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# CERTIFICATE

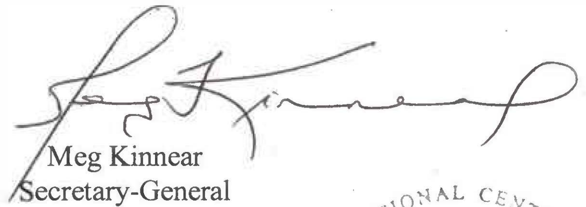
**INFRACAPITAL F1 S.À R.L. AND INFRACAPITAL SOLAR B.V.**

**V.**

**KINGDOM OF SPAIN**

**(ICSID CASE NO. ARB/16/18)**

I hereby certify that the attached documents are true copies of the English and Spanish versions of the Tribunal's Award dated 2 May 2023.



Meg Kinnear
Secretary-General

Washington, D.C., 2 May 2023

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**INFRACAPITAL F1 S.À R.L. AND INFRACAPITAL SOLAR B.V.**

Claimants

and

**KINGDOM OF SPAIN**

Respondent

**ICSID Case No. ARB/16/18**

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# AWARD

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***Members of the Tribunal***
Mr. Eduardo Siqueiros T., President
Prof. Peter D. Cameron
Mr. Luis González García

***Secretary of the Tribunal***
Mrs. Mercedes Cordido-Freytes de Kurowski

*Date of dispatch to the Parties:* 2 May 2023

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| | |
|---|---|
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings of 2006 |
| BDO's First Report | BDO's First Expert Report dated 9 July 2018, submitted with Respondent's Counter-Memorial |
| BDO's Second Report | BDO's Rejoinder Expert Report dated 13 February 2019, submitted with Respondent's Rejoinder |
| Brattle's First Quantum Report | Brattle's quantum expert report "Financial Damages to Investors" dated 29 March 2018, submitted with Claimants' Memorial |
| Brattle's Second Quantum Report | Brattle's second expert report entitled "Report: Financial Damages to Investors" dated 28 November 2018, submitted with Claimants' Reply |
| Claimants | Infracapital F1 S.à r.l. and Infracapital Solar B.V. |
| Claimants' Quantum Submission | |
| C-[#] | Claimants' Exhibit |
| CL-[#] | Claimants' Legal Authority |
| Cl. Memorial | Claimants' Memorial on the Merits dated 29 March 2018 |
| Cl. PHB | Claimants' Post-Hearing Brief dated 11 May 2020 |
| Cl. Rejoinder on Jurisdiction | Claimants' Rejoinder on Jurisdiction dated 25 April 2019 |
| Cl. Reply | Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction dated 29 November 2018 |
| Cl. Reply PHB | Claimants' Reply Post-Hearing Brief dated 17 June 2020 |
| Claimants' PV Plants | Jointly, the First and Second Investment Plants |
| Claimants' Quantum Submission | Claimants' Quantum Submission, dated 22 April 2022 |
| Decision | Decision on Jurisdiction, Liability and Directions on Quantum, dated 13 September 2021 |

| | |
|---|---|
| Disputed Measures | Measures adopted by Spain between 2012 and 2014, including Law 15/12, Royal Decree-Law 2/2013, Royal Decree-Law 9/2013, Law 24/2013, Royal Decree 413/2014 and the June 2014 Order |
| ECT | Energy Charter Treaty |
| EU | The European Union |
| Experts' Joint Memorandum | Joint Report prepared by the Parties' respective experts titled: "*Brattle-BDO Joint Memorandum*", dated 1 April 2022 |
| First Decision on Reconsideration | Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, dated February 1, 2022 |
| First Investment Plants | Jointly, the Tordesillas Plants and the Valtierra I, II and & III Plants |
| FIT | "*feed-in-tariff*" which represents the tariff that has a right to receive a premium payment over and above the market price per kWh produced |
| Hearings | The Hearing on Jurisdiction and the Merits held on 24-28 June 2019 in Paris (the "**June Hearing**"), and the Hearing held at the International Dispute Resolution Centre Ltd (IDRC) in London on 27 February 2020 (the "**Second Hearing**"). |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965 |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |
| IRR | Internal Rate of Return |
| June 2014 Ministerial Order | Ministerial Order IET/1045/2014 issued on 16 June 2014 by the Ministry of Industry, Energy and Tourism to further implement the New Regime |
| June Hearing | Hearing on Jurisdiction and the Merits held on 24-28 June 2019 in Paris |
| NAV | Net Asset Value |

| | |
|---|---|
| New Regime | Regime for compensation introduced under Royal Decree-Law 9/2013 whereby renewable energy producers received: (i) a payment of the wholesale market price for the electricity produced; (ii) a possible additional "*specific remuneration*" based on the electricity produced to compensate operating costs not covered by the wholesale market price; and (iii) a payment per MWh of installed capacity based on the net investment costs of a "standard facility" or "*instalación tipo*" during its "*useful life.* |
| Ordinary Regime | Chapter I of the 1997 Electricity Law, which applies to conventional electricity generation plants |
| PV | Photovoltaic energy |
| PV Plants | |
| R-[#] | Respondent's Exhibit |
| RD 1578/2008 | Royal Decree 1578/2008 dated 26 September 2008 "*on the remuneration for electric energy production using photovoltaic technology for plants subsequent to the deadline for maintenance of the remuneration under RD 661/2007*" |
| RD 661/2007 | Royal Decree 661/2007 dated 25 May 2007 "*regulating the activity of electricity production under the Special Regime*" |
| Request for Reconsideration | The request submitted by Respondent on 15 October 2021 titled "*Respondent's Petition of Reconsideration Regarding the Intra-EU Objection and the Merits on the basis of the CJEU Decision in the Case C-741/19, Republic of Moldova [Komstroy* Judgment*], ECLI:EU:C:2021:655*" for the Tribunal to declare its lack of jurisdiction for this case |
| Respondent | Kingdom of Spain |
| Respondent's Quantum Submission | Respondent's Submission on the Issues of Disagreement on Quantum, dated 22 April 2022 |
| RL-[#] | Respondent's Legal Authority |
| RRR | Reasonable Rate of Return |

| | |
|---|---|
| Second Decision on Reconsideration | The Decision on Reconsideration dated 19 August 2022 |
| Second Request for Reconsideration | The request submitted by Respondent on 24 June 2022 entitled "*Respondent's Request for Reconsideration of the Tribunal's Decisions of 13 September 2021 and 1 February 2022 on the basis of The Green Power Award*" for the Tribunal to declare its lack of jurisdiction for this case. |
| Second Hearing | A one-day hearing held at the International Dispute Resolution Centre Ltd (IDRC) in London on 27 February 2020. |
| Second Investment Plants | Jointly, the Fontellas and Lasesa Plants |
| Third Decision on Reconsideration | The Decision on Reconsideration dated _________, 2023 |
| Third Request for Reconsideration | The request submitted by Respondent on 27 December 2022 entitled "*Respondent's Request for Reconsideration of the Tribunal's Decision Dated 19 August*" for the Tribunal to declare its lack of jurisdiction for this case. |
| Tr. Day [#], [page:line] [Speaker(s)] | Transcript of the Hearing |
| Tribunal | Arbitral tribunal constituted on 24 October 2017 |
| TVPEE | "*Impuesto sobre el valor de la producción de energía eléctrica*", a 7% tax introduced by Law 15/2012, levied on "*the total amount that corresponds to the tax payer for the production of electricity and its incorporation into the electricity system, measured at power station bus bars, for each facility, in the tax period.*" |

# I. INTRODUCTION

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

2. The claimants are Infracapital F1 S.à r.l., a private limited liability company incorporated under the laws of Luxembourg, and Infracapital Solar B.V., a private limited liability company incorporated under the laws of the Netherlands (together, "**Claimants**").

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

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

5. This dispute relates to the alleged breaches by Spain of its obligations under the ECT. Claimants contend that the Government of Spain implemented measures which modified and altered the regulatory and economic framework for renewable energy projects, which Claimants had relied on when making their investments.

6. On 13 September 2021, the Tribunal issued its Decision on Jurisdiction, Liability and Directions on *Quantum* ("**Decision**"), Prof. Peter D. Cameron attached a Partial Dissenting Opinion, dated 13 September 2021 (the "**Partial Dissent**").

7. In the Decision, and for the reasons indicated therein, the Tribunal ruled as follows:[1]

> *" (1) The Tribunal has jurisdiction to hear the claims of breach of Article 10(1) of the ECT brought by Claimants, save in respect to the tax measure identified in paragraph (2) below, and therefore the remaining six jurisdictional objections of Respondent are rejected.*

[1] Decision, ¶ 822.

*(2) The Tribunal lacks jurisdiction to hear the claim of breach of Article 10(1) of the ECT with respect to the TVPEE.*

*(3) Claimants did not have a legitimate expectation that the remuneration of RD 1578 would continue to be paid for at least 25 years.*

*(4) Respondent breached of Article 10(1) of the ECT by clawing back past remuneration.*

*(5) Respondent breached Article 10(1) to the extent that the remuneration of each of the plants failed to ensure payment to Claimants of a reasonable rate of return on their investment during the lifetime of Claimants' PV Plants, as a consequence of the adoption of the Disputed Measures.*

*(6) All other claims of Claimants and requests of the Parties are dismissed.*

*(7) The Parties are directed to attempt to reach an agreement on the amount of compensation to be paid by Respondent to Claimants in respect to its obligations on post-tax rate of return in accordance with the Tribunal's findings.*

*(8) The Parties are directed to attempt to reach an agreement within three months after the date of this Decision.*

*(9) Should the Parties reach an agreement, they are directed to so report to the Tribunal in order to enable the Tribunal to issue an Award incorporating such agreement and deal with any residual issues identified, including costs, thereby terminating the proceedings.*

*(10) Should the Parties fail to reach an agreement in accordance with paragraph (7) supra, either Party may request the Tribunal to decide any outstanding issues in dispute, and the Tribunal will, following consultation with the Parties, fix a calendar for further submissions of the Parties on the outstanding issues relating to damages due to Claimants.*

*(11) The decision on the final determination of the damages due is thus reserved and will be fixed in the Award, along with the Tribunal's decisions as to interest and costs."*

8. The full text of the Decision, including the Partial Dissent, constitutes an integral part of this Award, and it is hereby incorporated as Annex A. The Procedural History of this arbitration leading up to the rendering of the Decision is summarized at Section II of that Decision. A summary of the procedural steps thereafter follows below.

9. The Tribunal refers to section III of the Decision for factual background of the case; and to the submissions made by the Parties and the Parties' respective requests for relief up to the Decision, referenced therein. In consequence, none of that is repeated here.

10. In this Award, unless the context otherwise requires, the Tribunal adopts the defined terms used in the Decision.

## II. POST-DECISION PROCEDURAL HISTORY

11. On 15 October 2021, Respondent submitted a request entitled "*Respondent's Petition of Reconsideration Regarding the Intra-EU Objection and the Merits on the basis of the CJEU Decision in the Case C-741/19, Republic of Moldova, ECLI:EU:C:2021:655*" to declare the Tribunal's lack of jurisdiction for this case (the "First **Request for Reconsideration**").[2]

12. Since the three-month period established in the Decision for the Parties to attempt to reach an agreement on the amount of compensation was due to expire on 13 December 2021, the Parties advised the Tribunal on 10 December 2021 that an extension would be required for them to complete their discussions, and on 13 December 2021, a joint request was made[3] to extend the deadline until 18 February 2022. The Tribunal agreed on 14 December 2021 to the extension requested.

13. After having received, at the Tribunal's request,[4] comments from Claimants on Respondent's First Request for Reconsideration,[5,] the Tribunal issued on 1 February 2022 its "*Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits*", rejecting such request for the reasons therein established.

14. On 17 February 2022, the Parties requested an additional extension until 11 March 2022, which the Tribunal confirmed on the same date. Additional requests for extension were made by the Parties on 8 and 25 March 2022, which the Tribunal confirmed on the same dates they were submitted.

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[2] The decision involved **RL-0151**, *Republic of Moldova v Komstroy LLC,* (the "***Komstroy*** **Judgment**") European Union Court of Justice Judgment of 2 September 2021 in the case C-741/19, *Republic of Moldova v. Komstroy LLC* ("***Komstroy*** **Judgment**").

[3] Claimants submitted the request advising on the joint agreement, which Respondent confirmed on 14 December 2021.

[4] On 16 October 2021, the Tribunal invited Claimants to submit any comments to the Request for Reconsideration.

[5] On November 12, 2021, Claimants submitted their response entitled "*Claimants' Response to Respondent's Petition for Reconsideration Regarding the Intra-EU Objection and the Merits*".

15. On 29 March 2022, the Parties advised the Tribunal that they had not been able to reach agreement on the amount of compensation due to Claimants, although they had collaborated to prepare a joint report. In that respect, Claimants requested the opportunity to make submissions on the issues upon which the Parties and their Experts had not been able to reach agreement, proposing terms for the submissions. Although Respondent disagreed with Claimants that written submissions were necessary, Respondent proposed short written submissions with limitations on the modality, scope, length and timeliness.

16. On 31 March 2022, the Tribunal confirmed the Parties that it had decided to allow for simultaneous written submissions following the Joint Report of their Experts to be delivered on 1 April 2022, establishing the terms thereof.

17. On 1 April 2022, the Parties submitted the Joint Report prepared by their respective Experts[6] entitled "*Brattle-BDO Joint Memorandum"* (the "**Experts' Joint Memorandum**").

18. On 22 April 2022, each of Claimants and Respondent submitted their respective submissions:

    a). Claimants' Quantum Submission ("**Claimants' Quantum Submission**"); and

    b). Respondent's Submissions on the Issues in Disagreement on Quantum ("**Respondent's Quantum Submission**").

19. On 15 June 2022, Respondent submitted a request entitled "*Respondent's Request for Reconsideration of the Tribunal's Decisions of 13 September 2021 and 1 February 2022 on the Basis of the Green Power Award*" to declare the Tribunal's lack of jurisdiction for this case (the "**Second Request for Reconsideration**").[7]

[6] The Experts who participated and signed the Joint Memorandum were Messrs. Carlos Lapuerta, Richard Caldwell and José Antonio García of The Brattle Group ("**Brattle**"), the experts retained by Claimants ("**Claimants' Experts**"); and Messrs. Gervase MacGregor, Eduardo Pérez, Javier Espel and David Mitchell of BDO ("**BDO**"), the experts retained by Respondent ("**Respondent's Experts**"). Claimants' Experts together with Respondent's Experts will be referred to as (the "**Experts**").

[7] The Second Request for Reconsideration involved **RL-0186,** *Green Power Partners K/S and SCE Solar Don Benito v. Kingdom of Spain*, case SCC-2016/135, Award, 16 June 2022 ("***Green Power*** **Award**").

20. After receipt of Claimants' comments to Respondent's Second Request for Reconsideration on 21 July 2022,[8] the Tribunal issued on 19 August 2022 its "*Decision on Respondent's Second Request for Reconsideration*", rejecting such request for the reasons therein established.

21. On 27 December 2022, Respondent submitted a request entitled "*Respondent's Request for Reconsideration of the Tribunal's Decision of 19 August 2022*" to declare the Tribunal's lack of jurisdiction for this case in light of two recent judgments involving intra-EU disputes (the "**Third Request for Reconsideration**").[9]

22. On 9 January 2023, the Parties filed simultaneous updated submissions on costs.

23. After receipt of Claimants' comments to Respondent's Third Request for Reconsideration on 4 January 2023,[10] the Tribunal issued on 2 February 2023 its "*Decision on Respondent's Third Request for Reconsideration*", rejecting such request for the reasons therein established.

24. On 2 February 2023, the Tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).

25. Except as otherwise noted in this Award, and as previously indicated, the defined terms in the Decision shall continue to apply and be used by the Tribunal. The Tribunal notes that the Experts utilize in the Experts' Joint Memorandum (and the Parties in limited occasions in their respective submissions) the term "Original Regulatory Regime" and "New Regulatory Regime". When quoting the Experts, the Tribunal maintains their reference,

[8] On 21 July 2022, Claimants submitted their response entitled "*Claimants Comments on Respondent's Second Request for Reconsideration*".

[9] The judgments cited are (a) **RL-0188**, Svea Court of Appeal Judgment dated 13 December 2022 on the appeal brought by the Kingdom of Spain to declare null and void the arbitral award dated 15 February 2018 in case SCC No. V (2015/063) between *Novenergia II-Energy & Environment (SCA) (Novenergia) and the Kingdom of Spain,* and (b) **RL-0189**, the Swedish Supreme Court Judgment, dated 14 December 2022, setting aside the award in *PL Holdings v. Poland.*

[10] On 4 January 2023, Claimants submitted their response and comments in the form of a brief letter indicating that, "*In light of the repetitive nature of Spain's arguments and in the interests of efficiency, the Claimants do not intend to re-state their position on the relevance of EU law yet again. Rather, the Claimants refer the Tribunal to their previous submissions on EU law, including but not limited to their submissions dated 12 November 2021 on Spain's First Request, and 21 July 2022 on Spain's Second Request*".

but otherwise keeps the terms "Original Regime" and "New Regime" as used in the Decision.

## III. THE EXPERTS' JOINT MEMORANDUM

### A. AREAS OF AGREEMENT AND DISAGREEMENT

26. The Tribunal will first examine the areas of agreement and disagreement in the Experts' Joint Memorandum, and then examine the positions each of the Parties has addressed in their respective quantum submission.

27. The Experts' Joint Memorandum indicates that pursuant to the Tribunal's instructions, the Parties were directed to attempt to reach an agreement on the impact of two elements:

(i) the wrongful "*retroactive application of the Disputed Measures*" concerning the PV Plants belonging to the Claimant (which the Experts define as "**Retroactivity Damages**") and

(ii) to the extent "*the measures … failed to maintain the reasonable rate of return ensured to Claimants under the primary legislation*" (which the Experts define as "**Reasonable Return Damages**"), under the following so-called "*essential parameters*" contained in the Decision:[11]

> *"i. **Period of depreciation**. ...this Tribunal believes the period to consider should be 25 years.*
>
> *ii. The **target rate of return**. 7% after-tax return.*
>
> *iii. **Investment and Operating costs**...the exercise should take into account the separate characteristics of each of Claimants' PV Plants.*
>
> *iv. **[Effective] Tax Rate**. The Tribunal accepts the 19.6% average tax rate across all of Claimants' PV Plants as proposed by Brattle, under the assumption that Claimants' PV Plants have no debt financing that translates into a tax shield benefit that lowers this rate. ...If, however, any of the Fontellas Plants, Lasesa Plants, Tordesillas Plants, Valtierra I & II Pants and Valtierra III Plants owned by Claimants through the various subsidiaries established had debt financing that received a tax shield benefit, this factor shall need to be taken into account individually for each PV Plant, as required, in order to determine the actual tax rate.*
>
> *v. **Date of Valuation**. . The Disputed Measures were finally adopted in June of 2014 –date on which Spain enacted the final June 2014 Order that*

[11] Experts' Joint Memorandum, ¶ 3, indicating that the Tribunal suggested in paragraphs 744, as well as 811 to 821of the Decision that the Parties take account of such "essential parameters" in attempting to reach an agreement on the amount of compensation to be paid by Respondent to Claimants in respect to its obligations on post-tax rate of return in accordance with the Tribunal's findings.

*culminated with the Disputed Measures–and therefore the Tribunal deems that this is the date for calculation of the damage. (emphasis added).”*

28. Brattle and BDO agree that computing damages pursuant to the Tribunal's findings involve consideration of a series of incremental cash flows (which they define as "**Revised Cash Flows**") related to the Reasonable Return Damages and the Retroactivity Damages,[12] which they examine separately.

29. In the determination of Reasonable Return Damages, the elements on which the Experts agree can be summarized as follows:

    (a) Claimants' PV Plants that fail to obtain under the New Regime the Original Regime's target of 7% after-tax lifetime project return are entitled to Reasonable Return Damages.[13]

    (b) that Reasonable Return Damages should reflect the "*stand-alone impact in case the Disputed Measures failed to ensure a reasonable return to Claimants*" and, further, that the relevant analysis should not attempt to also eliminate from the New Regime the claw-back of profits earned in the period prior to July 2013 under the Original Regime (i.e., the Retroactivity Damages).[14]

    (c) that to calculate the Reasonable Return Damages and Retroactivity Damages, it is first necessary to convert the 7% *post*-tax rate of return under the Original Regime into a *pre*-tax rate of return that will be used for the But-for scenario. To do so, they agree that it is necessary to estimate an effective tax rate to use in the conversion.[15]

    (d) Claimants' PV Plants benefitted from the tax deductibility of interest paid under shareholders loans.[16]

30. In connection with Retroactivity Damages, the Experts agree:

    (a) that Retroactivity Damages should only attempt to eliminate from the New Regime the claw-back of profits earned in the period prior to July 2013 under the Original Regime.[17]

    (b) to replace the July 2013 Net Asset Value ("**NAV**") adopted by Spain with the Revised July 2013 NAV, but otherwise to follow the calculations of the Investment Incentive per MW in the June 2014 Ministerial Order.[18]

    (c) to acknowledge a relationship between the calculation of Retroactivity Damages and the separate calculation of Reasonable Return Damages.[19]

[12] Experts' Joint Memorandum, ¶ 5.
[13] Experts' Joint Memorandum, ¶ 5, under first bullet point, "*Reasonable Return Damages*".
[14] Experts' Joint Memorandum, ¶ 5, under first bullet point, "*Reasonable Return Damages*".
[15] Experts' Joint Memorandum, ¶ 9.
[16] Experts' Joint Memorandum, ¶ 38.
[17] Experts' Joint Memorandum, ¶ 5, second bullet point, "*Retroactivity Damages*".
[18] Experts' Joint Memorandum, ¶ 86.
[19] Experts' Joint Memorandum, ¶ 88.

(d) that any Reasonable Return calculation continues to include a claw-back of profits earned prior to July 2013. The Experts also agree that the Retroactivity Damages calculation should therefore involve the elimination of the remaining "*Claw-Back Feature*" not already accounted for in the calculation of Reasonable Return Damages.[20]

31. On the other hand, the Experts disagree on three key elements relating to the determination of Retroactivity Damages:[21]

(i) the impact of the interest tax shield;

(ii) the actual costs of the Claimants' PV Plants; and

(iii) the alleged "improper attempt" of BDO to re-instate the claw-back as claimed by Brattle.

## B. REASONABLE RETURN DAMAGES

32. The Experts summarize their positions on the Reasonable Return Damages as follows:

> *"**Reasonable Return Damages**: The Experts agree that Reasonable Return Damages should reflect the stand-alone impact in case the Disputed Measures failed to ensure a reasonable return to Claimants and that the relevant analysis should not attempt to also eliminate from the New Regulatory Regime the claw-back of profits earned in the period prior to July 2013 under the Original Regulatory Regime (i.e. Retroactivity Damages). The Experts agree that Claimants' PV plants that fail to obtain under the New Regulatory Regime the Original Regulatory Regime's target of 7% after-tax lifetime project return are entitled to Reasonable Return Damages. Brattle considers that all of the Claimants' PV plants are entitled to Reasonable Return Damages as none of them receive the 7% after-tax return offered under the Original Regulatory Regime. BDO disagrees, and considers that the Tordesillas Plants, Fontellas Plants and Valtierra III Plants will obtain under the New Regulatory Regime (after removing the retroactivity effect of the Disputed Measures) returns in excess of the after-tax target return of 7%. Brattle and BDO further disagree on the annual incremental cash flows that the Lasesa Plants and the Valtierra I & II Plants needed in each year after 2013 for each of the PV projects to achieve the 7% after-tax return."*[22]

33. As stated in the Experts' Joint Memorandum, the Experts disagree on two essential parameters necessary to estimate the Revised Cash Flows related to Reasonable Return:

[20] Experts' Joint Memorandum, ¶ 88.
[21] Claimants' Quantum Submission, ¶ 8.
[22] Experts' Joint Memorandum, ¶ 5.

(a) the effective tax rates that the Tribunal should use to convert into pre-tax numbers the post-tax 7% target return under the New Regime defined by the Tribunal (*essential parameter "iv"*); and

(b) the appropriate methodology to consider the "separate characteristics of each of Claimants' PV Plants" with respect to their investment and operating costs (*essential parameter "iii"*) when estimating the revised incremental revenues.

**(1) Effective Tax Rate and Pre-Tax Target Rate**

34. The Experts agree that to calculate both the Reasonable Return and Retroactivity Damages, it is first necessary to convert the 7% post-tax rate of return under the Original Regime into a pre-tax rate of return that will be used in the But-for scenario. The Experts further agree that, to convert the Original Regime's 7% post-tax return into a pre-tax return, it is necessary to estimate an effective tax rate to use in that conversion.

35. However, the Experts disagree on the relevance of the tax shield benefits of the shareholder loans to estimate the effective tax rate for purposes of this conversion,[23] and include an Appendix showing the Experts' damages estimation subject to the different positions on the effective tax rate.[24]

36. Both Experts acknowledge that interest generated by the shareholder loans are deductible expenses that reduce the project effective tax rate, i.e., the effective tax paid by the projects, even in an all-equity basis (as shareholder loans may also be deemed equity funds).[25]

37. Perhaps the primary area of disagreement among the Experts is that, while Brattle believes that the Spanish regulator took into account any interest tax shield (external debt or shareholder loans) when setting remuneration,[26] BDO believes Claimants' PV Plants indeed had tax shield benefits through the various shareholder loans granted, and the

[23] Experts' Joint Memorandum, ¶ 9.
[24] Experts' Joint Memorandum, Appendix "A".
[25] Experts' Joint Memorandum, ¶ 32.
[26] Experts' Joint Memorandum, ¶ 26.

exercise should follow the Tribunal's instructions in the determination of the effective tax rate.

38. Thus, the Tribunal understood Brattle's and BDO's positions and arguments, and decided that if stakeholder financing was used, the relevant company enjoyed tax deductions on the rest paid. The Tribunal however was not certain at the time of issuing the Decision that such financing existed. In this regard, the Experts agree that such shareholder financing exists.[27]

**(2) Investment Costs**

39. The Experts indicate that, pursuant to the Tribunal's instructions in the Decision, the Experts "*should take into account the separate characteristics of each of Claimants' PV Plants*" when estimating damages. In this respect, the Experts agree that the interpretation of the Tribunal's instruction to factor the "*separate characteristics of each of Claimants' PV Plants*" is ultimately a legal issue. Within that context, the Experts disagree on the interpretation of this instruction.[28]

40. Brattle proposes four different interpretations of the "*marginal plant*" to estimate the "*Alternative Damages*" based on an entitlement to a reasonable return.[29]

41. BDO states that, since the Tribunal concluded in the Decision that "*… the exercise should take into account the separate characteristics of each of Claimants' PV Plants*",[30] this should "*automatically exclude use of the average plant by technology or the marginal plant" as proposed by Brattle*."[31]

42. BDO's Reasonable Return Damages approach is based on the actual performance of the Claimants' PV Plants to determine whether Claimants' PV Plants "*obtained a return above or below that which has been established to be a reasonable return*" but contends that the

[27] Experts' Joint Memorandum, ¶ 38.
[28] Experts' Joint Memorandum, ¶ 44.
[29] Experts' Joint Memorandum, ¶¶ 45-50.
[30] Decision, ¶ 815.
[31] Experts' Joint Memorandum, ¶ 60.

incurred investment cost of the Plants must be disregarded, as the PV Plants were not arm's length transactions.[32]

43. BDO further argues that "… *the best proxy to use is the investment cost of a typical installation, which is reasonably reflected by the own IT-code*".[33] To this end, BDO calculated Claimants' individual PV Plants' IRR under the New Regime to address the question of proportionality raised by the Tribunal. Once BDO calculates the actual pre-tax IRR of each of the PV Plants, BDO removes the claw-back effect of the Disputed Measures (which resulted in higher cash-flows of the Plants), that has the effect of increasing the Plants' IRR. BDO clarifies that in the first step the retroactivity of the New Regime is removed, while in the second BDO only seeks to determine, once the retroactivity is removed, whether the Plants' returns are above or below the target return. By doing this, BDO defines the return of Claimants' PV Plants to the 7% post-tax.[34]

44. Brattle criticises BDO's approach, as it deems that the IRRs computed by BDO do not reflect actual costs and performance, but a mix and match of the investment costs of standard installations and the actual costs and production of Claimants' PV Plants.[35] In contrast, Brattle adopts the calculation framework of the New Regime to estimate Reasonable Return damages, and makes one adjustment: it replaces the 7.398% pre-tax return used by Spain in the relevant Ministerial Orders with an 8.7% pre-tax return, equivalent to a 7% post-tax. This single change generates Revised Investment Incentives per MW and Operating Incentives per MWh, and ultimately the Revised Cash Flows to Claimants' Plants. By design, the Revised Investment and Operating Incentives are sufficient to provide the target reasonable return, measured for a given standard installation or individual facility through an IRR. Then, in a second step, Brattle eliminates the retroactivity still embedded in the formulas of the New Regime, regardless of the level of the allowed rate of return (7.398% pre-tax or 7% post-tax). According to Brattle, the result is post-July 2013 remuneration based on the New Regime framework that reflects both: (i)

[32] BDO states that there was an "*unjustified high investment cost declared by the Claimants*", Experts' Joint Memorandum, ¶ 57.
[33] Experts' Joint Memorandum, ¶ 55.
[34] Experts' Joint Memorandum, ¶¶ 77-81.
[35] Experts' Joint Memorandum, ¶ 62.

the 7% post-tax target return identified by the Tribunal and (ii) an elimination of any retroactivity in the formulas of the New Regime through delinking the Revised July 2013 NAV from the pre-July 2013 cash flows assumed by Spain for particular plants or groups of plants.[36]

### C. RETROACTIVITY DAMAGES

45. The Experts also summarized their positions on the Retroactivity Damages in the Experts Joint Memorandum, as follows.

> *"**Retroactivity Damages**: The Experts agree that Retroactivity Damages should only attempt to eliminate from the New Regulatory Regime the claw-back of profits earned in the period prior to July 2013 under the Original Regulatory Regime. The Experts disagree about precisely how to eliminate the pre-July 2013 claw-back feature."*[37]

46. The Experts further agree that:

> *"… the first step in the calculation of Retroactivity Damages due to the Claw-Back Feature is to estimate a Net Asset Value ("**NAV**") for each of the Claimants' PV Plants as of July 2013, which represents the extent of unrecovered capital and the effective investment upon which the post-July 2013 target return should be computed. The Experts estimate a July 2013 NAV based on an initial investment cost for each plant less an estimate of notional capital recovery in the pre-July 2013 period. The New Regulatory Regime also computed a July 2013 NAV, but took into account the historical cash flows actually earned by different standard installations and assumed that the plants were entitled only to earn a return of 7.398% pre-tax in the pre-July 2013 period. Retroactivity Damages stem from the New Regulatory Regime's underestimate of the remaining July 2013 NAV."* [38]

47. The Tribunal reproduces the following statements from the Experts' Joint Memorandum, on this topic,[39] which further indicate their areas of agreement and disagreement:

> *"84. The Experts disagree about the assumptions necessary to estimate the notional capital recovery to derive the Revised July 2013 NAV. Brattle calculates the Revised July 2013 NAV using the estimations for standard installations defined by Spain under the New Regulatory Regime for each of the*

[36] Experts' Joint Memorandum, ¶¶ 68-69.
[37] Experts' Joint Memorandum, ¶ 5.
[38] Experts' Joint Memorandum, ¶ 83.
[39] Section II.B *Retroactivity Damages* of the Experts' Joint Memorandum.

*scenarios (using Marginal Plant, Average Plant, Own IT code) and also presents a scenario using the Claimants' Plants actual investment costs. BDO computes a Revised July 2013 NAV only for the Own IT code option."*[40]

*"85. To avoid retroactivity, the calculation of the Revised July 2013 NAV must ignore the pre-July 2013 cash-flows estimated by Spain for the standard installation selected in the June 2014 Ministerial Order. Instead, the calculation of the Revised July 2013 NAV must include a deduction representing a notional recovery of capital costs in the operating period prior to July 2013. The notional recovery of capital is affected by two main assumptions. First, the applicable target rate of return in the period prior to July 2013 and the applicable indexation of pre-July 2013 payments."*[41]

*"86. The Experts agree to replace the July 2013 NAV adopted by Spain with the Revised July 2013 NAV, but otherwise to follow the calculations of the Investment Incentive per MW in the June 2014 Ministerial Order. The Revised July 2013 NAV flows directly into the relevant equations and results in a series of "Revised Investment Incentives" per MW for the standard installation in each scenario, which compare directly to the series of Investment Incentives per MW actually computed and applied by Spain over time. In theory, the difference between the series of Revised Investment Incentives per MW for each standard installation and the Investment Incentives per MW actually applied by Spain represents the stand-alone impact of the Claw-Back Feature of the Disputed Measures."*[42]

*"87. The Revised Investment Incentives also affect the estimation of the 7% tax on revenues, the TVPEE. Higher revenues mean higher payments related to the TVPEE. In order to compensate the plants for the increase in the TVPEE, the Experts estimate an uplift to the Operating Incentive."*[43]

*"88. Finally, the Experts acknowledge a relationship between the calculation of Retroactivity Damages and the separate calculation of Reasonable Return Damages. The magnitude of the Revised Investment Incentives per MW will naturally depend on both the Revised July 2013 NAV and the assumed allowed rate of return. The adoption of a revised target return of 7% post-tax in the Reasonable Return Damages calculation therefore will necessarily interact and impact the magnitude of any Retroactivity Damages. The Experts agree that any Reasonable Return calculation continues to include a claw back of profits earned prior to July 2013. The Experts also agree that the Retroactivity Damages calculation should therefore involve the elimination of the remaining Claw-Back Feature not already accounted for in the calculation of Reasonable Return Damages."*[44]

[40] Experts' Joint Memorandum, ¶ 84
[41] Experts' Joint Memorandum, ¶ 85.
[42] Experts' Joint Memorandum, ¶ 86.
[43] Experts' Joint Memorandum, ¶ 87.
[44] Experts' Joint Memorandum, ¶ 88.

> *"89. As a result, Retroactivity Damages involves applying the series of Revised Investment Incentives per MW from the selected scenario, and comparing the resulting cash-flows with the cash-flows obtained under the Reasonable Return Damages already computed for the relevant scenario. The difference between these two values represents the remaining stand-alone impact of the Claw-Back Feature of the New Regulatory Regime. The Experts therefore remind the Tribunal of the need to compute Reasonable Return Damages and Retroactivity Damages based on a consistent set of modelling assumptions. Mixing and matching assumptions for each of the separate calculation would result in distortions."*[45]

**(1) Elements of the Claw-Back Feature**

48. The Experts agree on two issues: (a) that the Original Regime calculated the incentives to renewable energy producers based on a different set of target return, tariff indexation and regulatory lifetime than Spain now provides for under the New Regime. The Experts also agree that these inputs, among others (production, pool price, operational expenditures, taxes, etc.), affect the profitability of a plant and thus the investment income generated by capital investment, and (b) that in order to eliminate the Claw-Back Feature of the Disputed Measures, a portion of the past profits that Spain used to calculate the July 2013 NAV must be removed from the revised calculation. The Experts disagree on the exact portion of the past profits to be removed.[46]

49. Where the Experts disagree relates to deductions made under the June 2014 Ministerial Order. To compute the July 2013 NAV for each standard installation under the New Regime,[47] the June 2014 Ministerial Order started with an assumed amount of capital investment. From the assumed amount of capital investment, the June 2014 Ministerial Order then made two deductions. Both of the deductions depended on an assumption that, prior to July 2013, PV Plants under RD 1578/2008 were only entitled to earn 7.398% pre-

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[45] Experts' Joint Memorandum, ¶ 89.
[46] Experts' Joint Memorandum, ¶ 91.
[47] BDO claims that the NAV is a "*financial based concept defined in the New Regulatory Regime, which depends on a regulatory period (30-year period as defined in the New Regulatory Regime) and a given target return that changes in each regulatory period (for the first regulatory period and thus for the July 2013 NAV calculation the target return defined in the New Regulatory Regime was a 7.398% pre-tax return*)." Brattle does not agree that the NAV "*depends on" the regulatory period and target return. The NAV is a measure of the investment base. At the outset of a PV Plant's life, it represents the total capital invested in the project. Over time a PV plant earns remuneration and recovers its upfront costs. The NAV therefore reduces over time to reflect the recovery of investment costs. The extent of capital recovery over time "depends on" the remuneration provided*." Experts' Joint Memorandum, note 57.

tax over a 30-year regulatory lifetime. Brattle considers that both of the deductions are part of the violative Claw-Back Feature, while BDO considers only the first deduction to be part thereof.[48]

### (2) The Pre-Tax Equivalent of the 7% Target Return and its Implication in the July 2013 NAV

50. The Experts debate regarding the pre-tax equivalent of the 7% after-tax rate of return, specifically, in connection with the inclusion of a tax shield.[49]

51. According to Brattle, the Experts agree that, when setting the FITs under RD 661/2007 and RD 1578/2008, the return actually targeted by Spain prior to July 2013 was 7% post-tax on an all-equity basis. However, Brattle indicates that the New Regime targets a pre-tax return of 7.398%, which is equivalent to only 5.95% after taxes on an "all equity" basis. That is why Brattle contends that, if the Tribunal were to decide to incorporate an interest tax shield when setting remuneration after July 2013 (as recommended by BDO), then it should revert to the 8.7% pre-tax figure excluding the interest tax shield for the calculation of Retroactivity Damages in the period prior to July 2013.[50]

52. BDO, on the other hand, believes that, although changes in the rate of return have an impact on the notional capital recovery prior to July 2013, it believes that changes in the rate of return should be included within the Reasonable Return Damages.[51]

### (3) Tariff Indexation or Constant Annuities

53. The Experts disagree on this issue. Brattle states that RD 1578/2008 FITs annually adjusted the FIT's according to inflation –more specifically, according to the general Consumer Price Index ("**CPI**"), and the New Regime involves a constant annual remuneration without any indexation (i.e., a constant annuity), and that this failure to account for the historical indexation of the FITs under the Original Regime contributes to the Claw-Back Feature.[52]

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[48] Experts' Joint Memorandum, ¶ 92.
[49] Experts' Joint Memorandum, ¶ 111.
[50] Experts' Joint Memorandum, ¶ 117.
[51] Experts' Joint Memorandum, ¶ 118.
[52] Experts' Joint Memorandum, ¶ 119.

54. BDO, on the other hand, contends that Brattle's tariff indexation is not correct, and it has no economic foundation, and therefore does not accurately represent the capital recovery that the standard installations would have had. This, because the Tribunal concluded that the New Regime should not have used past profits to calculate the future remuneration of the Plants, but it did not find that the mechanism to calculate the NAV breached the ECT, and the mechanism calculates the remuneration with constant annuities,[53] and the indexation theory ignores that the cash-flows (annuities) depend on many other elements besides tariffs, such as the plant's production, pool prices, changes in the operational expenditures, CPI evolution, other legal and tax measures.[54]

## D. DISCOUNT RATE AND REGULATORY RISK HAIRCUT

55. The Experts agree that the damages analysis must translate the series of incremental cash flows adopted by each Expert into present value figures. The Experts disagree with the applicable discount rate for Reasonable Return Damages and Retroactivity Damages, in addition to the disagreement concerning the incremental cash flow.[55]

56. Brattle's damages analysis in the arbitration assumed that regulatory risk would have been lower in the But-for scenario than in the Actual scenario, based on contemporaneous market commentary indicating that the Disputed Measures had introduced additional regulatory risk, and maintains that the But-for scenario should reflect a stable and ECT-compliant regulatory framework and thus less risk than the Actual scenario. On the other hand, Brattle observes that BDO's "*uniform regulatory risk*" assumption would imply a tension between the Tribunal's liability finding and the contemporaneous market commentary about regulatory risk cited by Brattle in the arbitration.[56]

57. For its part, BDO contends that the Tribunal has rejected the Claimants' But-for Scenario because all the Disputed Measures have been "*deemed to be legal (save for the retroactive effect of the NAV calculation and the target return*)" which is very similar to the Actual

[53] Experts' Joint Memorandum, ¶ 131.
[54] Experts' Joint Memorandum, ¶ 132.
[55] Experts' Joint Memorandum, ¶ 135.
[56] Experts' Joint Memorandum, ¶¶ 137-138.

Scenario –the only difference being the approach for calculating the July 2013 NAV and the target return. BDO adds that "*the relevant question is whether market participants would have perceived different regulatory risk in similar contexts*."[57]

## E. PREJUDGMENT INTEREST

58. Although the Experts agree to compute pre-award interest based on Spanish Sovereign bond yields, Brattle recommends that the Tribunal compute pre-decision interest based on 10-year Spanish Sovereign bond yields because it contends that Spanish Sovereign bond yields represent the Respondent's borrowing costs, and as such satisfy the "*forced loan*" theory, which "… *analogises a damages decision to a forced loan from the Claimants to the Respondent*", and the Claimants should therefore be compensated for this forced loan in exactly the same way as willing lenders to Spain.[58] BDO, on the other hand, proposes an 8-year Spanish Sovereign bond, since the yields would compensate Claimants for the delay in compensation that has occurred, taking in to account that the starting point should be the valuation date, i.e., June 2014, and 7 years and 6 months have passed since then.[59]

## F. SUMMARY OF DAMAGES CALCULATIONS BY THE EXPERTS

59. Despite their differences, the following table shows the calculations of damages as presented by the Experts, following their respective assumptions:[60]

[57] Experts' Joint Memorandum, ¶¶ 139-142.
[58] Experts' Joint Memorandum, ¶ 143.
[59] Experts' Joint Memorandum, ¶¶ 143-146.
[60] Experts' Joint Memorandum, ¶ 147.

**Joint Table 1: Damages results**

| | | Brattle options | | | | BDO Approach |
|---|---|---|---|---|---|---|
| | | Marginal Plant | Average Plant | Own It Code | Real Plant | |
| **Assumptions** | | | | | | |
| Setting remuneration | | Exclude Interest Tax Shield | Exclude Interest Tax Shield | Exclude Interest Tax Shield | Exclude Interest Tax Shield | Include Interest Tax Shield |
| Damages estimation | | Include Interest Tax Shield | Include Interest Tax Shield | Include Interest Tax Shield | Include Interest Tax Shield | Include Interest Tax Shield |
| Investment costs | | Marginal plant same technology | Average plant same technology | Own IT-Code | Actual Plants | Revised Actual Investment costs (Own IT-code) |
| Production and operating costs | | Marginal plant same technology | Average plant same technology | Own IT-Code | Actual Plants | Actual Plants |
| Regulatory risk | | Different But-for and Actual | Different But-for and Actual | Different But-for and Actual | Different But-for and Actual | Same But-For and Actual |
| Retroactivity Damages | € mln [1] | -5.4 | -8.3 | -6.9 | 0.8 | -9.2 |
| Reasonable Return Damages | € mln [2] | -21.5 | -17.2 | -18.0 | -50.7 | -0.6 |
| **Total Damages** | € mln [3] [1]+[2] | -27.0 | -25.6 | -24.9 | -49.9 | -9.9 |

## IV. THE PARTIES' POSITIONS

### A. CLAIMANTS' POSITION

60. Claimants have requested the Tribunal[61] to:

(a) *order that Spain pays the Claimants compensation for a total amount of EUR 50.7 million;*

(b) *pay the Claimants pre-award interest based on 10-year Spanish Sovereign bond yields, compounded monthly;*

(c) *pay the Claimants post-award interest, at a rate higher than the 10-year Spanish Sovereign bond yield to be determined by the Tribunal, compounded monthly, from the date of the award until full payment thereof;*

(d) *pay the Claimants all costs and expenses of this arbitration on a full-indemnity basis, including all expenses that the Claimants have incurred or will incur in respect of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants; and*

(e) *any other relief that the Tribunal may deem just and proper.*

[61] Claimants' Quantum Submission, ¶ 60.

61. In their quantum submission, Claimants addressed and commented on the areas of disagreement between the Experts on both the Reasonable Return Damages and the Retroactivity Damages.

**(1) Reasonable Return Damages**

62. Claimants contend that, although the Parties' Experts agree that Reasonable Return Damages requires the determination of the Revised Cash Flows necessary for each of the Claimants' PV Plants to obtain the 7% post-tax return offered under the Original Regime –as indicated in the description of the Experts' Joint Memorandum– Brattle argues that they disagree on three issues:[62]

a) the impact of the interest tax shield. Brattle follows the same methodology as the Original Regime by only taking account of the tax shield when modelling the actual taxes paid by the Claimants' PV Plants;

b) the actual costs of the Claimants' PV plants is the correct cost base. Brattle provides four possible alternatives (each examined below) to determine which investment and operating costs should serve as the basis on which to compute the Revised Cash Flows, specifically including the actual costs of the Claimants' PV Plants; and

c) Brattle's contention of BDO's improper attempt to re-instate the claw-back. Since Brattle contends that BDO adopts an approach which effectively neutralizes the Tribunal's finding on retroactive claw-back by purporting to eliminate its impact, but re-introducing a new form of retroactivity, Brattle performs a straightforward calculation which determines the additional cash flows needed to provide each of the Claimants' PV Plants with a 7% post-tax return over their lifetime.

***a. Impact of the Interest Tax Shield***

63. Claimants recall that the Tribunal instructed the Parties and their Experts in the Decision to compute Reasonable Return Damages using the 7% post-tax return that was offered under the Original Regime (emphasis by Claimants). Claimants contend that, although the

[62] Claimants' Quantum Submission, ¶¶ 7-8.

Experts agree that the first step is to convert the Original Regime's 7% post-tax return into a pre-tax return, and doing so entails estimating an effective tax rate, they disagree on how to make such conversion.

64. According to Claimants, this calculation should be made in such way as to determine what they would have received in "*real life*", and to this end they argue that Brattle adopts the same approach as the Spanish regulator under the Original Regime, by assuming there is no impact from the interest tax shield for purposes of converting the 7% post-tax return into a pre-tax target return. By doing so, Brattle calculates an effective tax rate of 19.6% and therefore converts the 7% post-tax return into an 8.7% pre-tax return.[63] Claimants add that "*…Brattle then uses the 8.7% pre-tax rate of return to derive the amount of revenue needed to ensure the Claimants receive the equivalent of the Original Regime's 7% post-tax return. In a second step, Brattle then reflects the actual taxes paid in 'real life' at each of the PV Plants, including by taking into account the interest tax shield"*.[64]

65. Claimants also contend that the Tribunal instructed in the Decision that any tax shield benefit obtained by the PV plants be "*taken into account individually for each PV plant, as required, in order to determine the actual tax rate*",[65] and stressed the importance that the Claimants do not "*do better in litigation than in real life*",[66] and that Brattle's two-step approach to implementing the interest tax shield does exactly that, adding that this is the rate of return the Claimants' PV Plants would have actually received under the Original Regime and also reflects the actual taxes that each of the Claimants' PV plants would have paid.[67]

66. Claimants criticise BDO's calculations by saying that BDO ignores the instruction to use the Original Regime's (single) 7% post-tax benchmark (by assuming that the Original Regime 7% target rate of return did, in fact, take account of the interest tax shield), and applies a *different* effective tax rate for each of the PV Plants that results in a *different* (and

[63] As described in the Experts' Joint Memorandum, ¶ 11.
[64] Claimants' Quantum Submission, ¶ 10(a).
[65] Decision, ¶ 817.
[66] Decision, ¶ 754.
[67] Claimants' Quantum Submission, ¶ 11.

much lower) pre-tax target return for each PV Plant.[68] According to Claimants, BDO then computes Revised Investment and Operating Incentives (as these terms are defined in the Experts' Joint Memorandum) based on these so-called by Claimants "*artificial*" pre-tax target returns for each plant. In this calculation, the average effective tax rate across the plants is 12.8%, which translates to an average pre-tax return of 8%.[69]

67. Claimants contend that the 7% post-tax return was set by Spain in the Original Regime, without considering the benefit of any interest tax shield (regardless of whether any PV plants might actually benefit from an interest tax shield),[70] which according to Claimants BDO admitted at the June Hearing.[71] Claimants further contend that Spain could not predict what specific financing arrangements might be present at each of the many thousands of individual PV plants in Spain,[72] also acknowledged by Respondent's expert at the hearing.[73] By not taking account of the interest tax shield in this first step of the calculation, Claimants argue that Brattle's 19.6% effective tax rate does precisely that, and therefore reflects "*real life*".[74]

68. Claimants indicate that, in a second step, both Experts take account of the actual interest tax shield at each of Claimants' PV Plants in order to determine what taxes are actually paid at each facilities when computing the Revised Cash Flows in both the Actual and But-for scenarios, i.e., to reflect the level of tax shield "*individually for each PV plant, as required, in order to determine the actual tax rate"* – as they recall the Tribunal directed in the Decision.[75]

69. Claimants point to BDO's reliance on paragraphs 748 and 754 of the Decision to suggest that the Tribunal determined that the interest tax shield <u>should</u> be taken into account in the first step, by converting the Original Regime's single 7% post-tax return into multiple

[68] Claimants' Quantum Submission, ¶ 10(b).
[69] Claimants' Quantum Submission, ¶ 10(b).
[70] Claimants' Quantum Submission, ¶ 12.
[71] Claimants' Quantum Submission, ¶ 12, making reference to June Hearing, Tr. Day 4, 161: 23 to 162: 3. See also, June Hearing, Tr. Day 4, 165: 5-13.
[72] Claimants' Quantum Submission, ¶ 13.
[73] June Hearing, Tr. Day 4, 167: 10 to 168: 7.
[74] Claimants' Quantum Submission, ¶ 14.
[75] Claimants' Quantum Submission, ¶ 15, quoting the Decision ¶ 817.

different pre-tax returns depending on the unique financing arrangements at each individual PV Plant, which Claimants contend "*makes no logical sense*" because *"in 'real life', Spain did not offer multiple different reasonable rates of return to investors depending on their tax individual status*".[76] They further claim that BDO's position is inconsistent, insofar as "*BDO accepts that any tax shield associated with external debt financing should not be included in the first step, but BDO nonetheless claims that any tax shield associated with internal debt (shareholder loans) should be included*".[77]

***b. The Actual Costs of the Claimants' PV Plants is the Correct Cost Base***

70. Claimants indicate that Brattle and BDO disagree on the determination of the appropriate "*Investment and Operating Costs*" since the Tribunal instructed the Parties to "*take into account the separate characteristics of each of Claimants' PV Plants*" in their damages calculations and have therefore adopted different investment and operating costs to calculate the Revised Cash Flows. To this end, Brattle performed alternative interpretations that the Tribunal may ultimately decide to adopt in its Award:[78]

(a) *first*, consistent with its previous Reports, Brattle adopts a "*Marginal Plant*" option which calculates the Revised Cash Flows on two marginal plants[79] representative of each type of PV plants owned by the Claimants: a "*Single-axis Marginal Plant*", and a "*Double-axis Marginal Plant*". According to Claimants, this interpretation would maintain a marginal system and at the same time take into account differences in PV technology;[80]

(b) *second*, Brattle adopts an "*Average Plant by Technology*" option which calculates the Revised Cash Flows on the average hypothetical standard installation costs of single and double-axis plants;[81]

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[76] Claimants' Quantum Submission, ¶ 17 (emphasis added by Claimants).
[77] Claimants' Quantum Submission, ¶ 18(emphasis added by Claimants).
[78] Claimants' Quantum Submission, ¶¶ 21-22.
[79] For each of the technologies, i.e., single-axis or double-axis, this is defined as "*the most expensive single-axis/double axis PV standard installation on the system that Spain continues to deem efficient under the New Regulatory Regime*" (Experts' Joint Memorandum, ¶ 46).
[80] Experts' Joint Memorandum, ¶ 46.
[81] Experts' Joint Memorandum, ¶ 47.

(c) *third*, Brattle adopts an "*Own IT-Code*" option which calculates the Revised Cash Flows on the basis of the hypothetical standard installation costs assigned by Spain under the New Regime to each of the Claimants' PV Plants;[82] and

(d) *fourth*, Brattle adopts an "*Actual Plant*" option which calculates the Revised Cash Flows on the basis of the actual investment and operating costs of each of the Claimants' PV Plants.[83]

71. Claimants point out that Brattle's view is that the "*Actual Plant*" option is that which is most in line with the wording of the Tribunal's instruction to take into account the "*separate characteristics*" of each of the Claimants' PV plants.[84]

72. Claimants add that "*[f]ocusing on actual costs is the best way accurately to capture the harm suffered by the Claimants and make sure that they receive full compensation for their losses*"[85] and reference *NextEra v. Spain*, where the tribunal found that focusing on the standardised costs of cost-effective facilities "*might be relevant for devising a regulatory regime based on a reasonable return*", but not for the calculation of damages.[86]

73. Further, Claimants criticise BDO's approach, explaining that Brattle argues that BDO adopts an inconsistent (and, therefore, invalid) approach which consists of "'*mixing-and-matching': (a) the hypothetical standard investments costs retroactively assigned by Spain under the New Regime to each of the Claimants' PV Plants in their respective IT-Code; but adopting (b) the actual operating costs and production levels at each of the PV Plants*."[87] This, they add, not only does not reflect the actual characteristics of the Claimants' PV Plants, but it leads BDO to underestimate Reasonable Return Damages.

74. Claimants add that BDO's position is contradictory. Even though BDO admits that it would be improper to focus exclusively on the performance of hypothetical standard installations

[82] Experts' Joint Memorandum, ¶ 48.
[83] Experts' Joint Memorandum, ¶ 49.
[84] Claimants' Quantum Submission, ¶ 23, making reference to the Experts' Joint Memorandum, ¶ 50.
[85] Claimants' Quantum Submission, ¶ 25.
[86] **CL-0182**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum, 12 March 2019, ¶ 654.
[87] Claimants' Quantum Submission, ¶ 27, making reference to Experts' Joint Memorandum, ¶¶ 52-54.

in light of the Tribunal's findings, "… *BDO nonetheless ignores the actual investment costs and claims they should be 'disregarded' in favour the hypothetical investment costs defined by Spain under the New Regime"*.[88] Further, Claimants challenge BDO's disregard for the actual investment costs also lacks any valid justification because it "… *simply states, without any supporting evidence, that the actual investment costs of the PV Plants are higher than they should have been due to alleged the presence of related-parties transactions during the construction period",* adding that "… *at no point did the Tribunal find BDO's claim of 'unjustified high investment cost' to be meritorious*".[89]

### *c. BDO's Improper Attempt to Re-Instate the Claw-Back*

75. Claimants contend that Brattle assesses Reasonable Return Damages and Retroactivity Damages through two separate exercises, such that the Claimants' PV plants both: (a) obtain a 7% post-tax return offered under the Original Regime;and (b) are not penalised by the retroactive features of the New Regime by assessing the amount of cash flows needed for the PV Plants to eliminate the retroactivity embedded in the formulas of the New Regime.[90]

76. Claimants state their disagreement with BDO's calculation because they indicate that – instead of looking at the PV Plants' actual IRRs– BDO computes the PV Plants' IRR assuming that the retroactivity has been eliminated from the New Regime (which Claimants contend is "*manifestly not the case*"), and then considers that Reasonable Return Damages only exist if this second, artificial IRR, remains below its target rate return. Since BDO links the effective remuneration permitted to the plants after July 2013 based on the extent of cash flows received by the plants prior to July 2013, this effectively re-introduces retroactivity.[91]

77. According to Claimants, the Experts' agreement about an "*inherent claw-back in any Reasonable Return calculation*" implies that the calculation sequence must be the other way around – first calculate Reasonable Return Damages (which will inherently include

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[88] Claimants' Quantum Submission, ¶ 28.
[89] Claimants' Quantum Submission, ¶¶ 29-30 (emphasis added by Claimants).
[90] Claimants' Quantum Submission, ¶ 33.
[91] Claimants' Quantum Submission, ¶ 35.

some claw-back) and then in a second step eliminate any remaining claw-back in the estimate of Retroactivity Damages.[92]

78. Thus, Claimants assert that "… *Brattle's Retroactivity Damages includes the Reasonable Return Damages, and eliminate only the remaining dependence of post-2013 remuneration on the actual cash flows earned by particular installations prior to July 2013 (i.e. the claw-back). Brattle's Retroactivity Damages are therefore reduced to the extent that a portion of the New Regulatory Regime's claw-back has already been captured in its Reasonable Return Damages*."[93]

**(2) Retroactivity Damages**

79. Claimants contend that, "… *to eliminate the full extent of retroactivity under the New Regime, both: (a) the arithmetical deduction of remuneration in excess of the newly defined 7.398% pre-tax return; and (b) the overestimation of capital recovery in the period before July 2013 (by assuming that capital is recovered based on a constant remuneration profile based on a 7.398% target pre-tax return), must be eliminated*".[94]

80. Claimants assert that the New Regime considers the remuneration received by the Claimants' PV Plants before its entry into force (July 2013) to calculate their future remuneration, and that the Tribunal found this feature to be in breach of the ECT.[95] By "*taking into account*" past revenues, Claimants contend that "… *the New Regime overestimates the extent of capital recovery as of the entry into force of the New Regime. The New Regime 'takes into account' pre-2013 revenues to reduce the NAV in two different ways. Both need to be removed to eliminate the full extent of the claw-back as ordered by the Tribunal*".[96] It takes into account, Claimants add, pre-2013 revenues to reduce the NAV in two different ways: (i) looks at the historical income received in the past in excess of the newly calculated stream of constant annuities, deducting the difference from the NAV;[97]

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[92] Claimants' Quantum Submission, ¶ 36.
[93] Claimants' Quantum Submission, ¶ 37 (emphasis added by Claimants).
[94] Claimants' Quantum Submission, ¶ 53.
[95] Decision, ¶¶ 696, 697, 698, 793(d), 820 and 822(4).
[96] Claimants' Quantum Submission, ¶ 48.
[97] Experts' Joint Memorandum, ¶ 96 ("[b]*y deducting the historical excess, the June 2014 Ministerial Order reduced the July 2013 NAV*").

and (ii) overestimates capital recovery in the period before its entry into force, thereby further reducing the value of the NAV by tampering with the level and profile of past remuneration and ignoring that under the Original Regime.[98]

81. According to Brattle, both elements contribute to overestimating the extent of capital recovery. In particular: (a) assuming an annuity based on a 7.398% pre-tax return instead of an annuity based on the 7% post-tax return targeted under the Original Regime leads to higher capital recovery in the pre-2013 period; and (b) by designing remuneration under the New Regime as a stream of constant annuities without any indexation, contrary to the Original Regime which were indexed according to inflation, Spain further overestimates the extent of capital recovery for the period before the entry into force of the New Regime.[99]

82. As in the case of the calculation of Reasonable Return Damages, Claimants argue that, although both Experts agree that the first element of the claw-back needs to be removed, BDO disagrees with the elimination of the second element of the claw-back. Further, according to Claimants, even though BDO agrees that changes in the target return have an impact on the capital recovery in the period before July 2013, BDO supports that the claw-back should be included within the Reasonable Return Damages.[100] In addition, Claimants assert that BDO considers that the tariff indexation artificially reduces the capital recovery in the period prior to 2013, resulting in a higher NAV, which is misleading, because the tariff indexation under the Original Regime was <u>not</u> artificial; it was real, as was its effect on capital recovery, adding that the same cannot be said of the New Regime's constant annuities, which never actually applied in the past, and which artificially overestimate the extent of capital recovery.[101]

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[98] Claimants' Quantum Submission, ¶ 50. Claimants state that under the Original Regime the FITs were set with by reference to a target return of 7% post-tax; and were updated annually according to inflation. Instead, the New Regime calculates the extent of capital recovery (the NAV) by reference to: (a) a different rate of return, a 7.398% pre-tax return; and (b) a new remuneration profile, the newly (and arbitrarily) calculated stream of constant annuities.
[99] Claimants' Quantum Submission, ¶ 51.
[100] Claimants' Quantum Submission, ¶ 52(a).
[101] Claimants' Quantum Submission, ¶ 52(b).

### (3) Discount Rate and Regulatory Risk

83. Claimants assert that the "*Experts agree that the incremental cash flows they calculated must be discounted to reflect present value*," but that "[t]*hey disagree, however, on the applicable discount rate and, in particular, how to treat regulatory risk. In short, Brattle assumes a higher regulatory risk in the Actual scenario (i.e., after Spain violated the ECT) than in the But-for scenario, while BDO assumes the same regulatory risk exists in both scenarios*."[102]

84. As explained in the Experts' Joint Memorandum,[103] Brattle applies a 4.84% base-line weighted average of cost of capital (WACC) plus a separate adjustment to account for regulatory risk (which it terms as "**Regulatory Risk Haircut**"), following the assumptions in their First and Second Brattle Quantum Reports.[104] The combined result was the equivalent of an overall 5.44% discount rate (after-tax) in the But-for scenario (i.e., where the Original Regime was maintained without significant change) and a 7.34% (after-tax) discount rate in the Actual scenario (i.e., under the New Regime).

85. Claimants contend that Brattle's position should be preferred, as a higher regulatory risk in the Actual scenario is supported by the evidence on the record, which confirms that Spain's implementation of the Disputed Measures significantly increased regulatory risk.[105]

### (4) Pre-Award Interest

86. Brattle proposes a 10-year bond yield is a natural proxy for a "*commercial rate established on a market basis*", as Claimants contend is required by the ECT, and criticises BDO's suggested 8-year bond yield, which Claimants argue should be rejected because there is no justification for using the length of time between the Valuation Date and the date of the Final Award to determine the interest rate that should be used.[106]

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[102] Claimants' Quantum Submission, ¶ 54.
[103] Experts' Joint Memorandum, ¶ 136.
[104] Brattle First Quantum Report, Section V.D. "Business Risks", and Second Brattle Quantum Report, Section VII.A.
[105] Claimants' Quantum Submission, ¶ 55.
[106] Claimants' Quantum Submission, ¶¶ 56-58.

## B. RESPONDENT'S POSITION

87. Respondent has requested the Tribunal to quantify damages in the Award in the amount of EUR 9.9 million,[107] based on the Joint Expert Memorandum and the allegations contained in its Respondent's Quantum Submission, where Respondent elected to highlight and addressed 6 (six) issues in disagreement among the Experts: (1) proportionality; (2) effective tax rate; (3) investment costs; (4) retroactivity; (5) regulatory risk; and (6) prejudgment interest. Each is examined below.

### (1) Proportionality

88. Respondent recalls that the Tribunal concluded in the Decision that Spain had breached its obligations under Article 10(1) of the ECT, since the Disputed Measures were not proportionate insofar as they failed to maintain the reasonable rate of return ensured to Claimants under the primary legislation.[108]

89. To address the economic impact of the lack of proportionality, BDO has calculated the actual IRR for each of the Claimants' PV Plants individually and has examined whether the Claimants' PV Plants needed or not a higher remuneration to achieve the 7% after tax target return indicated by the Tribunal in its Decision; they have considered the actual IRR of Claimants' PV Plants under the Disputed Measures and verified whether they achieve such threshold.[109]

90. Respondent points to the Tribunal's analysis in respect to proportionality in the Decision, where it established that "[t]*o examine the question of proportionality it is necessary to assess the impact to individual plants, which is consistent with the approach taken by the regulator when designing the special regime under Law 54/1997…*",[110] and argues that Brattle's approach ignores the actual individual Plant's return and focuses the exercise on

[107] Respondent's Quantum Submission, ¶ 54.
[108] Respondent's Quantum Submission, ¶ 4.
[109] Respondent's Quantum Submission, ¶ 7.
[110] Decision, ¶ 735.

"*standard installations*". Hence, it concludes that Brattle's approach does not address the issue of proportionality as directed by the Tribunal in its Decision.[111]

**(2) Effective Tax Rate**

91. Respondent refers to the difference acknowledged by the Tribunal of the "*effective tax rate*" identified by each of the Parties,[112] and recalls that two inputs were in disagreement: (a) depreciation period, and (b) tax deductibility of the shareholder loans.

92. In connection with the first, Respondent recalls that the Tribunal decided to maintain the 25-year period as proposed by Brattle.

93. On the second, Respondent further recalls that the Tribunal acknowledged that it had no information of the existence of shareholder loans in respect to the PV Plants but cautioned that if shareholder loans existed where the relevant companies benefitted from the so-called tax shield, this factor would need to be taken into account, individually for each PV Plant.[113] On this point, Respondent contends that there is evidence in the record that confirms that there are various shareholder loans that were granted to the Claimants' PV Plants, and hence that they benefited from the deductibility of the interest paid for said loans and attracted the corresponding tax shield, and points to the Experts' Joint Memorandum where BDO has included the necessary information to that effect.[114] Therefore, BDO included such tax shield benefit to determine the effective tax rate.

94. In response to the argument by Claimants that Spain did not consider any tax shield when designing the support scheme to derive the returns under the Original Regime, Respondent contends that this becomes irrelevant because the Tribunal has indicated in its Decision that the effective tax rate should include the shareholder loans tax benefits, if any. Further, Respondent contends that "… *if the tax shield is not applied when converting the 7% post tax to an equivalent pre tax rate of return, the result is a higher remuneration to the*

[111] Respondent's Quantum Submission, ¶ 12.
[112] Respondent's Quantum Submission, ¶ 13, with reference to the Decision, ¶ 742.
[113] Respondent's Quantum Submission, ¶¶ 16-18.
[114] Respondent's Quantum Submission, ¶ 19, referencing the Joint Expert Memorandum, ¶¶ 29-31 and Exhibit BQR-06.

*Claimants on the basis that they will have to pay taxes that will not actually be paid in the real world*".[115]

**(3) Investment Costs**

95. Respondent also recalls that the Decision provides that investment costs of the PV Plants should be taken into account to calculate the IRR and thus the damages in this case, and to this end, "… *the exercise should take into account the separate characteristics of each of Claimants' PV Plants"*.[116]

96. To address this element, BDO uses the actual production and operating costs of each of the Claimants' PV Plants and what it terms as revised actual investment cost for each of the Claimants' PV Plants, thereby combining actual performance with actual investment cost. Respondent denies the indication of Claimants that BDO adopted "*an inconsistent hybrid approach because it combines investment costs of standard installations with operating costs and production levels of the actual individual Plants*".[117] It refers to BDO's Second Expert Report which contains a detailed analysis of the need to compute a revised actual investment cost of Claimants' Plants.[118]

97. According to Respondent, BDO proved that the investment costs of Claimants' PV Plants "… *were excessive compared to other similar facilities and explained these exceptionally high costs by the fact that the PV Plants in this case were not constructed by third parties at arms' length prices but rather by group companies of the owners of the Plants at that time, who afterwards sold them to Claimants*".[119]

**(4) Retroactivity**

98. Respondent acknowledges the disagreement of the Parties' Experts on the manner to compute in the damages calculations the Tribunal's decision on the claw-back effect, and

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[115] Respondent's Quantum Submission, ¶¶ 20-23.
[116] Respondent's Quantum Submission, ¶ 28, with reference to the Decision, ¶ 815.
[117] Respondent's Quantum Submission, ¶¶ 29-30.
[118] BDO Second Report, dated 13 February 2019, ¶¶ 141, 143, 147 and 148-153.
[119] Respondent's Quantum Submission, ¶ 33.

claims a "*conceptual consideration needs to be made*", since "*… in reality, renewable investors in Spain have not suffered any damages due to the claw-back effect of the Disputed Measures adopted by the Kingdom of Spain*", because what the claw-back effect "*… really means is that the amounts received by the renewable plants in order to achieve a reasonable return through their useful life are received sooner rather than later during their useful life*,"[120] adding that renewable plants in Spain have not had to pay back under the Disputed Measures any of the subsidies already received from Spain. What has only occurred is that higher subsidies have been paid sooner in order to ensure a reasonable rate of return to renewable plants during their useful life, arguing that receiving subsidies sooner rather than later in time can in no way be considered detrimental to investors from a financial standpoint.[121]

**(5) Regulatory Risk**

99. On this point, Respondent states that BDO deems that the regulatory risk should be the same in both "But-for" and "Actual" scenarios, contrary to Brattle, who considers that risk in the But-for scenario should be lower than in the Actual scenario.[122]

100. Respondent contends that, during the arbitration, BDO and Brattle made their risk assessment of the But-for scenario assuming that none of the Disputed Measures would have been implemented in such scenario, but that, after the Tribunal's Decision was rendered, this context has completely changed as there is a "new" But-for scenario,[123] "*… where most of the New Regulatory Regime adopted by Spain is deemed legal and hence introduced in the Tribunal's But-for scenario*". This means, Respondent adds, that the Actual scenario and the Tribunal's But-for scenario represent very similar worlds with very similar risks.[124]

[120] Respondent's Quantum Submission, ¶¶ 38-39.
[121] Respondent's Quantum Submission, ¶ 39.
[122] Respondent's Quantum Submission, ¶ 44.
[123] Respondent's Quantum Submission, ¶ 46.
[124] Respondent's Quantum Submission, ¶¶ 46-47.

101. Respondent criticises Brattle and contends that Brattle ignores this fact and continues to apply a lower risk in the But-for scenario that would correspond to a "But-for scenario with no Disputed Measures", which no longer applies.[125]

**(6) Prejudgment Interest**

102. Respondent acknowledges that both Experts agree that the Tribunal should compute said prejudgment interest based on Spanish sovereign bond yields, although they disagree on the term of the bond. While Brattle proposes the use of 10-year Spanish sovereign bond yields, BDO proposes applying yields for an 8-year Spanish sovereign bond, considering that less than 8 years have passed since the 2014 valuation date. [126]

## V. THE TRIBUNAL'S ANALYSIS

103. At the outset, the Tribunal would like to note that the determination of damages has proven to be a very complex and difficult task. The Tribunal acknowledges that the Parties and their experts have attempted to untangle the complex issues and assist the Tribunal in the determination of damages due to Claimants, but the analysis and elements contained in the Experts' Joint Report and the Parties' submissions –rather than facilitating the Tribunal's work, have made the exercise more arduous because of the substantial disagreements contained therein. It is not that the Parties or their respective Experts have failed to provide elements for the determination of damages; they have. The issue for the Tribunal has been to identify an appropriate methodology that facilitates the determination of the amount.

104. The disagreements between the two sides are significant and the variables contained in the Expert's Joint Report are practically infinite. Any change, however minor, triggers different results. Brattle (Claimants' Expert) accepts the difficulty when it shows the various scenarios that arise simply when individual PV Plants take into account different financing terms, such as the amount of financing, ratio of debt/equity, interest rate, loan

[125] Respondent's Quantum Submission, ¶ 49.
[126] Respondent's Quantum Submission, ¶¶ 51-53, Experts' Joint Memorandum, ¶¶ 144-146.

tenure, etc. –even considering an "all equity" after-tax return of 7% that has been accepted by the Tribunal.

105. Each arbitral tribunal is faced with a task that likely has obstacles before it when seeking to reach an accurate determination of damages. In this case, however, one of the major obstacles faced is the lack of reliable information on the investment costs of the PV Plants.

106. Despite the best efforts of the Experts, the investment costs are estimated based on different assumptions: whether this may be a "marginal plant", "average plant by technology", "Own IT-Code" or "Actual plant" as Brattle has identified. Each option has internal elements that are not objective. In the case of a "marginal plant", for example, this relates to "*the most expensive…standard installation on the system that Spain continues to deem efficient*";[127] in the case of the "*average plant by technology*", then it is "*average hypothetical standard installation costs*"[128]; the "*Own IT-Code*" is the "*hypothetical standard installation costs assigned by Spain under the New Regime to each of the Claimants' PV Plants*";[129] and the "*Actual plant*" –despite its name, and the fact that it allegedly utilizes "*the actual investment and operating costs of each of the Claimants' PV Plants*", as defined by Brattle.[130]

107. Ultimately, however, the Tribunal must decide the compensation due to the Claimants based on the parameters set out in its Decision,[131] albeit with some degree of discretion. Such discretion should be exercised in a reasonable manner guided by the agreements among the Experts and using the information made available by the Parties and their respective Experts who, despite their disagreements on the methodology, do agree on damages calculations based on each other's assumptions,[132] and have even incorporated sensitivities to the damages calculation of the other.[133]

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[127] Experts' Joint Memorandum, ¶ 46.
[128] Claimants' Quantum Submission, ¶ 22(b).
[129] Claimants' Quantum Submission, ¶ 22(c).
[130] Experts' Joint Memorandum, ¶¶ 46-49; Claimants' Quantum Submission, ¶ 22(d).
[131] See ¶ 27 above (parameters of period of depreciation, target rate of return, investment and operating costs, effective tax rate and date of valuation of damages).
[132] Experts' Joint Memorandum, ¶ 147.
[133] Experts' Joint Memorandum, ¶¶ 148-149.

108. In assessing damages, the Tribunal begins by recalling the determinations on damages made in its Decision. Paragraph 822 of the Decision noted that Spain, "*breached Article 10(1) to the extent that the remuneration of each of the plants failed to ensure payment to Claimants of a reasonable rate of return on their investment during the lifetime of Claimants' PV Plants*" ("***Reasonable Return Damages***"), and "*by clawing back past remuneration*" ("***Retroactivity Damages***").[134] However, it was unable to quantify the rate of return of Claimants' Plants or the amount of the retroactive reduction on the basis of the quantum reports.

109. Such parameters were supposed to aid the Parties in calculating a rate of return that better reflected the *economic reality* (or actual impact) of the New Regime on the Plants. Although the Parties reached an agreement in certain elements necessary to implement such parameters, the areas of disagreement are substantial on both: the assumptions and methodologies. The Tribunal therefore considers it appropriate to begin the analysis of damages by identifying the areas of agreement and disagreement between the Parties.

- **Reasonable Return Damages**: The Parties agreed that the relevant analysis should reflect the "*stand-alone impact in case the Disputed Measures failed to ensure a reasonable return to Claimants*".[135] This means that if any of Claimants' Plants failed to obtain under the New Regime the target of 7% post-tax return then they are entitled to reasonable rate of return damages. The Parties disagreed on how to implement it. In essence they disagree on two essential parameters necessary to estimate the revised cash flows related to Reasonable Return: (i) the effective tax rates that it should be used to convert the post-tax rate of 7% into a pre-tax and (ii) the methodology to consider the investment and operating costs when estimating the revised incremental revenues.

- **Retroactivity Damages**: The Parties agreed that the claw-back provision of the New Regime should be eliminated only with respect to the profits earned in the period prior to July 2013. The Parties disagree on how to eliminate it.

[134] Decision, ¶ 822.
[135] Experts' Joint Memorandum, ¶ 3.

110. The Tribunal addresses each of the above items in the sections that follow.

**(1) Reasonable Return Damages**

111. The point of reference in the analysis is a target return of 7% post-tax as targeted under the Original Regime. If Claimants' PV Plants fail to obtain such target under the New Regime, then Claimants would be entitled to Reasonable Return Damages. As the Experts' Joint Report explains, this implies the need to estimate the amount of cash flows required for each plant to obtain the 7% post-tax return.

112. The Experts agree that in order to calculate the reasonable return it is necessary to convert the 7% post-tax rate of return under the Original Regime into a pre-tax rate of return.[136] To do so, the Experts also agree that it is necessary to estimate an effective tax rate to use in the conversion. The Experts profoundly disagree on the relevance of the tax shield benefits of the shareholder loans to assess the effective tax rate.

***a. The Effective Tax Rate***

113. In its Decision, the Tribunal set out a *post*-tax target rate of return of 7% and an average tax rate across all Claimants' PV plants of 19.6 % on the *assumption* that the Claimants' PV Plants had no debt financing that translates into a tax shield benefit that lowers this rate. In the event that any of the PV Plants benefitted from a tax shield arising from debt financing, then the tax rate should be adjusted accordingly. The Tribunal did not, however, state 'how' and 'when' this element is to be factored in. This is where the first divergence of approach emerges in the Experts' Joint Memorandum and the Parties' submissions.

114. For Claimants, a 19.6 % average effective tax rate applies based on the assumption that the Spanish regulator did not take into account the interest tax shield when deriving the FITs for RD 1578/2008. According to Brattle, this results in a pre-tax rate of return of 8.7% under a 19.6 % effective tax rate.[137] In their view, that reflects 'real life' at the time (i.e., 2008). Claimants add that Spain could not have predicted "*what specific financing*

[136] Experts' Joint Memorandum, ¶ 9.
[137] Experts' Joint Memorandum, ¶ 11.

*arrangement might be present at each of the many thousands of individual PV plants in Spain*".[138]

115. Claimants do not say, however, that the tax shield should not be taken into account. They contend that it should, but only in the second step – that is, when computing the Revised Cash Flows in both the 'Actual' and 'But-for' scenarios. Claimants argue that it is in this second step that they "*fully*" take the interest tax shield into account at each PV Plant.[139]

116. Respondent claims, on the other hand, that Brattle fails to consider the tax benefit of interest in the 19.6 % effective tax shield.[140] It argues that the impact of the tax shield should be applied in a first step while converting the 7% *post*-tax into a *pre*-tax rate, because failure to do so means that Claimants will receive higher compensation based on the tax rate that would not be paid in the 'real world'.[141] BDO (Respondent's Expert) finds that 12.8% is the average effective tax rate across the plants, which translates to an average pre-tax return of 8%.[142]

117. Claimants point to BDO's reliance on paragraphs 748 and 754 of the Decision to suggest that the Tribunal determined that the interest tax shield should be taken into account in the first step, by converting the Original Regime's single 7% *post*-tax return into multiple different pre-tax returns depending on the unique financing arrangements at each individual PV Plant, which Claimants contend "*makes no logical sense*" because "*in 'real life', Spain did not offer multiple different reasonable rates of return to investors depending on their tax individual status*".[143] They further claim that BDO's position is inconsistent, insofar as "*BDO accepts that any tax shield associated with external debt financing should not be included in the first step, but BDO nonetheless claims that any tax shield associated with internal debt (shareholder loans) should be included*".[144]

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[138] Claimants' Quantum Submission, ¶ 13.
[139] Claimants' Quantum Submission, ¶ 15.
[140] Experts' Joint Memorandum, ¶ 12.
[141] Respondent's Quantum Submission, ¶ 23.
[142] Experts' Joint Memorandum, ¶ 33, BDO Table 2.
[143] Claimants' Quantum Submission, ¶ 17 (emphasis added by Claimants).
[144] Claimants' Quantum Submission, ¶ 18 (emphasis added by Claimants).

118. Respondent claims that Brattle's approach is irrelevant in this respect because, even if the Spanish regulator did not calculate the return rate taking the interest tax shield into account at the outset, the Tribunal's instruction to the Parties in the Decision is clear enough: the Parties should factor the interest tax shield into its calculations in its assessment of damages.[145]

119. As identified in the Decision, the Tribunal has noted that the Spanish regulator set the remuneration on an "*all equity basis*". There is debate among the Parties as to what this concept entails, and whether the Spanish regulator determined the 7% *post*-tax rate of return on the assumption that there would be no financing. The Tribunal believes that when the regulator established the projects to be "*financed 100% with own resources (all-equity basis)"*[146] the reference to *all equity* meant precisely that: no third-party financing. If any financing was to be secured by the relevant entity, this would fall outside the established premise for the determination of the return.

120. In arriving at this conclusion, the Tribunal believes that at the time the Spanish regulator established the premise, the objective was for the relevant entity to have no third-party financing obligations. It meant that the FITs would be based on the investment made, and not on the basis of financing.

121. There is discussion among the Experts as to whether or not shareholder loans are to be considered as "equity". Categorizing shareholder loans as equity may be an accounting issue but not one which should be treated lightly. The Tribunal is aware that shareholder loans may, under certain circumstances, be treated as equity because the obligation may be subordinated to other obligations, or because the shareholder may covenant not call on the principal while the project requires the funds, or for other reasons. However, had the Spanish regulator intended to allow such financing, it could have established an exception, or identified shareholder loans for the "all equity" premise. But it did not. It established the premise of "all equity".

[145] Respondent's Quantum Submission, ¶ 22.
[146] Experts' Joint Memorandum, ¶ 16, making reference to **R-0030**, Economic Memorandum of RD 436/2004.

122. Although Brattle states that there may be benefits in a tax shield –and therefore higher returns– made possible by the use of debt financing, because from an economic standpoint this "*… provides correct incentives to investors to make 'wise' and efficient financing decisions…*",[147] the Tribunal believes that, even though it might be accurate, such argument misses the point because the issue at this stage deals with whether or not the rate afforded under the New Regime reflected a "reasonable rate of return".

123. When Brattle queries whether the Spanish regulator took into account the interest tax shield and concludes that it did not because it "*could not foresee the innumerable choices available to individual plants*",[148] this should not be treated as permissible. It should be the inverse. Failure to contemplate that means that "equity" must be understood to exclude financing, whether external or shareholder.

124. It is possible, as Claimants allege, that the Spanish regulator could not *at that time* have proposed different calculations and different rates of return for each PV Plant. There was likely a myriad of financing options open to investors and it would have been impossible for the Spanish regulator to design a regime that took them all into account. Claimants further argue that the Spanish Regulator understood that each investor had access to financing options and that such financing could generate the corresponding tax shield through the deductibility of interest paid; it was clear that the 7% post-tax target return would address all of the PV Plants, irrespective of the financing choice made by individual investors.

125. Brattle contends that this is supported by the economic memorandum of RD 436/2004 prepared by the Spanish Ministry which in relevant portion on this point states: *"Project financing:* '[…] *we are assuming that projects are financed 100% with own resources (all-equity basis). Leveraging and the percentage between equity capital and external debt are*

[147] Experts' Joint Memorandum, ¶ 15.
[148] Experts' Joint Memorandum, ¶ 26.

*specific decisions for each project and investor. If made wisely, they should provide better returns than those estimated here*.'"[149]

126. Indeed, the Tribunal finds that the Spanish regulator was aware that there would be an interest rate shield benefit if investors had obtained debt financing. While Spain was determining the 7% *post*-tax return, investors were likewise aware that there were financing options available that would lead to interest tax shield benefits or elements in financing that might yield higher returns.

127. However, even assuming that the Spanish Regulator was aware that investors had access to debt financing and so could even improve their returns "if made wisely", the Tribunal finds that the returns that were targeted under the Original Regime were 7% *post*-tax. The failure to maintain such reasonable rate of return is precisely what the Tribunal found to be in breach of Article 10(1) of the ECT. And it is the difference in reaching this percentage which should be compensated as damages.

128. The Tribunal has accepted, on the other hand, the 19.6% average tax rate with the caveat that it is only valid if there is "*no debt financing that translates into a tax shield benefit that lower this rate*"[150]. The evidence suggests, and Brattle does not seem to dispute it, that Claimants' PV Plants benefited from shareholder financing. This results in a tax shield benefit.

129. The Tribunal therefore concludes that the tax shield benefit of the shareholder loans should be factored into the conversion of the 7% post-tax target return into a pre-tax return.

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[149] Quote from Experts' Joint Memorandum, ¶ 16, which translates from the Spanish language original: "[…]*se ha supuesto, en todos los casos, que se realiza 100 por ciento con fondos propios. El apalancamiento y el porcentaje entre fondos propios y ajenos, son decisiones propias de cada proyecto y de cada promotor que, caso de estar bien tomadas, deben proporcionar mejores ratios que los aquí estimados*"; see Memoria Económica RD 436/2004, p.5. The English version of this document corresponds to **R-0030EN**. Spain recognizes this at its Counter-Memorial, ¶ 950.

[150] Decision, ¶ 816.

***b. The Actual Costs of the Claimants' PV Plants.***

130. The second area of disagreement relates to the actual costs of the PV Plants, given the fact that the Tribunal instructed the Parties to "*take into account the separate characteristics of each of Claimants' PV Plants"* in their damages calculations.[151]

131. The relevance of this is simple. Since the IRR is calculated based on these costs, differences also lead to divergences in the quantum calculation. Put simply, the higher the costs, the lower the IRR.

132. As has been identified above, each of the Experts utilizes different approaches to calculate the costs incurred by the Claimants, taking into account their separate characteristics.[152] Brattle has presented four interpretations: "Revised Marginal Plant", the "Average Plant by Technology"; the "Own IT-Code"; and the "Actual Plant". BDO criticises the Brattle approach by arguing that the costs are excessive. BDO instead uses what it deems are the actual production and operating costs of each of the Claimants' PV Plants and a revised actual investment cost for each of the Claimants' PV Plants, thereby combining, according to BDO, actual performance with actual investment cost.

133. While Respondent and its Expert, BDO, criticize Brattle's approach by arguing that it ignores the actual costs of each individual PV Plant and instead focusses the exercise on "standard installations", a similar criticism is made by Claimants and Brattle of BDO's exercise. According to Claimants, BDO's approach is one of "*mixing-and-matching*": (a) the hypothetical *standard* investments costs are retroactively assigned by Spain under the New Regime to each of the Claimants' PV plants in their respective IT-Code; but (b) the *actual* operating costs and production levels are set at each of the PV Plants.

134. Indeed, the reason BDO fails to give regard to the actual investment costs of the PV Plants is due to the fact that BDO deems that the incurred investment cost of the Claimants PV Plants has "*unjustified high investment cost declared by the Claimants*", adding that in its First Report BDO explained that the real investment cost of the Claimants' PV Plants was

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[151] Decision, ¶ 815 (emphasis added).
[152] Experts' Joint Memorandum, ¶¶ 44-61.

"*unjustified higher than the investment cost set by Spain to determine the incentive remuneration of the PV plants*".[153] This is due to the various related party transactions which BDO alleges occurred at the time of constructing the Claimants' PV Plants. BDO identified these in its Second Report, and concluded that the excess of investment cost was due to some unjustified and exceptionally high costs attributed to the Claimants' PV Plants.[154]

135. Respondent submitted a table prepared by BDO that compared a "*standard cost of investment according to Order IET/1045/2014 and the costs reflected in the EPC Contracts of Claimants*".[155] However, this table shows that not all of Claimants' PV Plants show the claimed "excess costs": indeed, only two (Valtierra III and Tordesillas) are shown by BDO to have a difference of approximately 17% with the "*standard cost of investment*". Fontellas is lower, and for another two there is no information (Valtierra I and Valtierra II). Further, there is no information regarding special circumstances surrounding the construction of the two plants that may have (or not) justified such alleged excess.[156]

136. The Tribunal has taken note of the allegations of Respondent in connection with the costs of the Claimants PV Plants, which it rejects since the analysis is based on a comparison with similar but different installations.[157] However, it does not need to rule or draw inferences from a reading of the EPC Contracts to conclude that certain transfer pricing transactions may have occurred as the plants were constructed by companies in the same group and cannot be deemed to be arm's length transactions. The question is whether the costs were unreasonably excessive at any of the Claimants' Plants, as BDO claims.

137. The Tribunal finds it difficult to accept a definition of costs on the basis of "*Marginal Plants*" as this would tend to reflect the most expensive type of efficient plant in the

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[153] Experts' Joint Memorandum, ¶ 57, making reference to BDO's First Report, ¶ 96.
[154] Experts' Joint Memorandum, ¶ 58, making reference to BDO's Second Report, ¶ 153.
[155] Respondent's Quantum Submission, ¶ 32, and Table 7 of the BDO Second Report.
[156] The Tribunal also notes that the claimed transfer pricing among group companies was not among Claimants' affiliates, but rather among the previous owners from which Claimants purchased the PV Plants in 2010 and 2011.
[157] BDO Second Report, ¶¶ 143-153.

system,[158] and, in taking such a view, the Tribunal would therefore fail to take into account "*the separate characteristics of each of the plants*".

138. Equally, the Tribunal cannot accept the "*Average Plant by Technology*" option which calculates the Revised Cash Flows on the average hypothetical standard installation costs of single and double-axis plants, since these do not take into consideration the separate characteristics of each of Claimants' PV Plants.

139. The fourth interpretation submitted by Brattle, based on the notion of the "*Actual Plant*", which purportedly calculates the Revised Cash Flows on the basis of the actual investment and operating costs of each of the Claimants' PV Plants, is equally dismissed for this exercise because of the uncertainty it entails in the reasonableness of the investment costs.

140. Ultimately, the Tribunal is faced with *estimates* in all of the arguments that have been presented to it, whether in the four options offered in the scheme of Brattle, or in the proposal of BDO that combines for each of the Claimants' PV Plants the actual production and operating costs with a "*revised actual investment cost*" for each of the Claimants' PV Plants. Such revised actual investment cost is the investment cost of a typical installation, which is reasonably reflected by the own IT-code, as explained by BDO.[159] It is not the actual investment of Claimants in the PV Plants.

141. When the Tribunal seeks to have the investment and operating costs to determine the compensation due to Claimants for the damages caused, its objective is to eliminate the deduction of remuneration in excess of the 7.39% *pre*-tax return.

142. The Tribunal considers that the appropriate methodology to consider the "*separate characteristics of each of Claimants' PV Plants*" with respect to their investment and operating costs is to focus, not on the marginal or average standard installations for a given technology, but on the individual standard installations now assigned by Spain to the Claimants' PV plants under the New Regime, which permit Spain *"to introduce multiple*

[158] Brattle's Second Quantum Report, ¶ 206.
[159] Experts' Joint Memorandum, ¶ 55.

*prices for groups of PV plants, and in so doing permit Spain to provide less remuneration to more efficient plants.*" It identifies this approach as "Own IT Code".[160]

143. The Tribunal notes that Brattle presents a table in the Experts Joint Memorandum,[161] summarizing the four possible interpretations following what it believes are the Tribunal's instructions. Such table compares each of the options presented by Claimants and aligns "*Own IT-Code*" with the "*Actual Plant*" presented by BDO.

**Brattle Table 2: Efficiency Actual Costs Alternatives**

| | Production and Operating Cost | | | |
|---|---|---|---|---|
| **Investment Cost** | Own IT-Code | Marginal Plant by Technology | Average Plant by Technology | Actual Plant |
| Own IT-Code | Brattle | | | BDO |
| Marginal Plant by Technology | | Brattle | | |
| Average Plant by Technology | | | Brattle | |
| Actual Plant | | | | Brattle |

Notes and Sources:
Option "Marginal Plant by Technology" and Option "Average plant by Technology" takes into account each of the Claimants's plants technology single axis, or double axis).

144. In this regard, the Tribunal accepts the own "*IT-Code*" option for each PV Plant because it considers it to be the most representative of the real investment costs of a typical installation in the market which, as described by Claimants, was applied by Spain under the New Regime to each of the Claimants' PV plants.[162]

### *c. The Alleged Attempt by BDO to Re-Instate Remuneration of Past Profits*

145. The Experts agree that any Reasonable Return calculation continues to include a claw-back of profits earned prior to July 2013.[163] They also agree that in order to eliminate the Claw-

[160] Experts' Joint Memorandum, ¶ 48.
[161] Brattle Table 2: Efficiency Actual Costs Alternatives, Experts' Joint Memorandum, ¶ 50.
[162] Claimants' Submission on Quantum, ¶ 22(c).
[163] Experts' Joint Memorandum, ¶ 88.

Back Feature of the Disputed Measures, a portion of the past profits that Spain used to calculate the July 2013 NAV must be removed from the revised calculation.[164]

146. The disagreement between the Parties and their Experts lies in the exact portion of the past profits to be removed. Claimants argue that BDO's approach of calculating Reasonable Return Damages is an attempt to "*implicitly including a form of retroactivity*" and Claimants deem this not to be "*appropriate in circumstances where the Tribunal expressly determined that Spain's claw-back of past revenues was a breach of the ECT*".[165]

147. The Tribunal finds that BDO's approach is to first compute the actual IRRs for each of the Claimants' PV Plants, which show that all of them (save for one) fall below the pre-tax target rate of return, thus implying they all suffer damages.[166] However, in a second step BDO then computes another lifetime IRR but, instead of looking at the PV Plants' actual IRRs, BDO computes the PV Plants' IRR assuming that the retroactivity has been eliminated from the New Regime (which, as Claimants assert, is manifestly not the case[167]), and then considers that Reasonable Return Damages only exist if this second IRR remains below its target rate return.[168]

148. The Tribunal agrees with Claimants that BDO effectively re-introduces retroactivity by linking the effective remuneration permitted to the plants after July 2013 based on the extent of cash flows received by the plants prior to July 2013. The effect is to once again claw-back past earnings, because determining post-July 2013 remuneration based on pre-July 2013 cash flows is precisely the problematic retroactivity identified by the Tribunal. Brattle confirms BDO's calculation that "*the pre-July 2013 cash flows continue to impact the remuneration*" for the post-July 2013 period.[169]

149. The Tribunal also agrees with the Experts about an inherent claw-back in any Reasonable Return calculation which implies that the calculation sequence must be the other way

[164] Experts' Joint Memorandum, ¶ 105.
[165] Claimants' Quantum Submission, ¶ 31.
[166] BDO Table 4: Actual IRR for each individual Plant and target return, Experts' Joint Memorandum, ¶ 78.
[167] Claimants' Quantum Submission, ¶ 35(a).
[168] BDO Table 5: IRR for each individual Plant after removing the claw-back and target return, Experts' Joint Memorandum, ¶ 79.
[169] Experts' Joint Memorandum, ¶ 67.

around – first, to calculate Reasonable Return Damages (which will inherently include some claw-back) and then, in a second step, to eliminate, as Claimants contend,[170] any remaining claw-back in the estimate of Retroactivity Damages, thereby eliminating only the remaining dependence of post-2013 remuneration. This eliminates any double counting. Retroactivity Damages are reduced to the extent that a portion of the New Regime's claw-back has already been captured in the calculation of Reasonable Return Damages.

**(2) Retroactivity Damages**

150. In the Decision, the Tribunal determined that the Retroactivity Damages were caused because the New Regime considers the remuneration received by the Claimants' PV Plants before its entry into force (July 2013) to calculate their future remuneration.[171] It applied to plants that were in operation when the New Regime entered into force, applying the new remuneration scheme as if it had been in place from the outset of their operating life.

151. As described in the Decision,[172] the "*… retroactive application of the Disputed Measures should not have an adverse effect on future remuneration of Claimants' PV plants, i.e., they cannot claw-back remuneration that was legitimately obtained under the previous regime and, as such, (the claw-back provision) is inconsistent with the principle of requirement of fairness in Article 10(1) of the ECT*". The New Regime implemented a reduction in revenues for Claimants' PV Plants, lowering their target returns retrospectively by clawing back revenues previously received. The New Regime provides a return of 7.398% pre-tax over standard investment costs, which requires the projection of revenues over the entirety of an installation lifetime, including the period before the New Regime came into effect.

152. Consequently, the Tribunal determined that Claimants should be compensated for the harm suffered by the Claw-Back Feature under the New Regime.

[170] Experts' Joint Memorandum, ¶ 88.
[171] Decision, ¶ 696.
[172] Decision, ¶ 793(d).

153. However, the Tribunal had not been presented with the requisite information or methodology that would allow it to calculate the *quantum* of compensation for the effect of the unlawful retroactive application of the Disputed Measures on the Claimants' investments. Its analysis of the Claw-Back Feature and its conclusion that a breach of Article 10(1) of the ECT occurred are set out in paragraphs 691 to 698 of the Decision. In section VII on Damages, it therefore directed the Parties to try to agree on the amount of compensation due from the retroactive element of the New Regime, without offering any specific guidance on the factors to be taken into account in the calculation of *quantum*. In paragraph 822(7), it simply directed the Parties to try to reach agreement "*in respect of its obligations on post-tax rate of return in accordance with the Tribunal's findings*".

154. In their response to this direction, the Parties' Experts submitted a Joint Report, in which they established the principles for such calculations and offered the Tribunal proposals for their application. In some instances, they agreed, while in others they failed to do so. The Tribunal notes that they agree that any Reasonable Return calculation continues to include a claw-back of profits earned prior to July 2013, and also agree that the Retroactivity Damages calculation should therefore involve the elimination of the remaining Claw-Back Feature not already accounted for in the calculation of Reasonable Return Damages.[173]

155. Although the Experts agree that Retroactivity Damages should "*only attempt to eliminate from the New Regulatory Regime the claw-back of profits earned in the period prior to July 2013 under the Original Regulatory Regime*",[174] they disagree on how to eliminate it. However, they agree that the first step in the calculation of Retroactivity Damages due to the Claw-Back Feature is to estimate a Net Asset Value (or NAV)[175] for each of the Claimants' PV Plants as of July 2013, because "*Retroactivity Damages stem from the New Regulatory Regime's underestimate of the remaining July 2013 NAV*".[176]

156. Claimants assert that, in doing so, Respondent first projected the income that the installation would need to receive from the outset of its lifetime to obtain a 7.398% pre-tax

[173] Experts' Joint Memorandum, ¶ 88.
[174] Experts' Joint Memorandum, ¶ 5.
[175] The NAV represents investment value that has not yet been recovered by the investor, i.e., investment pending to be amortized.
[176] Experts' Joint Memorandum, ¶ 83.

return (30 years in the case of Claimants' PV Plants). The yearly income was calculated as a constant stream of remuneration, on an annual basis over the entire lifetime, as opposed to the remuneration under RD 1578/2008 which was indexed to inflation. Spain then compared this stream of constant annuities with the remuneration *actually* received by each plant *before* the entry into force of the New Regime to estimate the proportion of the investment costs that was still unrecovered as of 1 January 2014, considering a 7.398% pre-tax return as a target for investment recovery. To do so, Spain calculated a Net Asset Value for each standard installation as of the same date. Finally, the New Regime then uses that NAV to calculate the remuneration going forward, based on a return of 7.398% pre-tax. In short, it calculates the remuneration required on a yearly basis, in constant annuities, to provide a 7.398% pre-tax return on the NAV.[177]

157. Since the New Regime "*takes into account*" pre-2013 revenues to reduce the NAV in two different ways, Claimants contend that both need to be removed to eliminate the full extent of the claw-back, since both elements contribute to overestimating the extent of capital recovery.[178]

158. Both Experts agree that a *first* deduction to the NAV should be removed,[179] i.e., that occurring where Spain lowers the installations' future remuneration to compensate the higher remuneration received before the New Regime by deducting from the NAV income received in the past in excess of the newly calculated stream of constant annuities. There is an arithmetical deduction of remuneration over the newly defined 7.398% target *pre-tax* return.

159. It is about the *second* deduction that the Experts disagree. Whereas Brattle contends that under the Original Regime: (i) the FITs were set by reference to a target return of 7% *post-tax*; and (ii) FITs were updated annually according to inflation, the New Regime calculates the extent of capital recovery (the NAV) by reference to: (a) a different rate of return, a 7.398% *pre-tax return*; and (b) a new remuneration profile, the newly calculated stream of

[177] Claimants' Quantum Submission, ¶¶ 44-47.
[178] Claimants' Quantum Submission, ¶ 48.
[179] Experts' Joint Memorandum, ¶ 101.

constant annuities.[180] Brattle contends that this second feature should be eliminated, while BDO believes this deduction should be included within the Reasonable Return Damages.[181]

160. The Tribunal considers reasonable the approach by Claimants and agrees that both deductions must be eliminated from the Retroactivity Damages to avoid the claw-back. In the case of the first deduction, there is agreement among the Experts about its inclusion. As to the second, it needs to be included since this deduction ignores the actual profile of remuneration –the so-called stream of constant annuities– and overestimates the capital recovery in the period before July 2013 by assuming that capital is recovered based on a constant remuneration profile under a 7.398% target *pre*-tax return. The Tribunal agrees with Brattle that the New Regime's approach is analogous to removing inflation indexation from a debt, but then going back in time and computing the capital repayments as if the bond was never inflation indexed in the first place.[182] This results in an excessive reduction of the NAV that needs to be eliminated to avoid the "full extent" of the claw-back.

161. The *second* deduction is an effect of the use by Spain of the NAV calculation considering the 30-year period regulatory period and the target return of 7.398% pre-tax return provided in the New Regime. It deems that subsidies paid prior to the entry into force of the New Regime which exceed the reasonable rate of return can be eliminated. The Tribunal has concluded that it cannot.

162. As expressed by Brattle, the *first* deduction concerns one element of the past profitability: the cash flow generation of different plants and vintages of plant under the Original Regime, while the *second* deduction concerns another aspect: the assumed extent of capital recovery and investment return provided for under the Original Regime prior to July 2013.[183]

163. The process of eliminating the claw-back requires addressing the impact of the New Regime's assumptions in respect to both elements, by eliminating the first deduction – with

[180] Claimants' Quantum Submission, ¶¶ 49-50, making reference to the Experts' Joint Memorandum, ¶¶ 110 and 112.
[181] Claimants' Quantum Submission. ¶52(a).
[182] Claimants' Quantum Submission, ¶ 51.
[183] Experts' Joint Memorandum, ¶ 102.

which BDO agrees – and recalculating the second deduction to eliminate its enlargement of the Claw-Back Feature's negative effect.

164. The Tribunal notes that BDO contends that, even though the Tribunal concluded that the New Regime should not have used past profits to calculate the future remuneration of the Plants, "*it did not find that the mechanism to calculate the NAV breached the ECT, and the mechanism calculates the remuneration with constant annuities that are recalculated on the pre-established regulatory periods*".[184] This is not accurate. The Tribunal did not rule on the legitimacy of the mechanism to calculate the NAV. Rather the Tribunal determined that past profits should not be used to calculate future remuneration of the PV Plants, and this principle applies whether this a direct or indirect process.

165. Further, BDO notes the wording in the Decision that *"[t]he Tribunal agrees with the Eurus tribunal*"[185] and refers to that tribunal's conclusion 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*". However, BDO omitted quoting in full the text of the conclusion in the *Eurus v. Spain* Decision, which should be complemented with "… *in previous years, <u>did breach the obligation of stability under Article 10(1), first and second sentences of the ECT</u>*".[186] The assumption is that to eliminate the Claw-Back Feature of the Disputed Measures the only portion of past profits that must be removed is the excess of what an installation would have received under the New Regime in previous years. The Tribunal does not accept this view and notes that in its earlier Decision, and indeed the submissions of the Parties and their Experts during the previous stage of these proceedings, the focus resided on the Disputed Measures *as a whole*, and not on specific elements such as the Claw-Back Feature. It is therefore quite wrong to infer from the absence of a discussion of such elements that the Tribunal had examined and rejected the position that Claimants have

[184] Experts' Joint Memorandum, ¶ 106 (emphasis omitted).
[185] Experts' Joint Memorandum, ¶ 107 (emphasis omitted).
[186] Experts' Joint Memorandum, ¶ 107, where BDO cites to **RL-0153**, *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021 ("***Eurus v. Spain, Decision***"), ¶ 467(c).

argued with respect to the second deduction. At that time there was no need to address such issues, and they were therefore not considered.

166. Having considered carefully the views of both Parties, the Tribunal is persuaded that it is necessary to remove both elements of the claw-back calculation because the second deduction also contributes to overestimating capital recovery pre-July 2013 (by assuming a constant annual remuneration in the past). It is, therefore, only through the removal of both elements that the full effect of retroactivity that overestimates capital recovery can be eliminated.

167. Indeed, the Parties' Experts acknowledged that there is a close relationship between the calculation of Retroactivity Damages and a separate calculation of Reasonable Return Damages. They also agreed that "…*the Retroactivity Damages calculation should therefore involve the elimination of the remaining Claw-Back Feature not already accounted for in the calculation of Reasonable Return Damages*…".[187] This implies that a two-step process is required. The two-step process outlined in this Award reflects both deductions. A failure to adopt such an approach would, in the Tribunal's view, not properly compensate Claimants for the damages caused.

168. For the reasons explained above, the Tribunal therefore decides that both deductions carried out as part of the New Regime should be eliminated as part of the elimination of the claw-back.

**(3) Discount Rate and Regulatory Risk Haircut.**

169. As expressed above,[188] the Experts agree that the damages analysis must translate the series of incremental cash flows adopted by each Expert into present value figures but disagree with the applicable discount rate for Reasonable Return Damages and Retroactivity Damages, in addition to the disagreement concerning the incremental cash flow.

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[187] Experts' Joint Memorandum, ¶ 88.
[188] See *supra*, Section III(D).

170. The Experts' assessments of the Regulatory Risk in their respective reports were based on the difference in risk between a scenario where all the Disputed Measures have been implemented ("Actual Scenario"), and another scenario characterized by the absence of the Disputed Measures ("Claimants' But-for Scenario").

171. In essence, while Brattle asserts that regulatory risk would have been lower in the "But-for" scenario than in the "Actual" scenario, BDO contends that there is no difference in both scenarios since "*most of the New Regulatory Regime adopted by Spain is deemed legal*".[189]

172. The Tribunal believes that it is inaccurate to claim –as BDO claims– that the Tribunal decided that all the Disputed Measures were deemed to be legal, save for the retroactive effect of the NAV calculation and the target return.

173. The New Regime resulted in a reduction of return topped with periodical revisions. The Tribunal also believes that it is reasonable for market participants to assign a greater risk in the system after the implementation of the new measures.[190] Thus, the regulatory risk should have been lower in the "But-for" scenario than in the "Actual" scenario.

174. In its First Brattle Quantum Report,[191] Brattle states that "*[a]pplying a haircut directly to revenues ensures that the [discounted cash flow] (DCF) analysis accurately reflects the potential economic impact of a future change in financial support. Reduced financial support would affect plant revenues while leaving costs largely unaffected, squeezing investor returns*". After subtracting the explicit haircut from revenues, Brattle indicates that the adjusted revenues provide the basis for its forecasts of the "expected" free cash flows for the PV plants. Brattle then discounts the expected free cash flows at a discount rate of 3.71%.[192]

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[189] Respondent's Quantum Submission, ¶46; Experts' Joint Memorandum, ¶ 139.
[190] Experts' Joint Memorandum, ¶¶ 136-138.
[191] First Brattle Quantum Report, ¶ 114.
[192] First Brattle Quantum Report, ¶ 115.

175. The Tribunal accepts Brattle's calculations[193] which follow the discounting assumptions explained in the First and Second Brattle Quantum Reports and decides to apply the discount assumptions of a 5.44% discount rate (after tax).

**(4) Conclusions on Reasonable Return Damages and Retroactivity Damages.**

176. Taking into account that the Tribunal has accepted that: (i) the Effective Tax Rate to apply pre-tax should be 8.7%, (ii) the investment and operating costs to apply to Claimants' PV Plants should be those of an "Own IT Code" as one of the options presented by Brattle; (iii) the Interest Tax Shield should be factored in since Claimants did receive a benefit of deduction of the interest paid under shareholder loans, and further that (iv) the regulatory risk identified is different in the "But-for" and the "Actual" scenarios, the Tribunal determines that the amount of Reasonable Return Damages should be EUR 18.0 million as accepted by the Experts in Joint Table 1 of the Experts' Joint Memorandum.[194]

177. In light of the above findings, and those that the Tribunal took into account in the determination of Reasonable Return Damages, the Tribunal determines that the Retroactivity Damages amount to EUR 6.9 million based on the results of the calculations following the Experts assumptions as identified on Joint Table 1 of the Experts' Joint Memorandum.[195]

178. The determination of the Reasonable Return Damages and the Retroactivity Damages include the "sensitivities" to the Effective Tax Rate and regulatory risk assumptions in Brattle's calculations, as provided in Brattle Table 7 of the Expert's Joint Memorandum.[196]

179. For the reasons indicated above the Tribunal determines that the amount of damages to be awarded to Claimants is: EUR 24.9 million.

[193] Expert' Joint Memorandum, ¶ 136.
[194] Experts' Joint Memorandum, ¶ 147.
[195] Expert' Joint Memorandum, ¶ 147.
[196] Experts' Joint Memorandum, ¶ 149.

## VI. INTEREST

180. Claimants have requested the Tribunal to award both *pre*-award, as well as *post*-award interest, both compounded on a monthly basis.

181. Respondent has not objected to the concept, for which reason the Tribunal needs not examine the appropriateness and justification for awarding interest on the amounts that Respondent is required to pay Claimants as damages, nor monthly compounding. However, Respondent nonetheless disputes the rates claimed by Claimants, as examined below.

### A. PRE-AWARD INTEREST

182. The positions of the Parties on this point are not that far apart. As indicated in Section III. above, both Experts agree to compute pre-award interest based on Spanish Sovereign bond yields. The difference is the duration of the bond. While Brattle proposes a 10-year bond, BDO deems the 8-year bond best reflects the circumstances of the case.

### B. POST-AWARD INTEREST

183. Post-award interest was not dealt with by the Experts in their Joint Memorandum, or their respective Quantum Reports, as this was not part of the work entrusted to them.

184. Claimants have requested that post-award interest be compounded monthly, at a rate that is higher than the pre-award rate, calculated on the basis of the 10-year Spanish bond.[197] Claimants contend that post-award interest should be established at a higher rate "*in order to encourage prompt compliance and to prevent unjust enrichment of the respondent*".[198]

185. Respondent does not object to post-award interest,[199] nor submitted objections to a monthly compounding, although it objects to a higher interest above the pre-award interest – which Respondent characterises as "*punitive interest*".[200] Spain draws support from *Vestey v.*

[197] Claimants' Reply, ¶ 712.
[198] Claimants' Reply, ¶ 708.
[199] Respondent's C-Memorial, ¶ 1403.
[200] Respondent's Rejoinder, ¶ 1371.

*Venezuela*,[201] *National Grid v. Argentina*[202] and *Micula v. Romania*[203] to argue that a post-award interest should not be higher than pre-award interest, as this would imply the existence of a breach of Respondent to its international obligations.[204]

186. Claimants respond that "*a higher post-award interest compared to the pre-award interest may only be considered punitive to the extent that the party with the payment obligation intends to delay payment. Indeed, if Spain does not intend to delay or default on an award, a higher post-award interest should have no bearing on its ultimate obligation*".[205]

## C. THE TRIBUNAL'S ANALYSIS

187. When determining interest, whether this is *pre*-award or *post*-award, the Tribunal must be guided by the principle that full reparation implies that Claimants must be compensated for the loss of their ability to dispose of the amount of damages awarded.[206]

188. Considering there is agreement among the Parties and their Experts on such principle, the Tribunal is left to decide only which rate should apply amongst those proposed by the Parties, and whether the post-award rate should be higher.

189. The current yield of the 10-year bond, *versus* the 8-year bond varies. Naturally, under prevailing market conditions, the longer the term, the greater the yield. Although such difference may not be significant,[207] there are two reasons the Tribunal decides to apply the 10-year bond. *First*, and foremost, because the 10-year Spanish government bond-rate is the natural proxy for a "*commercial rate established on a market basis*", as required by

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[201] **RL-0063**, *Vestey Group Ltd v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/06/4, Award, 15 April 2016.

[202] **RL-0070**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL Arbitration, Award 3 November 2008, footnote 122.

[203] **RL-0068**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 1269.

[204] Respondent's Rejoinder, ¶¶ 1371-1372.

[205] Claimants' Reply, ¶ 711.

[206] Payment of interest is an integral component of full reparation, running from the date of the occurrence of damage to the date of full payment of the debtor's obligations, as provided for in Article 38 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.

[207] Research by the Tribunal as of July 2022, indicates the difference in yield is approximately 35 basis points. See http://www.worldgovernmentbonds.com/country/spain/.

the ECT,[208] and s*econd*, the time that has taken to secure compensation for the breaches and the expected time before Spain makes payment. Other tribunals in similar cases involving RE arbitrations against Spain have decided in the same direction.[209]

190. Therefore, the Tribunal determines that pre-award interest should be paid from 30 June 2014 to the date of this Award at the rate of 1.2973%, which is the average rate of the 10-year Spanish bond during such relevant period, to be compounded monthly.[210]

191. As to the post-award rate of interest, although BDO argues that there is no reason to make a distinction between the pre-award and post-award interest because the purpose of interest is to compensate the detriment of value of compensation, the Tribunal agrees with other tribunals[211] in recent decisions that awarding post-award interest serves the purpose of incentivising compliance with the terms of the Award as expediently as possible.

192. The Tribunal therefore awards interest from the date of the Award to the date of payment at the rate of pre-award interest of 1.2973% plus 1.00%, that is 2.2973%, compounded monthly.

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[208] Claimants' Quantum Submission, ¶ 57, citing Claimants' Reply, ¶¶ 705-706. The tribunal in **CL-206**, *Watkins Holdings S.à.r.l and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, ¶ 746 makes reference to the effect that this rate is used by Spain under the New Regime to determine the allowed return.

[209] **CL-055**, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. 2015/063, Award, 15 February 2018, ¶ 846; **CL-100**, *Antin Infrastructure Services Luxembourg S.à r.l and Antin Energia Termosolar B.V. v. The Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 733; **CL-200**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, ¶ 558; **CL-204**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, ¶ 721.

[210] The rate corresponds to the monthly average rate in force for the period comprised between June 2014 and January 2023. Source: Bloomberg.

[211] **CL-029**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, ¶ 476; **CL-139**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 665; **CL-122**, *Foresight Luxembourg Solar 1 S.À.R.L., Foresight Luxembourg Solar 2 S.À.R.L., Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A., GWM Renewable Energy II S.P.A. v. The Kingdom of Spain*, SCC Arbitration V (2015/150), Final Award, 14 November 2018, ¶ 545; and **CL-206**, *Watkins Holdings S.à.r.l and Others v. The Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, ¶ 747.

## VII. COSTS

### A. THE PARTIES' POSITIONS

193. With respect to the Parties' positions, in their Costs Submissions, Claimants set out the categories of costs they seek to recover that are distributed among: (a) legal costs and related disbursements; (b) expert fees and related disbursements; and (c) institutional, Tribunal and Hearing costs covered by payments that Claimants made directly to ICSID, as follows:[212]

| | |
|---|---|
| Legal Fees and Disbursements | GBP 3,769,196.24 |
| Expert Fees and Disbursements | EUR 487, 664.10 |
| | GBP 18,309.40 |
| ICSID Costs | USD 855,000.00 |
| **Totals:** | **GBP 3,787, 505.64** |
| | **EUR 487, 664.10** |
| | **USD 855, 000.00** |

194. Claimants have described the representation of their counsel and distinguished the amount of legal fees and disbursements incurred involving primarily translations, document processing and printing, transportation costs, hotels, meals and telephone charges.

195. Regarding Experts, Claimants also separate fees and disbursements incurred by the experts retained from the Brattle Group, as well as advice on the "clean-hands" objections presented by Respondent (Professor Ricardo Robles of Pompeu Fabra University, Messrs Ignacio Ayala and Rafael Alcacer of Oliva-Ayala Abogados, Mr. Eduardo Sánchez-Cervera of Sánchez-Cervera Abogados and Mr. Esteban Mestre Delgado of Alcalá de Henares University).[213]

[212] Claimants' Cost Submission, ¶ 4.
[213] Claimants' Cost Submission, ¶ 12.

196. Lastly, Claimants refer to the payments made to ICSID during the proceeding to defray the costs of the proceeding, including the fees and expenses of the arbitrators and other expenses.

197. According to Claimants, the total costs "… *are reasonable in light of the length of the proceedings, the procedural history, and the complexity of the issues raised*."[214]

198. Claimants contend that the Tribunal has already found in the Decision of 13 September 2021 that "… *Spain breached its international law obligations under the ECT in relation to the Claimants' investment in Spain*" and that the Tribunal "… *also dismissed all but one of Spain's objections to the jurisdiction of the Tribunal to hear the Claimants' claims*."[215] Considering the Decision, and "*Spain's numerous procedural tactics and belated frivolous jurisdictional objections* [that] *have unnecessarily protracted the proceedings and significantly increased costs*,"[216] Claimants submit they are entitled to their costs on a "*full indemnity basis*".[217]

199. Respondent, on the other hand, claims the total amount of EUR 3,342,045.12 on account of the costs incurred, which includes the fees of experts issuing reports, disbursements and the "legal cost in lawyers and representatives acting on behalf of the Kingdom of Spain",[218] as follows:

| | |
|---|---|
| Expert Fees | EUR 537,567.00 |
| Disbursements | EUR 191,400.06 |
| ICSID Costs | EUR 751,578.06[219] |
| Legal Fees | EUR 1,861,500.00 |
| **Total:** | **EUR 3,342,045.12** |

[214] Claimants' Cost Submission, ¶ 5.
[215] Claimants' Cost Submission, ¶ 21.
[216] Claimants' Cost Submission, ¶¶ 22- 23.
[217] Claimants' Cost Submission, ¶ 22.
[218] Respondent's Cost Submission, ¶¶ 8-15.
[219] Respondent presents the equivalent in euros to the sum of USD 855,000 dollars paid to ICSID as costs of the arbitration.

200. The disbursements include the costs of translations, courier services, editing services and travel expenses.

201. Respondent contends that the costs are reasonable "*in light of the complexity of this case, its duration, and the amount of time and efforts that the Kingdom of Spain has devoted to a dispute* …", involving "… *a number of challenging procedural and legal issues, which the Respondent addressed with professional and effective advocacy*".[220]

202. Respondent contends that it is "… *beyond any reasonable doubt that the Respondent should have never been charged with the burden and the costs of defending itself through this arbitration proceeding and therefore, the Respondent requests that the Tribunal exercises its broad discretion to make an award of costs in the Respondent's favour"*,[221] but adds that, in the event that this Tribunal were to render an award ordering Spain to pay, in whole or in part, the costs incurred by Claimants in this arbitration, that such order includes "*only costs that are i) reasonable and ii) incurred in connection with this arbitration* …", in accordance with Rule 28 of the ICSID Arbitration Rules.[222]

## B. THE TRIBUNAL'S ANALYSIS

203. Both Parties have acknowledged that the ECT is silent on how the costs of any proceeding shall be allocated,[223] and have also confirmed the wide discretion of a tribunal in an ICSID arbitration to allocate costs between the parties.[224]

204. Indeed, Article 61(2) of the ICSID Convention provides broad discretion to the Tribunal to allocate costs among the Parties:

> "*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.*"

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[220] Respondent's Cost Submission, ¶¶ 5 and 7.
[221] Respondent's Cost Submission, ¶ 4.
[222] Respondent's Cost Submission, ¶ 6.
[223] Claimants' Cost Submission, ¶ 18; Respondent's Cost Submission, ¶ 1.
[224] Claimants' Cost Submission, ¶¶ 17-18; Respondent's Cost Submission, ¶ 1.

205. The accepted principle in arbitration is that the unsuccessful party must pay the successful one all or a portion of the costs. The principle "costs follow the event" may be inferred from the rule of customary international law requiring "full reparation" to the party injured by a breach of an international obligation. Claimants have cited the *Gold Reserve v. Venezuela* award,[225] where the tribunal stated that *"[c]ompensating Claimant for the cost of bringing this proceeding is required to wipe out the consequences of Respondent's breach of the BIT and is particularly appropriate in the current case given the serious and egregious nature of the breach*".[226] The Tribunal agrees that the concept of *restitutio in integrum*, requires that the prevailing party who has suffered damages by reason of illegal actions should be reimbursed the costs of litigation, which could have been avoided if the other party had recognized the pursued rights.

206. In its Decision of 13 September 2021, the Tribunal found on the merits of the dispute that:

> "*Respondent breached Article 10(1) of the ECT by clawing back past remuneration*."[227]
>
> "*Respondent breached Article 10(1) to the extent that the remuneration of each of the plants failed to ensure payment to Claimants of a reasonable rate of return on their investment during the lifetime of Claimants' PV Plants, as a consequence of the adoption of the Disputed Measures*."[228]

207. The Tribunal has also decided, however, (by majority) that Claimants did not have a legitimate expectation that the remuneration of RD 1578 would continue to be paid for at least 25 years,[229] and other claims from Claimants and the Respondent.

208. Considering such findings, and drawing support from the Joint Experts Memorandum, the Tribunal has determined in this Award damages that Respondent must pay Claimants along with interest thereon.

209. The Tribunal notes also that of the seven jurisdictional objections raised by Respondent in its Counter-Memorial on Merits and Memorial on Jurisdiction, the Tribunal dismissed all,

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[225] **CL-124**, Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 860.
[226] Claimants' Cost Submission, ¶ 20.
[227] Decision, ¶ 822(4).
[228] Decision, ¶ 822(5).
[229] Decision, ¶ 822(3).

except for that dealing with the lacks jurisdiction *ratione voluntatis* to hear Claimants' claim for breach of Article 10(1) of the ECT deriving from Spain's introduction of the TVPEE in Law 15/2012.

210. The Tribunal further notes that since the June Hearing,[230] Respondent has raised several objections or requests, all of which have been unsuccessful: (a) the "New Jurisdiction Objection" dated 20 December 2019 based on the alleged lack of "clean-hands" by Claimants, (b) the "First Request for Reconsideration" dated 15 October 2021, (c) the "Second Request for Reconsideration" dated 24 June 2022, and (d) the "Third Request for Reconsideration" dated 27 December 2022.

211. These have required not only decisions on the part of the Tribunal, but also further rounds of submissions by Claimants.

212. Aside from these instances, the Tribunal recognizes that the Parties have acted properly during the proceedings, while each has fiercely defended its respective position.

213. Although one of the factors that tribunals may utilize in allocating costs is the success –or failure– of claims submitted before the tribunal, in this case it is difficult to assess an arithmetical distribution, or even an estimate thereof, since the initial valuation reports and the ultimate determination of damages. The fact that an initial expert valuation may be deemed to have been excessive in light of the actual amount of damages awarded to Claimants, this should not, by itself, be a strict determinant for the allocation of costs. It is, nonetheless, an element to consider.

214. The main factor considered by the Tribunal is the breach by Respondent to the ECT. The other elements are taken into account, but are secondary.

215. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to:

| | |
|---|---|
| Arbitrators' fees and expenses | US$ 1,187,661.12 |
| ICSID's administrative fees | US$ 252,000.00 |

[230] Hearing on Jurisdiction and the Merits held on 24-28 June 2019.

| | |
|---|---|
| Direct expenses (estimated) | US$ 199,208.60 |
| **Total** (estimated) | **US$ 1,638,869.72** |

216. The costs of the arbitration have been paid out of the advances made by the Parties in equal parts.[231]

217. For the reasons stated above, the Tribunal decides that Respondent should bear in addition of its share of the costs of the arbitration, 60% (Sixty percent) of Claimants' costs of the arbitration reflected in ICSID's final financial statement.

218. Also, for the above-indicated reasons, the Tribunal considers it appropriate for Claimants to be awarded a proportion of their legal and expert fees and costs and other expenses proportionate to their degree of success in the arbitration. Accordingly, Claimants are awarded 60% (Sixty percent) of their legal fees as follows:

| Total Claimed | Total Awarded |
|---|---|
| GBP 3,787,505.64 | GBP 2,272,503.38 |
| EUR 487,664.10 | EUR 292,598.46 |

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

## VIII. AWARD

219. For the reasons set forth above, the Tribunal hereby declares, orders and decides:

(1) Respondent shall pay Claimants the amount of EUR 24.9 million as compensation for the damages resulting from its breaches to the ECT as determined in the Tribunal's Decision on Jurisdiction, Liability and Directions on *Quantum* dated September 13, 2021.

(2) Respondent shall pay pre-award interest on the amount determined in the preceding paragraph at a rate equal to 1.2973 %, from 30 June 2014 through the date of this Award.

(3) Respondent shall reimburse Claimants the amount of GBP 2,272,503.38 and EUR 292,598.46 in respect of Claimants' legal and expert fees and costs and other expenses.

(4) Respondent shall reimburse Claimants 60% of the expended portion of Claimants' advances to ICSID (as reflected in ICSID's final financial statement for this case), in respect of costs of arbitration.

(5) If the principal amount of this Award, plus interest and costs ordered to be paid in the preceding paragraphs, are not paid within thirty (30) calendar days from the date of this Award, then Respondent is ordered to pay interest on such amounts at a rate equal to 2.2973 %, compounded monthly, from the date of this Award and until such payment is made.

(6) All other claims are dismissed.

Prof. Peter D. Cameron
Arbitrator

Date: 27 April 2023

Mr. Luis González García
Arbitrator

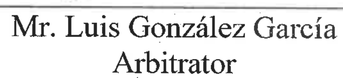
Date:

Mr. Eduardo Siqueiros T.
President of the Tribunal

Date:

Prof. Peter D. Cameron
Arbitrator

Date:



Mr. Luis González García
Arbitrator

Date: 28 April 2023

Mr. Eduardo Siqueiros T.
President of the Tribunal

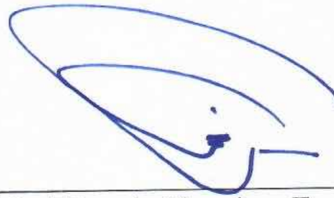
Date:

Prof. Peter D. Cameron
Arbitrator

Date:

Mr. Luis González García
Arbitrator

Date:



Mr. Eduardo Siqueiros T.
President of the Tribunal

Date: 2 May 2023