ 14, 15.
[116] *Ibid*., Joint Memorandum, ¶¶ 122, 123.
[117] Resp. Response, ¶¶ 16 *et seq*., with references to arbitral case law.
[118] *Ibid*., ¶¶ 18, 19, with reference to arbitral decisions.

be unjustified under that test.[119] The Respondent also contends in this regard that '[…] the Awards and Decisions rendered in the renewable energy arbitrations against the Kingdom of Spain have mostly applied a June 2014 valuation date.'[120]

b. The Tribunal's Analysis

105. The Tribunal has considered the Parties' submissions concerning the valuation date. For the reasons set out below, it concludes that the June 2021 valuation date is the appropriate valuation date to be applied for the calculation of damages.

106. At the outset, the Tribunal has taken note of the Respondent's procedural argument that the Claimant should not be permitted to change its position at this stage of the proceedings, *i.e.*, after the Tribunal rendered its Decision. The Tribunal considers, however, that it is in principle legitimate for a party to amend its position and legal arguments throughout the proceedings, including after the hearing, as long as no new evidence is being submitted and the other side is given a chance to respond to these new arguments. The Respondent was given this opportunity.

107. Furthermore, having carefully reviewed the Parties' legal arguments and the jurisprudence they cite, the Tribunal is not persuaded that it is appropriate to rely upon a June 2014 valuation date in the present circumstances. As set out above, under the applicable principles of customary international law, the Tribunal's main goal and task in this phase of the proceedings is to put the Claimant in the position it would have been in if the unlawful measures had not been taken.

108. In certain circumstances, this principle justifies that the damage be determined on the date of the award – or its closest proxy –, rather than the date on which the unlawful measure was taken, recognising that in those circumstances the value of the damage may be more accurately reflected at the time of the award. This principle has previously been endorsed

[119] *Ibid*., ¶ 20.

[120] *Ibid*., ¶ 21, with reference to arbitral decisions.

and applied,[121] and the Tribunal does not see any convincing reason to depart from this approach.

109. More particularly, the Tribunal is not persuaded that the jurisprudence on which the Respondent relies should lead to the acceptance of June 2014 as the appropriate valuation date in the present circumstances. The Respondent has argued that the Tribunal should rely upon the date of 30 June 2014 as the date of the breach by applying the equivalent to the 'irreversible deprivation test' applied in cases of indirect expropriation. In cases of non-expropriatory breaches, the Respondent argues, the equivalent of the moment of irreversible deprivation is the moment of the 'most serious damage'[122]. The Respondent also asserts that '[i]n the renewable cases against Spain, the date of the "most serious damage" and hence the valuation date under said "irreversible deprivation test" has been found to be June 2014.'[123]

110. In support of its submission, the Respondent relies in particular upon the decisions in the cases *Masdar v. Spain* and *Infracapital v. Spain*.[124] It is correct that in *Masdar*, the tribunal, by majority, applied the June 2014 date as it considered that:

> […] Claimant is entitled to full reparation for Respondent's breach of the ECT's FET standard. In this regard, Claimant's valuation date is better suited to provide such compensation as it uses hindsight and historical experience until Ministerial Order IET/1045/2014 implemented the new regime. […][125]

It should be noted, however, that in that case Spain did not advocate using the June 2014 valuation date, which it considered to be 'random', but requested that the Tribunal use an earlier date, namely 31 December 2012, which was the date when Spain began to implement the relevant measures.[126] This shows that the tribunal chose the later of two

[121] See, *e.g.*, **Exhibit CL-0011**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, ¶ 360, which accepted that 'the value of the investment to be compensated is the value it has now, as of the date of this Award, unless such value is lower than at the date of expropriation, in which event the earlier value would be awarded.' See also **Exhibit CL-0052**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16), Award, 2 October 2006, ¶¶ 496 - 499.

[122] Resp. Response, ¶ 18.

[123] *Ibid*.

[124] *Ibid.*, ¶¶ 19, 22.

[125] **Exhibit RL-0105**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1), Award, 16 May 2018, (hereinafter *Masdar v. Spain*), ¶ 606.

[126] *Ibid.*, ¶ 604.

proposed dates and did not follow the argumentation on which the Respondent relies in the present case.

111. Indeed, when looking at the reasoning of the *Masdar* tribunal for choosing the June 2014 valuation date, *i.e.*, the later rather than the earlier date proposed by the parties in that case, it becomes apparent that it was guided not only by the principle of 'most serious damage' – relied upon by the Respondent as the equivalent of the 'irreversible deprivation test' for non-expropriatory breaches – but also by considerations of 'hindsight and historical experience.'[127] Therefore, if the Tribunal were to follow the approach taken by the majority in *Masdar* as proposed by the Respondent, it could not ignore the considerations that led that tribunal to adopt that approach. In the present case, considerations of 'hindsight and historical experience' would lead, in the Tribunal's view, to the acceptance of the Claimant's proposed valuation date of June 2021.

112. In the second case on which the Respondent relies, *Infracapital v. Spain*, the claimant advocated a valuation date of October 2016 (when it sold the plants in question) while Spain relied upon the June 2014 valuation date.[128] In referring to this matter, the Respondent states:

> It should also be highlighted that the Awards and Decisions rendered in the renewable energy arbitrations against Kingdom of Spain have mostly applied a June 2014 valuation date. This is expressly stated in the Infracapital v Spain Decision, which also reflects that during the hearing in that case Brattle admitted that the date of breach of June 2014 is mostly used by claimants and mostly applied by Tribunals in similar cases against the Kingdom of Spain..[129]

113. While the Tribunal accepts that the tribunal in *Infracapital* sided with the respondent and accepted the June 2014 valuation date, it considers it important to address the underlying cases on which this decision was based and which the Respondent also cites. In support of its ruling, the tribunal relied upon other cases cited by Spain, noting '[…] that other tribunals have utilized the June 2014 date for valuation.' Nevertheless, the cases referred

[127] *Ibid*., ¶ 606.

[128] **Exhibit RL-0106**, *Infracapital F1 S.À.R.L. and Infracapital Solar B.V. v. The Kingdom of Spain* (ICSID Case No. ARB/16/18), Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 (hereinafter *Infracapital v. Spain*), ¶ ¶ 802, 804, 819.

[129] Resp. Response, ¶ 21 (emphasis omitted).

to by the *Infracapital* tribunal, namely *Antin Infrastructure v. Spain* and *Greentech Energy Systems v. Spain,* do not actually support the tribunal's ruling. In those cases, either (i) the valuation date was not in dispute between the parties[130] or (ii) the valuation date was not June 2014, but – as requested by the claimant in that case and contested by the respondent – 1 January 2015.[131] The above observation shows that the *Infracapital* tribunal chose the valuation date of June 2014 based on very different circumstances and, partially, by relying upon decisions that do not support its conclusion.

114. For the foregoing reasons, the jurisprudence on which the Respondent relies does not, in the Tribunal's view, support the application of a June 2014 valuation date. In addition, the Respondent has not demonstrated why the Tribunal should not follow the principles set out in the decisions in *Siemens v. Argentina* and *ADC v. Hungary*, pursuant to which a tribunal's obligation to apply customary international law – an obligation that is undisputed by the Parties – means that an investor may not only be entitled to compensation for damages incurred at the date of the breach, but to compensation of the value at the date of the award, or its closest proxy.[132] The Tribunal is of the view that, given that there is a considerable increase between the compensation calculated as of June 2014 and that calculated as of June 2021, the application of the principles of customary international law, as spelled out in the *Chorzow Factory* case, does not permit choosing the June 2014 valuation date, because doing so would not result in full reparation of the damages suffered.

115. In this regard, the Respondent has argued that the Claimant should be compensated only for the loss caused by unlawful conduct and that, therefore, any difference in value originated by issues not related to the unlawful conduct should not be awarded. In principle, the Tribunal agrees with that proposition. Nevertheless, it does not consider that the change in the discount rate – to which the Respondent refers, as far as the Tribunal is aware, as the only issue illustrating that statement – is independent of and can be separated from the loss caused in the manner suggested by the Respondent.

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[130] *Infracapital v. Spain*, ¶ 819, fn. 1003.

[131] *Greentech Energy Systems v Spain,* SCC Arbitration V (2015/095), Final Award, 23 December 2018, ¶ 564.

[132] For the avoidance of doubt, in the present case, this breach is limited to the Claw-Back Feature of the Disputed Measures.

116. The compensation of losses requires the determination of the Claimant's lost cash-flows resulting from the Claw-Back Feature of the Disputed Measures, for which the Parties have agreed to use the DCF method. This method is used to compare the estimated cash-flows in the actual world (in which the unlawful measures exist) with the estimated cash-flows in a hypothetical world in which the unlawful measures do not exist, both sets of estimated cash-flows discounted by appropriate discount rates. It follows that the discount rates to be applied constitute an inherent feature of the method that the Parties agreed upon to establish the damages. Changes in the discount rates are therefore not issues unrelated to the unlawful conduct; they are essential elements of the calculation of the losses suffered by the Claimant.

117. Finally, the Tribunal shares the view that applying a later valuation date would not just be legally appropriate in the present circumstances, but it would also permit to calculate damages on the basis of more reliable data. The Tribunal has taken note of and agrees with the views expressed in the jurisprudence relied upon by the Claimant in this regard, which, in summary, states that this approach better reflects reality as it takes into account relevant facts that have occurred since the date of the breach.[133] It also reduces the amount of speculation inherent in a damage calculation by way of DCF by reducing by several years the period over which it is necessary to project estimated future cash-flows.

(2) The Applicable Discounting Assumptions

a. The Parties' Positions

(i) The Claimant's Position

118. The Claimant states that, as of the June 2014 valuation date, Brattle followed the discounting assumptions explained in the First and Second Brattle Quantum Reports. It applied a 4.84% base-line WACC plus a separate adjustment to account for regulatory risk

[133] See **Exhibit CL-0064**, *Quiborax S.A. and others v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015, ¶ 379; **Exhibit CL-0121**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Reconsideration and Award, 7 February 2017, ¶ 332; **Exhibit CL-0123**, *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. The Republic of Indonesia* (ICSID Case No. ARB/81/1), Award in Resubmitted Proceeding, 31 May 1990, ¶ 186.

which resulted in the equivalent of an overall 5.3% discount rate (after tax) in the But For Scenario, *i.e.* where the Original Regulatory Regime was maintained without significant change, and a 5.5% (after tax) discount rate in the Actual Scenario (under the New Regulatory Regime).[134]

119. As of the June 2021 valuation date, Brattle applied a 2.81% base-line WACC plus an adjustment for regulatory risk, equivalent to an overall 3.4% discount rate (after tax) in the But For Scenario (where the Original Regulatory Regime was maintained without significant change) and a 3.1% discount rate in the Actual Scenario (under the New Regulatory Regime). The New Regulatory Regime assumes a 7.398% pre-tax allowed rate of return.[135]

120. The Claimant further states that its damage analysis assumed that the regulatory risk would have been lower in the But-For Scenario than in the Actual Scenario. This analysis was based on contemporaneous market commentary indicating that the Disputed Measures had introduced additional regulatory risk.[136]

121. In answer to the Respondent's claim that an assumption of less regulatory risk in the But For Scenario is no longer appropriate because the Tribunal found a violation of the ECT only in regard to the Claw-Back Feature of the Disputed Measures, the Claimant contends that the Respondent's 'uniform regulatory risk' assumption implies a tension between the Tribunal's finding on liability and the contemporaneous market commentary about regulatory risk cited by Brattle in the arbitration, as it implies either that market participants mistakenly perceived additional regulatory risk even though the measures in question were compliant with the ECT, or that the Tribunal found a violation of the ECT but that this violation did not contribute to contemporaneous market opinion.[137]

[134] Joint Memorandum, ¶ 126.
[135] *Ibid*.
[136] *Ibid*., ¶ 128.
[137] *Ibid*.

(ii) The Respondent's Position

122. The Respondent explains that the Parties' assessments of the regulatory risk was based on the difference in risk between a scenario where all the Disputed Measures have been implemented, *i.e.,* the Actual Scenario, and a scenario characterised by the absence of Disputed Measures, *i.e*. the Claimant's But-for Scenario. The Respondent submits that the Tribunal has rejected the Claimants' But-for Scenario because all the Disputed Measures are deemed to be legal, save for the retroactive effect of the NAV calculation and that, accordingly, the Claimant's But-for Scenario cannot be used any more.[138]

123. Furthermore, the Respondent contends that the Tribunal has decided on the new counterfactual scenario, the Tribunal's But-for Scenario, which is very similar to the Actual Scenario. The only difference between these scenarios relates to the approach for calculating the July 2013 NAV while they have the same remuneration adjustment mechanism in the future. Given the similarity of these two scenarios, the Respondent argues, the regulatory risk and discount rate used should not be very different from each other.[139] The Respondent asserts, however, that if one scenario is deemed to carry a higher regulatory risk, it should be the Tribunal's But-for Scenario because it is characterised by an instability of the Spanish electricity system that would remain but for corrective measures that in fact occurred in reality.[140]

124. Finally, in response to the Claimant's view, the Respondent points out that the Tribunal's Decision is irrelevant as it was not public to market participants at the time of the 2014 valuation date.[141]

b. The Tribunal's Analysis

125. The Parties disagree on their assessment of the relative regulatory risk between a scenario where the Disputed Measures have been implemented in their entirety (the '**Actual Scenario**'), and a scenario in which the Disputed Measures would have implemented

[138] *Ibid*., ¶ 130.
[139] *Ibid*., ¶ 131.
[140] *Ibid*., ¶ 132.
[141] *Ibid.*, ¶ 133.

without the Claw-Back Feature of the Disputed Measures (the '**But-for Scenario**'). Consequently, they apply different discount rates.

126. The Tribunal notes that the Respondent's position is based upon the assertion that (i) the But-for Scenario is very similar to the Actual Scenario and (ii) if one scenario is deemed to carry a higher regulatory risk, it should be the But-for Scenario because it is characterised by an instability of the Spanish electricity system that would remain but for corrective measures that in fact occurred in reality.

127. The Arbitral Tribunal is not persuaded by this argument. In the Tribunal's view, the difference between the two scenarios is that of a regulatory regime with or without the Claw-Back Feature of the Disputed Measures and, consequently, with or without a feature violating the ECT. While it accepts that the difference between these two scenarios may be small in monetary terms,[142] it is not negligible.

128. As of the June 2021 valuation date, the Claimant has applied a discount rate of 3.1% in the Actual Scenario and a 3.4% discount rate in the But-for Scenario. It assumes a higher regulatory risk in the former scenario. The Arbitral Tribunal agrees with this opinion. In the Tribunal's view, a world in which certain aspects of the Disputed Measures have been found to violate the ECT carries a greater regulatory risk than the world in which such a violation does not exist. Therefore, the Tribunal concludes that it is justified to assume slightly – the difference is minimal – different risk profiles because the Actual and But-for Scenarios are not identical.

D. THE AMOUNT OF DAMAGES

129. In their Joint Memorandum, the Parties set out agreed tables which show the amounts payable to the Claimant, depending upon the Tribunal's decision concerning the elements of the calculations in respect of which the Parties disagree.[143] The amounts set out in the respective tables are agreed between the Parties.

[142] According to the agreed calculations of the Parties, the difference amounts to EUR 100,000. See Joint Memorandum, ¶ 140 as well as Tables 3 and 4 thereof.

[143] Joint Memorandum, ¶¶ 138 - 140, Joint Tables 2 - 4.

130. The Tribunal has discussed above each element of the calculation in respect of which the Parties disagree and has set out its decision on each of the items of disagreement. Based on those decisions and the application of Joint Table 3, the Tribunal determines that the Claimant is entitled to damages in the amount of EUR 106.2 million.[144]

E. INTEREST

(1) The Parties' Positions

a. The Claimant's Position

131. The Claimant claims compound interest on its losses, based upon Spain's borrowing rate in reference to 10-year Spanish Government bonds. It contends that the reference to the 10-year Spanish bond yields is appropriate in the present case because (i) the Claimant will likely receive a final payment in 2022, after the present proceedings and potential further proceedings are completed, *i.e.,* eight years after the valuation date; (ii) Spanish 10-year bond yields are in line with commercial borrowing rates, and have been lower than the SPCs' borrowing costs since 2014; and (iii) the Respondent itself refers to 10-year bond yields to determine the return under the New Regulatory Regime.[145]

132. The Claimant also contends that Spanish sovereign bond yields represent the Respondent's borrowing costs, thereby satisfying the 'forced loan' theory which analogises a damages decision to a forced loan from the Claimant to the Respondent. The Claimant should therefore be compensated for this forced loan in exactly the same way as willing lenders to Spain.[146]

133. Finally, the Claimant asserts that the 10-year bond is the most reasonable proxy since close to nine years have now passed since Spain introduced the New Regulatory Regime in July

[144] *Ibid*., ¶ 139.
[145] Cl. Reply, ¶¶ 360, 365.
[146] Joint Memorandum, ¶ 134.

2013. The use of a Spanish short-term bond yield would undercompensate the Claimant for the delay in compensation that has occurred.[147]

b. The Respondent's Position

134. The Respondent agrees with the reference to the Spanish sovereign bond.[148] It maintains, however, that the bond used as reference should be a shorter-term bond.[149]

135. Referring to jurisprudence and commentators, the Respondent asserts that a 'risk free rate' should be applied, as it is not appropriate to compensate a risk that has not been incurred.[150]

136. Moreover, the Respondent contends that the starting point should not be the date when the New Regulatory Regime was introduced, but the valuation date of June 2014. Assuming that the final award will be rendered in the next six months, an 8-year Spanish sovereign bond yields will compensate the Claimant for the delay in compensation that has occurred.[151]

(2) The Tribunal's Analysis

137. The Arbitral Tribunal notes that the Parties' experts agree that the rate of interest should be that of Spanish sovereign bonds but disagree on the term of the bond that should be used for that purpose. For the reasons set out above, the Arbitral Tribunal has determined the appropriate valuation date to be June 2021. Consequently, the damages awarded by reference to this valuation date serve to compensate the Claimant for its losses. Moreover, compound interest, compounded annually, shall be payable from and after the valuation date, until payment of the final award, at a rate based on a short-term government bond, *i.e.,* by reference to a 2-year Spanish sovereign bond.

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[147] *Ibid*., ¶ 135.
[148] Resp. Rej., ¶ 843; Joint Memorandum, ¶ 136.
[149] Resp. Rej., ¶¶ 844, 845.
[150] *Ibid*., ¶¶ 846 *et seq*.
[151] Joint Memorandum, ¶ 137.

VI. COSTS

A. THE CLAIMANT'S COST SUBMISSIONS

138. Referring to Article 61(2) of the ICSID Convention, the Claimant asserts that costs should reflect the Parties' success in the arbitration[152] and that, as the Claimant is the successful Party in these proceedings, it should be reimbursed for its costs, including its legal fees and other expenses.[153]

139. The Claimant contends further that in the four years since the hearing in this matter, it incurred additional legal and expert costs as a direct result of Spain's conduct in these proceedings and that the Tribunal should take such conduct into account when deciding how to allocate costs.[154] In this regard, the Claimant sets out certain examples which it alleges constitute incidents of conduct that, the Claimant states, '[…] highlight Spain's obstructive approach to this arbitration.'[155]

140. The Claimant also states that its costs have been reasonably incurred and are proportionate, particularly in light of (a) the long duration of the Claimant's investment in Spain, (b) the relative complexity of the case, and (c) the large amount of damages suffered.[156]

141. In response to the Respondent's Cost Submission, the Claimant states that:

> ICSID tribunals have long recognised that 'allocating costs according to the **outcome** of the arbitration is a widely applied principle in international arbitration in general and [which] is also applied in ICSID proceedings' and that 'the starting point [is] that the successful party should receive reimbursement from the unsuccessful party'.[157]

[152] Cl. Cost Submission, ¶ 7.

[153] *Ibid*., ¶ 9, see also Cl. Reply Cost Submission, ¶ 3.

[154] Cl. Cost Submission, ¶¶ 10, 11.

[155] *Ibid.*, ¶ 12.

[156] *Ibid*., ¶ 15.

[157] Cl. Reply Cost Submission, ¶ 8 (emphasis in original, footnotes omitted)

The Claimant asserts that this approach is also consistent with the *Chorzów Factory* principle of full reparation pursuant to which it is necessary to wipe out the consequences of an unlawful act.[158]

142. The Claimant also contends in this regard that the principle that costs follow the event is typically only displaced in circumstances where the winning party has committed a wrongdoing of a substantive or procedural nature during the proceedings which the Claimant did not do.[159] Neither should the Claimant's claims be considered frivolous.[160]

143. Concerning the legal fees claimed by the Respondent, the Claimant states that, given that these were incurred by the Attorney General's Office, costs spent by in-house counsel and employees of a party are typically not recoverable as conducting the arbitration is an inherent and unavoidable element of doing business.[161] Moreover, the Claimant asserts, the Respondent has also failed to prove that the costs were incurred for the specific purpose and as a result of this arbitration, excluding the Government's own regular staffing expenses.[162]

144. The Claimant has submitted the following claims for legal and other costs (excluding advances made to ICSID):[163]

- Legal fees: USD 4,150,291; JPY 230,965,204 and EUR 131,168.80
- Experts' fees and expenses: USD 1,186,580.33 and JPY 57,924,363
- Other expenses: USD 375,746.66; EUR 4,674.88 and JPY 44,096,786
- **Total:** USD 5,712,617.99; EUR 135,843.68;[164] JPY 332,986,353[165].

[158] *Ibid*., ¶ 10, with references to jurisprudence.
[159] *Ibid*., ¶ 9.
[160] *Ibid*., ¶ 13.
[161] *Ibid*., ¶¶ 17 *et seq.*
[162] *Ibid*., ¶ 20.
[163] Cl. Cost Submission, ¶ 26.
[164] Equivalent to USD 140,305.39 at the exchange rate on 11 November 2022.
[165] Equivalent to USD 2,393,518.93 at the exchange rate on 11 November 2022.

B. THE RESPONDENT'S COST SUBMISSIONS

145. The Respondent also refers to Article 61 of the ICSID Convention and contends that, given the absence of specific provisions addressing the allocation of costs in the ECT, the Tribunal has very broad discretion with respect to the allocation of fees and costs.[166]

146. The Respondent also states that the Tribunal found that the Respondent's breach was limited to Article 10(1), first and second sentences, of the ECT while all other claims were rejected.[167] The Respondent also asserts that it has proved that the Claw-Back Feature of the Disputed Measures has not caused any damage to the Claimant.[168] Thus, the Claimant did not emerge as the winner.[169]

147. The Respondent contends that in light of these circumstances, it should not have been charged with the burden and the costs of defending itself against the vast majority of claims raised by the Claimant in these proceedings. Consequently, the Tribunal should award costs in the Respondent's favour.[170] Alternatively, the Respondent requests that it should not be ordered to bear the Claimant's costs, even if the Tribunal upheld a limited part of the Claimant's claim.[171]

148. In response to the Claimant's Cost Submission, the Respondent states that the Claimant made untrue statements and misrepresentations concerning the Respondent's conduct in these proceedings.[172] Addressing certain examples relied upon by the Claimant, the Respondent contends that at all times during these proceedings, it acted '[…] in good faith and with utter professionalism in defense of its legitimate rights'[173] and in compliance with the Tribunal's orders and directions.[174]

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[166] Resp. Cost Submission, ¶ 20 – 22; see also Resp. Reply Cost Submission, ¶ 9.
[167] Resp. Cost Submission, ¶ 24; Resp. Reply Cost Submission, ¶¶ 7 - 12.
[168] Resp. Cost Submission, ¶ 25, with reference to the Resp. Response.
[169] Resp. Reply Cost Submission, ¶¶ 5 et *seq*.
[170] Resp. Cost Submission, ¶ 26.
[171] *Ibid*., ¶ 27.
[172] Resp. Reply Cost Submission, ¶ 16.
[173] *Ibid.*, ¶ 18; see also ¶ 29.
[174] *Ibid.*, ¶¶ 21 *et seq*.; see also ¶ 35.

149. The Respondent has submitted the following claims for legal and other costs (excluding advances made to ICSID):[175]

- Experts and witnesses: EUR 493,180.35
- Translations: EUR 22,285.58
- Editing and printing services: EUR 131,453.54
- Courier: EUR 5,174.84
- Travelling expenses: EUR 14,433.09
- Legal fees: EUR 1,205,890
- **Total:** EUR 1,872,417.40.[176]

C. THE TRIBUNAL'S DECISION ON COSTS

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

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

151. As acknowledged by the Parties, this provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

152. In its decision on costs, the Arbitral Tribunal is guided by the principle that 'costs follow the event'. In the present arbitration, each Party prevailed partially on issues of jurisdiction and liability. Moreover, and for the reasons set out in detail above, the Claimant prevailed in its damage claim in the amount of EUR 106.2 million, excluding interest. In its Reply, the Claimant requested to be awarded damages in the amount of EUR 173 million (excluding interest and tax gross-up).[177] The amount awarded equals 61.4% of the amount claimed. In other words, the Claimant prevailed in its claim at a rate of approximately 60%. Consequently, the Tribunal considers it appropriate that the legal fees and costs incurred

[175] Resp. Cost Submission, ¶¶ 12 - 18.

[176] Equivalent to USD 1,933,915.93 at the exchange rate on 11 November 2022.

[177] Cl. Reply, ¶ 430.

throughout these proceedings be allocated accordingly, *i.e.,* that Claimant bear 40% while the Respondent bear 60% thereof.

153. In doing so, the Tribunal has taken note of the Parties' arguments regarding their conduct in this case as well as the Claimant's argument that costs incurred by Spain's Office of the Attorney General should not be granted as the cost incurred in-house counsel and employees of a party are typically not recoverable. The Tribunal is not persuaded by these arguments. First, the Tribunal considers that the principle of equality requires that the Parties' legal costs be treated equally and, consequently, that the Respondent not be disadvantaged by its choice to rely on in-house legal counsel instead of engaging external legal counsel. Second, the Tribunal considers that any inefficiencies derived from positions taken by either Party in the proceedings are immaterial in relation to the proceedings as a whole. Finally, the Tribunal considers the fees incurred to be reasonable and proportionate, given the length and complexity of the proceedings.

154. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):[178]

Arbitrators' fees and expenses	
Ms. Anne K Hoffmann	84,607.50
Mr. Oscar M. Garibaldi	298,221.45
Prof. Andrea Giardina	393.472.24
Judge James Crawford	279,826.29
ICSID's administrative fees	274,000
Direct expenses	248,853.96
Total	**1,578,981.44**

155. The above costs have been paid out of the advances made by the Parties in equal parts.[179] As a result, each Party's share of the costs of arbitration amounts to USD 789,490.72.

[178] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

[179] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

156. The total costs of the arbitration and of the legal fees and costs for both Parties is USD 11,759,339.68.

157. Accordingly, the Respondent shall pay 60% of the costs of the arbitration proceeding and of the legal fees and costs, namely USD 7,055,603.81 of which it has already advanced USD 2,723,406.65.[180] The Claimant shall pay 40% of the costs of these proceedings and of the legal fees and costs, namely USD 4,703,735.87, of which it has paid already USD 9,035,933.03. Therefore, the Respondent shall pay to the Claimant USD 4,332,197.16.

VII. AWARD

158. For the reasons set forth above, the Tribunal decides as follows:

1. Orders the Respondent to pay the Claimant the amount of EUR 106.2 million, plus interest calculated by reference to a 2-year Spanish sovereign bond compounded annually, payable from 1 June 2021, until payment of this Award;

2. Orders the Respondent to pay the Claimant the amount of USD 4,332,197.16 in respect of the overall costs of the arbitration, including legal costs and fees, legal fees, plus interest calculated by reference to a 2-year Spanish sovereign bond, payable from the date of this Award until payment thereof; and

3. All other claims are dismissed.

[180] The Parties claim reimbursement of fees and costs in different currencies. All amounts claimed in currencies other than USD have been converted into USD on 11 November 2022.

Oscar M. Garibaldi
Arbitrator

Date: 8 November 2022

Andrea Giardina
Arbitrator

Date:

Anne K. Hoffmann
President of the Tribunal

Date:

Oscar M. Garibaldi
Arbitrator

Date:

Andrea Giardina
Arbitrator

Date: 8 November 2022

Anne K. Hoffmann
President of the Tribunal

Date:

Oscar M. Garibaldi

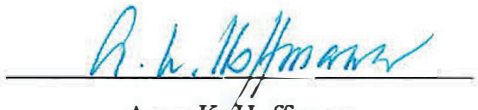
Arbitrator

Date:

Andrea Giardina

Arbitrator

Date:



Anne K. Hoffmann

President of the Tribunal

Date: 14 November 2022