



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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CERTIFICATE

DCM ENERGY GMBH & CO. SOLAR 1 KG AND OTHERS

v.

KINGDOM OF SPAIN

(ICSID CASE NO. ARB/17/41)

I hereby certify that the attached documents are true copies of the English version of the Tribunal's Decision on Jurisdiction, Liability and Quantum Principles dated September 30, 2024, and the English version of the Dissenting Opinion of Prof. Pierre-Marie Dupuy of the same date.

A handwritten signature in black ink, appearing to read "Gonzalo Flores", with a horizontal line extending to the right.

Gonzalo Flores
Acting Secretary-General

Washington, D.C., September 30, 2024



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the matter of an arbitration proceeding between

1. DCM ENERGY GMBH & CO. SOLAR 1 KG
2. DCM ENERGY GMBH & CO. SOLAR 2 KG
3. EDISUN POWER EUROPE AG
4. HANNOVER LEASING SUN INVEST 2 SPANIEN GMBH & CO. KG
5. HANNOVER LEASING SUN INVEST 2 SPANIEN BETEILIGUNGS GMBH

(Claimants)

and

THE KINGDOM OF SPAIN

(Respondent)

ICSID CASE NO. ARB/17/41

DECISION ON JURISDICTION, LIABILITY AND QUANTUM PRINCIPLES

Members of the Tribunal

Ms. Carole Malinvaud, President of the Tribunal

Mr. Oscar M. Garibaldi, Arbitrator

Prof. Pierre-Marie Dupuy, Arbitrator

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the Tribunal

Mr. Sacha Willaume

Date of dispatch to the Parties: 30 September 2024

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Solar 2 KG, Edisun Power Europe AG,
Hannover Leasing Sun Invest 2 Spanien
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LIST OF SELECT ABBREVIATIONS AND DEFINITIONS

APPA	Association of Renewable Energy Producers (by the Spanish acronym: Spanish: <i>Asociación de Productores de Energías Renovables</i>)
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BQR-[#]	Exhibits to Financial Expert Report of The Brattle Group
Brattle	Claimants' regulatory and quantum experts
Brattle First Quantum Report	The Brattle Group expert report entitled 'Financial Damages to Investors' dated 9 November 2018
Brattle First Regulatory Report	The Brattle Group expert report entitled 'Changes to the regulation of photovoltaic installations in Spain since November 2010' dated 9 November 2018
Brattle Rebuttal Quantum Report	The Brattle Group expert report entitled 'Rebuttal Report: Financial Damages to Investors' dated 17 July 2019
Brattle Rebuttal Regulatory Report	The Brattle Group expert report entitled 'Rebuttal: Changes to the regulation of photovoltaic installations in Spain since November 2010' dated 12 July 2019
BRR-[#]	Exhibits to Regulatory Expert Report of The Brattle Group
C-[#]	Claimants' factual exhibit
CL-[#]	Claimants' legal authority
Claimants	DCM Energy GmbH & Co. Solar 1 KG, DCM Energy GmbH & Co. Solar 2 KG, Edisun Power Europe AG, Hannover Leasing Sun Invest 2 Spanien GmbH & Co. KG and Hannover Leasing Sun Invest 2 Spanien Beteiligungs GmbH

Cl. Mem.	Claimants' Memorial on the Merits of 9 November 2018
Cl. PHB	Claimants' Post-Hearing Brief of 21 May 2020
Cl. Rej.	Claimants' Rejoinder on Jurisdiction of 22 November 2019
Cl. Reply	Claimants' Reply Memorial on the Merits and Counter-Memorial on Jurisdiction of 17 July 2019
CNE	National Energy Commission (by the Spanish acronym: <i>Comisión Nacional de Energía</i>)
CPI	Consumer Price Index
Crowe Kleeberg Report	Opinion on the German tax treatment of a potential award to DCM Energy GmbH & Co. Solar 1 KG and DCM Energy GmbH & Co. Solar 2 KG prepared by Crowe Kleeberg and dated 17 June 2019
CWS-[#]	Claimants' witness statement
DCM 1	DCM Energy GmbH & Co. Solar 1 KG
DCM 2	DCM Energy GmbH & Co. Solar 2 KG
Decision	The present Decision on Jurisdiction, Liability and Quantum Principles in ICSID Case No. ARB/17/41
Directive 2011/77/EC	Directive 2001/77/EC of the European Parliament and of the Council, of 27 September 2001, on the promotion of electricity produced from renewable energy sources in the internal electricity market
Dissent	The dissenting opinion issued by Professor Pierre-Marie Dupuy in ICSID Case No. ARB/17/41, attached to the present Decision
EC	European Commission
ECT	Energy Charter Treaty

Edisun	Edisun Power Europe AG
EU	European Union
€	Euros
FET	Fair and equitable treatment
First Raster WS	First Witness Statement of Mr. Stefan Raster, 8 November 2018.
First Toggweiler WS	First Witness Statement of Mr. Peter Toggweiler, 8 November 2018.
First Roeder WS	First Witness Statement of Mr. Klaus Roeder, 9 November 2018.
FIT	Feed-in tariff
German Claimants	DCM Energy GmbH & Co. Solar 1 KG, DCM Energy GmbH & Co. Solar 2 KG, Hannover Leasing Sun Invest 2 Spanien GmbH & Co. KG and Hannover Leasing Sun Invest 2 Spanien Beteiligungs GmbH
HL Sun Invest	Hannover Leasing Sun Invest 2 Spanien GmbH & Co. KG and Hannover Leasing Sun Invest 2 Spanien Beteiligungs GmbH
HL Sun Invest GmbH	Hannover Leasing Sun Invest 2 Spanien Beteiligungs GmbH
HL Sun Invest KG	Hannover Leasing Sun Invest 2 Spanien GmbH & Co. KG
Hearing	Hearing held in Paris on 17-21 February 2020
Tr.Day [#], [page:line]	Transcript of the Hearing
Hermuth WS	Witness Statement of Mr. Claus Hermuth, 2 November 2018.
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

IDAE	Institute for the Diversification and Saving of Electricity
Law 54/1997	Law 54/1997 of 27 November 1997 relating to the Electricity Sector
Law 15/2012	Law 15/2012 of 27 December 2012 on tax measures for energy sustainability
Law 24/2013	Law 24/2013 of 26 December 2013 relating to the Electricity Sector
Margarit Regulatory Report	Report of Jaume Margarit on the regulatory framework to promote renewable energy before RDL 9/2013 and its determining factors dated 2 November 2018
Margarit Complementary Report	Complementary report of Jaume Margarit on specific aspects of the regulatory framework for the promotion of renewable energy in Spain dated 17 July 2019
MO IET/1045/2014	Ministerial Order IET/1045/2014 of 16 June 2014
NRR	New Regulatory Regime
ORR	Original Regulatory Regime
PANER	Spain's National Renewable Energy Action Plan
PER	Renewable Energy Plan (by its Spanish acronym: <i>Plan de Energías Renovables</i>)
PHB	Parties' respective Post-Hearing Briefs filed on 21 May 2020
PV	Photovoltaic
Quadrant First Report	Expert report of Daniel Flores, Ph.D. of Quadrant Economics LLC dated 8 March 2019
Quadrant Second Report	Second expert report of Daniel Flores Ph.D. of Quadrant Economics LLC dated 18 October 2019

R-[#]	Respondent's factual exhibit
RAIPRE	Administrative record of electricity production facilities (by the Spanish acronym: <i>Registro administrativo de instalaciones de producción de energía eléctrica</i>)
RD	Royal Decree
RD 2818/1998	Royal Decree 2818 of 1998 enacted on 23 December 1998
RD 436/2004	Royal Decree 436 of 2004 enacted on 12 March 2004
RD 661/2007	Royal Decree 661 of 2007 enacted on 25 May 2007
RD 1578/2008	Royal Decree 1578 of 2008 enacted on 26 September 2008
RD 1565/2010	Royal Decree 1565 of 2010 enacted on 19 November 2010
RD 413/2014	Royal Decree 413/2014 enacted on 6 June 2014
RDL	Royal Decree-Law
RDL 14/2010	Royal Decree-Law 14/2010 enacted on 23 December 2010
RDL 2/2013	Royal Decree-Law 2/2013 enacted on 1 February 2013
RDL 9/2013	Royal Decree-Law 9/2013 enacted on 12 July 2013
RE	Renewable Energy
REIO	Regional Economic Integration Organization
Resp. C-Mem.	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction of 8 March 2019
Resp. PHB	Respondent's Post-Hearing Brief of 21 May 2020

Resp. Rej.	Respondent's Rejoinder Memorial on the Merits, Reply Memorial on Jurisdiction and Comments to the <i>Amicus Curiae</i> Brief of the European Commission of 18 October 2019
RL-[#]	Respondent's legal authority
RRR	Reasonable rate of return
Second Raster WS	Second Witness Statement of Mr. Stefan Raster, 15 July 2019.
Second Roeder WS	Second Witness Statement of Mr. Klaus Roeder, 9 July 201,
SES	The Spanish Electrical System
Spain or Respondent	The Kingdom of Spain
Swiss Claimant	Edisun Power Europe AG
TFEU	Treaty on the Functioning of the European Union
TMR	Average Reference Electricity Tariff (Tarifa Media de Referencia)
Tribunal	Arbitral Tribunal constituted on 14 June 2018
TVPEE	Tax on the value of the production of electrical energy created by Law 15/2012 of 27 December 2012 on fiscal measures for energetic sustainability
Vienna Convention	The Vienna Convention on the law of treaties of 23 May 1969

1. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Energy Charter Treaty, which entered into force in Spain, Germany and Switzerland on 16 April 1998 (the “**ECT**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The Claimants are:
 - DCM Energy GmbH & Co. Solar 1 KG (“**DCM 1**”) and DCM Energy GmbH & Co. Solar 2 KG (“**DCM 2**”), two limited partnerships duly formed under the laws of the Federal Republic of Germany and listed in the Munich Commercial Register under registration numbers HRA 81675 and HRA 81674, respectively;
 - Edisun Power Europe AG (“**Edisun Power**”), a public corporation duly incorporated under the laws of the Swiss Confederation and listed in the Zurich Commercial Register under registration number CHE-112.680.241;
 - Hannover Leasing Sun Invest 2 Spanien GmbH & Co. KG (“**HL Sun Invest KG**”), a limited partnership duly established under the laws of the Federal Republic of Germany and listed in the Munich Commercial Register under registration number HRA 92866.4, and Hannover Leasing Sun Invest 2 Spanien GmbH (“**HL Sun Invest GmbH**” and, together with HL Sun Invest 2 Spanien GmbH & Co. KG, “**HL Sun Invest**”), a limited liability company duly incorporated under the laws of the Federal Republic of Germany and listed in the Munich Commercial Register under registration number HRB 140991.5 (altogether, the “**Claimants**”).
3. The Respondent is the Kingdom of Spain (“**Spain**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to in this Decision as the “**Parties**”, and the term “**Party**” is used to refer to either the Claimants or the Respondent. The Parties’ current representatives and their addresses are listed above on page (i).

2. PROCEDURAL HISTORY

2.1 Request for Arbitration

5. On 17 October 2017 DCM Energy GmbH & Co. Solar 1 KG and others (the “**Claimants**”) submitted a Request for Arbitration against the Kingdom of Spain (the “**RfA**” or “**Request for Arbitration**”).
-

6. On 31 October 2017, pursuant to Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Institution Rules, the ICSID Secretary General issued a notice of Registration (ICSID Case No. ARB/17/41), thereby registering the Request for Arbitration submitted by the Claimants.

2.2 Constitution of the Tribunal

7. On 14 February 2018, following appointment by the Claimants, Mr. Oscar M. Garibaldi (Argentine/U.S.) accepted his appointment as arbitrator.
8. On 7 March 2018, following appointment by the Respondent, Professor Pierre-Marie Dupuy (French) accepted his appointment as arbitrator.
9. On 14 June 2018, following appointment by the Secretary-General, Ms. Carole Malinvaud (French) accepted her appointment as presiding arbitrator.
10. The Tribunal was constituted on 14 June 2018, in accordance with Article 37(2)(a) of the ICSID Convention and the ICSID Rules. On the same day, copies of the signed declarations by the Members of the Tribunal were distributed to the Parties by the ICSID Secretariat.

2.3 First Session

11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 17 July 2018 by telephone conference (the "**First Session**").
12. On that First Session, the Tribunal also considered the appointment of an Assistant to the Tribunal, as mentioned in the letters from the Tribunal dated 25 June 2018 and 16 July 2018.
13. The Draft Agenda and the Procedural Order were circulated on 28 June 2018, and comments were sent by the Parties on 11 July 2018.
14. The participants in the conference were:
 - *Members of the Tribunal:* Ms. Carole Malinvaud, President of the Tribunal; Mr. Oscar M. Garibaldi, Arbitrator; Prof. Pierre-Marie Dupuy, Arbitrator.
 - *ICSID Secretariat:* Ms. Mercedes Cordido-Freytes de Kurowski, Secretary of the Tribunal.
 - *On behalf of Claimants:* Ms. Amy Roebuck Frey, King & Spalding; Mr. Christopher Smith, King & Spalding; Mr. Luis Gil Bueno, Gómez-Acebo & Pombo; Ms. Inés Vázquez García, Gómez-Acebo & Pombo.
 - *On behalf of Respondent:* Ms. Amaia Rivas Kortazar, Abogacía General del Estado; Ms. María José Ruiz Sánchez, Abogacía General del Estado.

15. Following the first session, the Tribunal issued Procedural Order No. 1 (“**PO 1**”). PO 1 recorded that no Party had raised an objection to the appointment of any Member of the Tribunal, and that the Parties confirmed that the Tribunal was properly constituted. It also provided, *inter alia*, that the proceedings shall be conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006 and that the fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.¹
16. Furthermore, PO 1 recorded that the decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal. The same Procedural Order stated that the Secretary of the Tribunal was Ms. Mercedes Cordido-Freytes de Kurowski and included the appointment of an Assistant to the Tribunal, Mr. Sacha Willaume, with a description of his corresponding role and tasks, as clarified by letter dated 16 July 2018.²
17. With respect to the place of the proceeding and the procedural languages, PO 1 established that Washington, D.C. as the seat of the Centre would be the place of the proceeding, although the Tribunal could hold hearings and deliberate at any other place that it would consider appropriate if the Parties agreed.³ Both English and Spanish were to be the procedural languages of the arbitration.
18. Finally, PO 1 recorded the guidelines with regards to the production and submission of documents, the witness statements and examination, expert’s reports, pre-hearings, hearings, records of hearings and sessions, post-hearing memorials and statements of costs.

2.4 European Commission’s First Application

19. On 5 November 2018, the European Commission (the “**EC**”, or “**EU Commission**”) submitted an “Application for Leave to Intervene as a Non-Disputing Party” (the “**Application**”) dated 29 October 2018 in the proceeding.
20. On 6 November 2018, in accordance with ICSID Arbitration Rule 37(2), the Tribunal invited the Parties to provide their observations on the Application by 16 November 2018.
21. On 16 November 2018, each party filed its observations on the Application.
22. On this basis, the Tribunal issued Procedural Order No. 2 (“**PO 2**”), dated 19 December 2018. According to the PO 2, the EU Commission sought to intervene as a non-disputing party (“**NDP**”) and submitted two arguments:

¹ PO 1, para. 3.1.

² PO 1, paras. 7, 8.2, 8. 3.

³ PO 1, para. 11.

- (i) Article 26 of the ECT does not apply intra-EU, and therefore, according to the EU Commission, the Tribunal in the present case lacks jurisdiction.
 - (ii) Union law on State aid is relevant as a matter of law for the interpretation of the substantive investment protection provisions of the ECT and precludes in the present case the award of damages against Spain.
23. Accordingly, the EU Commission requested that the Tribunal (i) grant it leave to intervene in the present proceedings; (ii) set a deadline for it to file a written *amicus curiae* submission; (iii) allow it access to the documents filed in the case; and (iv) allow it to attend the hearings.
24. PO 2 reflects the decision of the Tribunal on this matter. The Tribunal reviewed and considered the observations of the Parties of 16 November 2018, and decided that the request was premature, thereby rejecting the EU Commission's application.⁴
25. By application of Rule 37(2)(a) and (c), the Tribunal decided that the proceeding was at a very early stage, and that the Tribunal at that time was ill-equipped to assess whether the EU Commission's submission would assist it in the determination of an issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties.⁵
26. Furthermore, the Tribunal held that it was only when the Respondent should have submitted its objection to jurisdiction, if any, and when the Claimants should have addressed that objection, that the Tribunal would be in a position to rule on the EU Commission's Application.⁶ Finally, the Tribunal considered that it would be premature to enter into any detailed consideration of the substance of the Application.⁷
27. Therefore, the Tribunal rejected the EU Commission's Application without prejudice to the latter's right to re-submit an application once both Parties should have filed their respective submissions on jurisdictional objections, if any.

2.5 First Round of Written Submissions of the Parties

28. On 9 November 2018, the Claimants filed their Memorial on the Merits together with factual exhibits C-1 to C-335 and legal authorities CL-1 to CL-90 and five witness statements from Mr. Bernhard Renger, Mr. Klaus Roeder, Mr. Stefan Raster, Mr. Peter Toggweiler, and Mr. Claus Hermuth.
29. Furthermore, the Claimants filed three expert reports:
 - a regulatory report prepared by Mr. Jaume Margarit,

⁴ PO 2, para. 55.

⁵ PO 2, para. 50.

⁶ PO 2, para. 51.

⁷ PO 2, para. 52.

- a report on the quantum entitled “Financial Damages to Investors” prepared by The Brattle Group and
- a report on the Changes to the Regulation of Photovoltaic Installations in Spain since November 2010, also prepared by The Brattle Group.

30. On 8 March 2019, the Respondent filed its Counter-Memorial, including jurisdictional objections to the merits, together with factual exhibits R-0001 to R-0230 and legal authorities RL-6 to RL-88, as well as an expert report prepared by Quadrant Economics.

2.6 Document Production Phase

31. On 29 March 2019, pursuant to Article 16 of PO 1, the Claimants and the Respondent submitted their respective Requests for production of documents in the form of a Redfern Schedule divided respectively in 32 categories of documents for the Claimants and 65 categories of documents for the Respondent.

32. On 19 April 2019, the Claimants and the Respondent exchanged their respective objections to the Requests formulated by the opposing Party and inserted them in the Redfern Schedule.

33. On 3 May 2019, each Party submitted its Redfern Schedule to the Tribunal with its responses to the objections raised by the opposing Party.

34. On 7 June 2019, the Tribunal issued Procedural Order No. 4 (“**PO 4**”) concerning the Requests for Production of Documents. In PO 4, the Tribunal set forth the applicable rules and rendered a decision on the Requests for production of documents of each Party that were objected by the other Party.

2.7 European Commission’s Second Application

35. In parallel, on 5 April 2019, the EU Commission submitted a “Second Application for Leave to Intervene as a Non-Disputing Party” (the “**Second Application**”) in the proceeding, together with six annexes.

36. On 9 April 2019, in accordance with ICSID Arbitration Rule 37(2), the Tribunal invited the Parties to provide their observations on the Second Application by 19 April 2019.

37. On 19 April 2019, each party filed its observations on the Second Application.

38. On 22 May 2019, the Tribunal issued Procedural Order No. 3 (“**PO 3**”), in which the Tribunal noted that, in contrast with the EU Commission’s First Application, the Respondent had already submitted “intra-EU” jurisdictional objections and developed arguments on the application of EU law and State Aid issues.⁸

⁸ PO 3, para. 71.

39. The Tribunal observed that, pursuant to ICSID Arbitration Rule 37(2)(a), the EU Commission's intervention could assist the Tribunal in the sense that it might bring a perspective or knowledge different from Respondent's, especially since the EU Commission was one of the main negotiating parties of the ECT and played a central role in the application of State Aid law. Second, the Tribunal acknowledged that the EU Commission had a significant interest in the proceedings in accordance with ICSID Arbitration Rule 37(2)(c).⁹
40. The Tribunal found that the EU Commission's Second Application would not disrupt the proceeding and that addressing it would not require excessive additional effort from the Parties. Accordingly, it rejected the Claimants' request for the EU Commission to provide an undertaking on costs¹⁰ and decided that the EU Commission would be allowed to file a written submission with the ICSID Secretariat by 13 June 2019.¹¹
41. On 13 June 2019, the EU Commission submitted an *amicus curiae* brief.

2.8 Second Round of Written Submissions and Admissibility of New Documents

42. On 17 July 2019, the Claimants submitted their Reply on the Merits and Counter-Memorial on Jurisdiction, together with factual exhibits C-336 to C-440 and legal authorities CL-91 to CL-181.
43. The Claimants also filed three additional witness statements from: Mr. Stefan Raster, Mr. Peter Toggweiler, and Mr. Klaus Roeder.
44. In addition, the Claimants filed:
- a complementary report on specific aspects of the regulatory framework for the promotion of renewable energy in Spain by Mr. Jaume Margarit;
 - a legal expert report of Crowe Kleeberg, and
 - two Rebuttal Reports: a Quantum Report and a Regulatory Report prepared by The Brattle Group.
45. On 18 October 2019, the Respondent submitted a Rejoinder on the Merits and Reply on Jurisdiction together with factual exhibits R-0231 to R-0336 and legal authorities RL89 to RL130, as well as the Respondent's comments on the *Amicus Curiae* Brief of the EU Commission.
46. The Respondent also filed a second Expert Report dated 18 October 2019, prepared by Quadrant Economics.

⁹ PO 3, paras. 73-76.

¹⁰ PO 3, para. 80.

¹¹ PO 3, para. 87.

47. On 22 November 2019, the Claimants filed their Rejoinder on Jurisdiction together with factual exhibits C-441 to C-450 and legal authorities CL-182 to CL-188.
48. On 3 February 2020, in accordance with Section 17.3 of Procedural Order No. 1, the Claimants requested leave from the Tribunal to introduce twenty-four new documents, including twenty factual exhibits and four legal authorities, and notably the two following ICSID awards: *Watkins Holding S.à.r.l. et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020; and *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, 15 July 2019.
49. On the same day, the Respondent requested leave from the Tribunal to introduce eight new documents, including five factual exhibits and the three following ICSID awards:
- *Stadtwerke München GmbH, RWE Innogy GmbH and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 and the Dissenting Opinion of Professor Kaj Hobér;
 - *BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 and the Dissenting Opinion of Mr. Horacio A. Grigera Naón; and
 - *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019.¹²
50. By letter of 6 February 2020, the Respondent opposed the admission of two legal authorities and one factual exhibit by Claimants.
51. By email of the same day, the Claimants did not oppose the admission of the documents requested by the Respondent and reserved their rights to comment on the relevance or materiality of any of those documents.
52. On 7 February 2020, the Tribunal issued Procedural Order No. 6 (“**PO 6**”) admitting the Claimants’ Request to introduce twenty-four new documents (filed as factual exhibits C-452 to C-471 and legal authorities CL-189 to CL-192) and the Respondent’s Request to introduce eight new documents in the record (filed as factual exhibits R-337 to R-341 and legal authorities RL-131 to RL-135).¹³
53. On 13 February 2020, the Respondent submitted an amended list of legal authorities (adding RL-136 to RL-143) indicating that the added legal authorities were mentioned and analyzed in its Rejoinder on the Merits but had not been filed as a result of a clerical error.

¹² PO 6, para. 6.

¹³ PO 6, para. 12.

2.9 Hearings Phase and Post-Hearing Briefs

54. On 14 January 2020, the Secretary of the Tribunal circulated a draft agenda for the Pre-Hearing Organizational Meeting.
55. The Pre-Hearing Organizational Meeting was held on 28 January 2020, at 9:00 a.m. EST Washington D.C. time (8:00 a.m. CST Houston, and 3:00 p.m. CET in Paris, Madrid and Frankfurt), by telephone conference (the “**Pre-Hearing Meeting**”).
56. Audio recordings of the Pre-Hearing Meeting were deposited in the archives of ICSID. The recordings were subsequently distributed to the Members of the Tribunal and the Parties on 28 January 2020.
57. A Hearing on Jurisdiction and the Merits (the “**Hearing**”) was held on 17-21 February 2020, at the World Bank Group Conference Center in Paris, France.
58. The participants were:

Tribunal

- Ms. Carole Malinvaud, President
- Mr. Oscar M. Garibaldi, Co-Arbitrator
- Professor Pierre-Marie Dupuy, Co-Arbitrator

ICSID Secretariat

- Ms. Mercedes Cordido-Freytes de Kurowski, Secretary of the Tribunal

Assistant to the Tribunal

- Mr. Sacha Willaume, Assistant to the Tribunal

Claimants

Counsel

- Mr. Kenneth Fleuriet, King & Spalding
- Mr. Kevin Mohr, King & Spalding
- Ms. Amy Frey, King & Spalding
- Mr. Christopher Smith, King & Spalding
- Ms. Violeta Valicenti, King & Spalding
- Mr. Georges Alboustany, King & Spalding
- Mr. Lorenzo Nizzi, King & Spalding
- Ms. Teresa Gutiérrez Chacón, Gómez-Acebo & Pombo
- Ms. Inés Puig-Samper, Gómez-Acebo & Pombo
- Ms. Cristina Matia Garay, Gómez-Acebo & Pombo

Parties

- Mr. Harald Lenz, DCM
- Mr. Stefan Raster (after testimony), Seelstrang & Partner mbB (DCM)
- Ms. Brigitte Steidle, Hannover Leasing
- Mr. Rainer Isenrich, Edisun Power
- Ms. Mafalda Soto, Brenes Abogados (DCM, Hannover Leasing, Edisun Power)
- Mr. Roberto Soto, Administradora Solar Hispano Alemana (DCM, Hannover Leasing, Edisun Power)

Witnesses

- Mr. Stefan Raster (after testimony), Seelstrang & Partner mbB (DCM)
- Mr. Peter Toggweiler, Edisun Power
- Mr. Klaus Roeder, Hannover Leasing

Experts

- Mr. Jaime Margarit, Independent Consultant, formerly Director of Renewable Energy at IDAE
- Mr. Carlos Lapuerta, Brattle
- Mr. José Antonio García, Brattle
- Mr. Richard Caldwell, Brattle
- Mr. Andrés Child, Brattle
- Mr. Felix Schmidt, Brattle

Respondent

Counsel

- Mr. José Manuel Gutiérrez Delgado, State Attorney's Office
- Ms. Irene Bonet Tous, State Attorney's Office
- Ms. Socorro Garrido Moreno, State Attorney's Office
- Mr. Rafael Gil Nievas, State Attorney's Office
- Mr. José Antonio Jurado Ripoll, State Attorney's Office
- Ms. Elena Oñoro Sainz, State Attorney's Office
- Mr. Francisco de la Torre Díaz, State Attorney's Office
- Mr. Luis Vacas Chalfoun, State Attorney's Office
- Ms. Gloria de la Guardia Limeres, State Attorney's Office

Experts

- Dr. Daniel Flores, Quadrant Economics
- Dr. Juan Riveros, Quadrant Economics
- Mr. Andrés León, Quadrant Economics

Interpreters

- Mr. Jesús Getan Bornn, English-Spanish Interpreter
- Ms. Amalia Thaler de Klemm, English-Spanish Interpreter
- Ms. Gertrudis Durkop Larrauri, English-Spanish Interpreter
- Ms. Silke Schoenbuchner, German Interpreter
- Mr. Ralph Gerhardt, German Interpreter
- Ms. Monika Brasse, German Interpreter

Court Reporters

- Mr. Trevor McGowan, English Court Reporter
- Mr. Leandro Lezzi, Spanish Court Reporter
- Ms. Luciana Sosa, Spanish Court Reporter

59. The Hearing was conducted in accordance with the provisions set forth in Procedural Order No. 5 dated 31 January 2020 (“**PO 5**”) and Procedural Order No. 1 dated 1 August 2018 (“**PO 1**”).
60. On 17 February 2020, during the first day of the Hearing, the Respondent informed of its intention to file a new objection to jurisdiction (the “**New Jurisdictional Objection**”).¹⁴
61. Without getting into the substance of the New Jurisdictional Objection, and at the request of the President of the Tribunal, the Respondent indicated the reasons why it intended to make such a late application, and the Claimants objected to its introduction.
62. The Tribunal noted from the Respondent’s explanation that the New Jurisdictional Objection did not arise out of any new fact or event, and that it appeared that the New Jurisdictional Objection was a preliminary objection, which according to ICSID Arbitration Rule 41(1) had to be made before the date for filing the Respondent’s Counter-Memorial.
63. In such circumstances, and since the Claimants had objected to the raising of the New Jurisdictional Objection, the Tribunal denied the Respondent’s request to file the New Jurisdictional Objection.¹⁵
64. On the same day, the Respondent sought leave to introduce in the record the ICSID award issued on 2 August 2019 in the case *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 (the “**InfraRed award**”).
65. On 18 February 2020, the Tribunal granted the Respondent’s request.

¹⁴ Tr. Day 1, 140:1-8.G

¹⁵ Tr. Day 1, 144:19 to 145:4.

66. On the same day, the Respondent filed the *InfraRed* award as RL-144.
67. On 21 February 2020, in the course of the Respondent's closing statement, the Respondent recalled that it had been its intention to submit the New Jurisdictional Objection, but since the Tribunal had not allowed it to do so, the Respondent was not going to submit it.
68. The President of the Tribunal noted, for the record, the Respondent's withdrawal of the New Jurisdictional Objection that the Respondent had meant to bring at some point.¹⁶
69. On 2 March 2020, the Tribunal issued Procedural Order No. 7 ("**PO 7**") to address certain procedural matters discussed at the end of the Hearing and certain questions that the Tribunal asked the Parties.
70. PO 7 first recalled the Respondent's request to raise the New Jurisdictional Objection and the Tribunal's rejection of such request.
71. The Tribunal then invited the Parties to consult with each other and to inform the Tribunal on the agreed deadline for the submission of the agreed corrections to the transcripts.
72. Furthermore, the Tribunal recorded the Parties' agreement to file Post-Hearing Briefs ("**PHBs**") on 14 May 2020. In light of the Parties' disagreement as to whether the PHBs should be filed simultaneously or in sequence, the Tribunal decided that both PHBs should be filed simultaneously.¹⁷
73. The Tribunal also ruled that the Parties could address in their PHBs any upcoming awards or decisions involving Energy Charter Treaty claims, with respect to renewables, which might be relevant to the present case and become available up to the time for filing the PHBs.¹⁸
74. Finally, the Tribunal listed the questions that it wished the Parties to address in their PHBs in PO 7:

"22.1. Was Exhibit R-248 (mentioned at p. 13 of Respondent's closing presentation) published or made available to the public and if so, on what date?"

22.2. What is the relevance of EU law on the claims of Edisun (on jurisdiction or on the merits)?"

22.3. Assuming that the TVPEE formally qualifies as a tax measure according to Article 21 of the ECT, could you elaborate on the reasons

¹⁶ Tr. Day 5, 118:12-15.

¹⁷ PO 7, paras. 13, 14.

¹⁸ PO 7, para. 17.

why –t does - or d–es not - fall within the carve-out provision of Article 21?

22.4. Is there a contradiction in considering, on the one hand, that the regime set out in RD 661/2007 guaranteed potential investors against future changes affecting existing PV plants and, on the other hand, that the State had the right to modify its regulatory framework on renewables?

22.5. What is the legal impact (if any) on the Parties' dispute of Spain's statement that the disputed measures were the only means available to make the electricity system sustainable, it being understood by the Tribunal that Spain does not invoke the defense of State necessity?

22.6. Regarding Law 54/1997: Could the Parties briefly explain if and to what extent the provisions of Law 54/1997 provide guidance or set criteria for the Government of Spain to set the remuneration for the plants eligible to the Special Regime?

22.7. Regarding RD 661/ 2007:

22.7.1. What is the Parties' position on:

i. Whether the fixed feed-in tariffs provided for in RD 661/2007 were compatible with Law 54/1997?

ii. Whether RD 661/2007 (or RD 661/2007 combined with Law 54/1997) was compatible with EU law and notably the EU State Aid regime (without prejudice to the tribunal's decision as to the relevance or applicability of EU Law)?

22.7.2. Could the Parties sum up their legal analysis of art 44.3 in fine of RD 661/2007?

22.8. Regarding RD 1578/2008: Could each Party briefly summarize the reasons supporting its view that future changes to the remuneration offered to investors under RD 1578/2008 could or could not affect existing plants validly enrolled pursuant to this RD?

22.9. Regarding RDL 17/2019 (C-451):

22.9.1. Does this new piece of legislation have any impact on the Parties' positions in this arbitration and, if so, what is that impact? In particular:

i. To what extent is there a difference between article 44.3 in fine of RD 661/2007 and the commitments that Spain would make in accordance with the terms of the final provision of RDL 17/2019 for the two relevant periods of time (2020-2031)?

ii. Assuming that an investor relinquishes its claims, are these commitments made by Spain pursuant to RDL 17/2019 consistent with the Spanish Supreme Court decisions discussed during the proceedings?

22.9.2. Does this new piece of legislation have an impact on the Parties' respective financial positions and, if so, what is that impact?

22.10. Tax gross up: Could Respondent clarify whether it is its position that an award of damages in favor of Claimants would be taxable under Spanish law?"

75. On 3 March 2020, the Parties informed the Tribunal that they had agreed that the deadline for the submission of the agreed corrections to the transcripts would be 3 April 2020. Such deadline was later extended by joint agreement of the Parties to 8 April 2020.
76. On 8 April 2020, the Parties submitted the joint proposed amendments to the English and Spanish transcripts, in chart format, for the court reporters and stenographers to incorporate them to a final version of the Hearing transcripts.
77. On 15 April 2020, the ICSID Secretariat informed the Parties that the agreed changes had been incorporated and that the final version of the Hearing transcripts had been uploaded on the ICSID Box folder.
78. On 6 May 2020, The Respondent indicated that, pursuant Section V of PO 7, it intended to address the most recent decisions: a) the Award, of 28 February 2020, rendered in the case *The PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14; and b) the Decision on Jurisdiction, Liability and Directions on Quantum, of 9 March 2020, rendered in the case of *Hydro Energy 1 S.Å.R.L. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42. The Respondent notably requested that the Tribunal confirm or otherwise order that the Claimants are also expected to address their comments on both decisions.
79. On the same day, the Tribunal invited the Claimants to comment, if they so wished, on the Respondent's request of 6 May 2020 by 7 May 2020.
80. On 7 May 2020, the Claimants indicated that they agreed with Spain's understanding that the Parties could address the final awards in *PV Investors v. Spain* and *Hydro Energy v. Spain*, as well as any other ECT awards in renewable energy matters rendered or published between now and the Parties' submissions of their PHBs. In relation to the *PV Investors* case, the Claimants also informed that they intended to include the Preliminary Award on Jurisdiction and the Concurring and Dissenting Opinion of Charles N. Brower.
81. In addition, the Claimants sought leave to file an updated model from Brattle (in excel form), along with a very brief explanation from Brattle as to what had changed, indicating they were not proposing to add any new evidence or arguments with this

submission but rather to give the Tribunal accurate numbers reflecting the current regime in force in Spain.

82. On 8 May 2020, the Tribunal authorized the Respondent to submit by Monday, 11 May 2020, its comments on the Claimants' request of 7 May 2020 for leave from the Tribunal to file a submission of an updated calculation and a brief update from Brattle.
83. On the same day, the Claimants informed the Tribunal that the Respondent had agreed to a request from the Claimants that the deadline for submitting the PHBs be extended until Thursday, 21 May 2020, agreement which the Respondent confirmed on the following day.
84. On 11 May 2020, the Respondent commented on the Claimants' request of 7 May 2020. In substance, the Respondent agreed that both parties may submit updated models from their respective experts (in excel form) strictly limited to updates, if any, related to considering the final version of RDL 17/2019. However, the Respondent opposed the proposal that Brattle submit an explanatory document and proposed instead that those updates be explained by counsel in their PHBs. In the event that the Tribunal allowed Brattle to submit a written explanatory document, the Respondent requested that the Respondent's experts be allowed to file a subsequent written document commenting on it.
85. On the same day, the Claimants informed the Tribunal that they were agreeable to the Respondent's proposal that the Parties submit with their PHBs quantum updates by their respective experts in Excel format only, with no accompanying memorandum from the experts.
86. On 15 May 2020, the Tribunal took note of the Parties' latest exchanges with respect to the upcoming filing of their PHBs and confirmed that comments on the decisions post-dating the Hearing shall be included in the 60-page PHBs.
87. The Tribunal also acknowledged the Parties' agreement regarding the simultaneous filing with their PHBs of the calculation of their respective experts in response to section 22.9.2 of PO 7 while the Parties may comment these calculations in their PHBs.
88. On 21 May 2020, further to their joint agreement to a 7-day extension of the initial deadline, the Parties respectively filed their PHBs, including their respective answers to the questions asked by the Tribunal in PO 7. In particular:
 - The Claimants filed their PHB together with (i) an updated Consolidated list of Legal Authority Index, (ii) Legal Authorities: CL-193, CL-194, and CL-195; and (iii) "Tables Q- Updated Financial Model-Dec 19" and "Tables S- Updated Rebuttal Alternative Claim Tool – Dec19";
 - The Respondent filed its PHB together with (i) an updated Consolidated list of new Legal Authorities, (ii) Legal Authorities: RL-145, R-146 and RL-147;

and (iii) updated models; QE-0135-RDL 17-2019 “Updated Cash Flow and IRR Calculations for PV Plants” and QE-0136-RDL 17-2019 – “Updated Sensitivities to Brattle’s Tables from the Quadrant experts in response to the Tribunal’s question 22.9.2”.

89. On 28 May 2020, the Respondent complained about the Claimants’ updated evaluation in their PHB, which it considered to go beyond what had been allowed by the Tribunal and contrary to section 22.9.2 of PO 7. It therefore sought leave to submit brief explanatory comments, limited to demonstrate the extra-limitations of Claimants’ updated evaluation.
90. On the same day, the Tribunal invited the Claimants to comment on the Respondent’s message by 1 June 2020.
91. On the same day, the Claimants explained that they disagreed that Brattle’s updated quantum model exceeded the appropriate scope of updating an *ex post* valuation model. The Claimants further stated that, because Spain had not articulated how it believed Brattle’s quantum update was problematic, they were not in a position to respond further to Spain’s comments. They did not oppose Spain’s request to submit brief observations on the updated model, provided that the Claimants had an opportunity to respond.
92. On 1 June 2020, the Tribunal granted the Respondent’s request to file “*brief explanatory comments*” by 8 June 2020 and invited Claimants to respond thereto by 15 June 2020.
93. On 8 June 2020, the Respondent submitted its comments about an alleged breach of PO 7 by the Claimants.
94. On 15 June 2020, the Claimants filed observations on the Respondent’s comments of 8 June 2020.
95. On 17 June 2020, the Respondent (i) sought leave to respond to the Claimants’ comments of 15 June 2020 and (ii) filed as a new legal exhibit RL-148- *Eiser Infrastructure Limited and Energía Solar Luxembourg S.á r.l. v. Kingdom of Spain*, ICSID Case ARB/13/36, Decision on Annulment, 11 June 2020 (the “**Eiser annulment decision**”) pursuant to Section 18 of PO 7.
96. On 18 June 2020, the President of the Tribunal granted the Respondent’s request to file a maximum one-page comment on the “*Claimants’ Response to Respondent’s comments regarding their post hearing brief*” and authorized the Claimants, if they so wished, to submit a response of the same length within two business days.
97. On 21 June 2020, the Respondent submitted a one-page response to the Claimants’ comments of 15 June 2020.
98. On 23 June 2020, the Claimants briefly responded to the Respondent’s comments of 21 June 2020.

99. On 29 June 2020, the Claimants submitted their comments on the *Eiser* annulment decision.

2.10 Admissibility of Further Documents

100. On 19 October 2020, pursuant to Article 17.3 of PO 1, the Respondent sought leave to submit into the record the Decision on Jurisdiction, Liability and Directions on Quantum rendered on 31 August 2020 in *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case ARB/15/34, together with the Dissenting Opinion of Mr. David R. Haigh Q.C.
101. On 27 October 2020, the President of the Tribunal invited the Claimants to comment on the Respondent's letter of 19 October 2020, by 30 October 2020.
102. On 30 October 2020, the Claimants informed the Tribunal that they "*ha[d] no objection to adding the Cavalum Decision and Dissent to the record, so long as the Tribunal also admit[ed] into the record the Decision on Jurisdiction, Liability and Directions on Quantum in STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4, together with the Dissenting Opinion of Prof. Pierre-Marie Dupuy, both rendered on October 8, 2020.*" Claimants further requested that each Party had the opportunity to submit a two-page statement on the authorities in each case in accordance with PO 7.
103. On 1 November 2020, the President of the Tribunal invited the Respondent to comment on the Claimants' letter of 30 October 2020, by Wednesday, 4 November 2020.
104. On 4 November 2020, the Respondent stated that it "*ha[d] no objection to adding the Decision on Jurisdiction, Liability and Directions on Quantum in STEAG GmbH v. Kingdom of Spain and Dissenting Opinion of Prof. Pierre-Marie Dupuy to the record so long as the Tribunal also admit[ted] into the record the Cavalum Decision together with the Dissenting Opinion of Mr. David R. Haigh Q.C.*" and that it "[did] *not agree with the relevance that Claimants give to the STEAG Decision in their letter of October 30, 2020*".
105. On 6 November 2020, the Tribunal admitted into the record (i) the Decision on Jurisdiction, Liability and Directions on Quantum issued on 31 August 2020 in the ICSID Case No. ARB/15/34 of *Cavalum SGPS, S.A. v. Kingdom of Spain*, together with the Dissenting Opinion of Mr. David R. Haigh Q.C., and (ii) the Decision on Jurisdiction, Liability and Directions on Quantum in *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4), together with the Dissenting Opinion of Prof. Pierre-Marie Dupuy, both issued on 8 October 2020. It further invited the Parties to submit a two-page submission for each of those decisions by 17 November 2020.
106. On 17 November 2020, both Parties submitted their comments on the *Cavalum* and *STEAG* decisions, together with the decisions themselves, as well as updated lists of the legal authorities.

107. On 26 March 2021, in accordance with PO 1, the Respondent requested the inclusion of two new legal authorities: (i) the Final Award issued in the arbitration between *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case V 2017/060, and (ii) the Decision on Jurisdiction and Liability issued on 18 March 2021, in the case of *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4 (including Mr. Garibaldi's dissent).
108. On the same day, the President of the Tribunal invited the Claimants to comment on the Respondent's request by Thursday, 1 April 2021.
109. On 1 April 2021, the Claimants informed the Tribunal that they had no objection to adding these authorities to the record (while pointing out their limited relevance to the current matter), provided that they were afforded an opportunity briefly to comment thereupon.
110. On 6 April 2021, the Tribunal admitted into the record the two new legal authorities: (i) the Final Award rendered in *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case V 2017/060; and (ii) the Decision on Jurisdiction and Liability issued on 18 March 2021 in *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4 (including Mr. Garibaldi's dissent). The Tribunal further invited the Respondent to submit a two-page submission on the relevance of the above-referenced authorities by 14 April 2021 and the Claimants to respond, with the same page limit, by 21 April 2021.
111. On 14 April 2021, the Respondent submitted its comments on the *FREIF* and *Eurus* decisions, together with the authorities themselves and a consolidated list of its legal authorities.
112. On 21 April 2021, the Claimants submitted their comments on the two above-referenced authorities.
113. By letter of 16 August 2021, submitted with two annexes, the Claimants informed the Tribunal of an award that reportedly was rendered in *Sun-Flower Olmeda GmbH & Co. KG and others v. Kingdom of Spain*, ICSID Case No. ARB/16/17 ("**Sun-Flower award**"). According to the Claimants, this unpublished award was relevant to the present case and the Tribunal would be well within its power to order Spain to disclose it so that the Tribunal could consider it when finalizing the Award in this matter. The Claimants further indicated that they would be happy to provide comments on this Award, after Spain's disclosure.
114. On 23 August 2021, the Tribunal invited the Respondent to submit any comments that it might have regarding the *Sun-Flower* award by 21 August 2021.
115. On 26 August 2021, the Respondent informed the Tribunal that it did not consent to the disclosure of the *Sun-Flower* award, as well as the dissenting opinion of Professor Kohen.

116. On 31 August 2021, the Tribunal ordered the Respondent to communicate the above-referenced award and dissent by 8 September 2021, together with a two-page comment maximum as to the relevance or not of the *Sun-Flower* award and dissent. The Claimants would then have the same time (and page limit) to file their comments, if any.
117. On 8 September 2021, the Respondent filed its comments on the *Sun-Flower* award together with the award and dissenting opinion and an updated consolidated list of legal authorities.
118. On 10 September 2021, the Respondent sought leave to submit into the record the judgment of the Grand Chamber of the Court of Justice of the European Union of 2 September 2021, issued in the Case C-741/19, *Republic of Moldova v. Komstroy LLC*.
119. On 13 September 2021, the Claimants complained about alleged missing parts in the production of the *Sun-Flower* award and requested that the Tribunal order Spain to produce the full award and dissent. The Claimants further reserved their right to request a brief extension of the approaching deadline to submit their comments on the *Sun-Flower* award by Thursday, 16 September 2021 as a result of Spain's failure to follow the Tribunal's earlier order.
120. On the same day, the Respondent answered the Claimants' email explaining that this was a clerical and involuntary error and attached a correct and full copy of the *Sun-Flower* award and dissent.
121. On the same day, the Tribunal invited the Claimants to comment on the Respondent's request of 10 September 2021 for leave from the Tribunal to submit to the record the Judgment of the Court of Justice of the European Union dated 2 September 2021 in *Republic of Moldova v. Komstroy LLC*, Case C-741/19 ("**Komstroy judgment**") by 17 September 2021.
122. On 14 September 2021, the Tribunal invited the Claimants to confirm by 15 September 2021, whether in light of Respondent's submission of 13 September 2021, the Claimants' request of the same date had become moot.
123. On 15 September 2021, the Claimants confirmed that it was the case.
124. On 17 September 2021, the Claimants submitted their comments on the *Sun-Flower* award and dissent.
125. On the same day, the Claimants submitted their comments on the *Komstroy* judgment.
126. On 21 September 2021, the Tribunal granted the Respondent's request to introduce the *Komstroy* judgment into the record by 22 September 2021. The Tribunal also informed the Parties that it wished to receive more detailed comments on the impact, if any, of the *Komstroy* judgment on the present case. To such effect, the Tribunal

invited the Parties to agree on a page limit and on the filing of such comments by 30 September 2021, and to revert to the Tribunal in case of disagreement.

127. On 22 September 2021, the Respondent filed the *Komstroy* judgment into the record as a new legal authority (RL-167), together with a list of consolidated legal authorities.
128. On 30 September 2021, the Parties informed the Tribunal that they had agreed on the length, format, and spacing of their comments on the *Komstroy* judgment and that the Respondent would submit its comments on Tuesday, 5 October 2021, and the Claimants would submit their response on Tuesday, 19 October 2021.
129. On 5 October 2021, the Respondent submitted its comments on the *Komstroy* judgment.
130. On 19 October 2021, the Claimants submitted their comments on the *Komstroy* judgment.
131. In a letter of 13 December 2021, the Claimants informed the Tribunal of two new legal developments further to the *Komstroy* judgment: (i) a Decision on Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021 issued on 6 December 2021 in *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, which rejected Spain's intra-EU jurisdictional objection and (ii) an article published by Global Arbitration Review titled "Spain Fails to Reopen Intra-EU Objection After Komstroy", which discussed *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45. Alleging that these two authorities were relevant and responsive to Respondents' comments on the *Komstroy* judgment, the Claimants sought leave to introduce them into the record.
132. On 14 December 2021, the Tribunal invited the Respondent to submit, by 20 December 2021, any observations that it might have on the Claimants' letter of 13 December 2021.
133. On 20 December 2021, the Respondent submitted its comments on the Claimants' letter of 13 December 2021 (which was re-sent with clerical amendments on the following day).
134. On 7 February 2022, the Tribunal informed the Parties that it had decided to admit the *Kruck* decision and the GAR article on the *Landesbank* decision into the record.
135. On 15 February 2022, the Claimants filed the two abovementioned legal authorities into the record as CL-198 (Decision on Respondent's Request for Reconsideration of the Tribunal's Decision dated 19 April 2021 in the *Mathias Kruck v. Kingdom of Spain* case) and CL-199 (an article published in GAR on the *Landesbank* decision, titled "Spain fails to reopen intra-EU objection after Komstroy") together with a consolidated legal authority index.

136. On 10 May 2022, the Respondent sought leave to introduce six new legal authorities into the record:
- (i) the judgment of the CJEU issued in the Case C-109/20, *PL Holding v. Poland*, 26 October 2021;
 - (ii) the order issued by the Svea Court of Appeal in *Athena (formerly Greentech) and Novenergia v. Italy*, 12 November 2021;
 - (iii) the ruling of the CJEU in Case C-638-19, *European Food and others v. European Commission*, 25 January 2022;
 - (iv) a press release from the European Commission titled “Commission refers UK to CJEU over a UK Judgment allowing enforcement of an arbitral award granting illegal State aid”, 9 February 2022;
 - (v) the judgment of the Paris Court of Appeal No. 48/2022, 19 April 2022; and
 - (vi) the judgment of the Paris Court of Appeal No. 49/2022, 19 April 2022.
137. On the same day, the Tribunal invited the Claimants to comment on the Respondent’s request by 17 May 2022.
138. On 17 May 2022, the Claimants requested that the Tribunal dismiss the Respondent’s application because it is “*untimely, addresses irrelevant documents, and risks causing undue delay to the final resolution of this dispute in violation of the Tribunal’s duty under the ICSID Arbitration Rules.*” Alternatively, should the Tribunal decide to admit Spain’s documents into the record, the Claimants submitted in turn that the Tribunal should also admit the following nine legal authorities into the record:
- (i) *Rockhopper Exploration Plc et al. v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Italy’s Request for Reconsideration, 20 December 2021;
 - (ii) *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Spain’s Request for Reconsideration, 10 January 2022;
 - (iii) *Mainstream Renewable Power et al. v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Decision on Respondent’s Application Under ICSID Arbitration Rule 41(5), 18 January 2022;
 - (iv) *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Respondent’s Request for Reconsideration, 1 February 2022;
 - (v) *Sevilla Beheer B.V. et al. v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022;

- (vi) *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022;
 - (vii) *NextEra Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022;
 - (viii) *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022; and
 - (ix) *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022.
139. On 25 May 2022, the Tribunal decided to admit into the record the six documents listed in the Respondent's request, as well as the nine documents listed in the Claimants' response. It also invited the Parties to file simultaneous comments in the form of a single submission on the relevance of the new authorities by 8 June 2022, not to exceed ten pages in total.
140. On 8 June 2022, the Claimants filed their nine new legal exhibits as CL-200 to CL-208 and submitted their comments on the new legal authorities filed by Spain.
141. On the same day, the Respondent filed its six new documents as R-0343 (press release of the EU Commission) and RL-168 to RL-172 and submitted its comments on the new legal authorities filed by the Claimants.
142. On 20 June 2022, the Tribunal informed the Parties that it was working on its Award and anticipated being able to provide a more specific timetable by the end of the Summer.
143. On 23 June 2022, the Respondent sought leave to introduce into the record the SCC Award dated 16 June 2022, rendered in the Case V 2016/135, *Green Power K/S and SCE Solar Don Benito v. Kingdom of Spain*, which it considered "*of the greatest relevance in relation to the intra-EU objection also raised by the Kingdom of Spain in the present case*" and requested that the Tribunal grant the Parties the opportunity to submit observations on this award, in sequence.
144. On 24 June 2022, the Tribunal invited the Claimants to comment on the Respondent's request by 30 June 2022.
145. On 30 June 2022, the Claimants asked the Tribunal to reject Spain's request because Spain had failed to demonstrate that "*exceptional circumstances*" existed to warrant the addition of the *Green Power* award into the record. Alternatively, should it be allowed into the case record, the Claimants requested that the Tribunal simply take note of it and not require further submissions from the Parties. They further argued that, if submissions were to be required, the Respondent, as the objecting party, should submit comments first to which the Claimants would respond. In addition, the

Claimants requested that the Tribunal set a deadline by which the Parties should submit their Submissions on Costs, and then close the proceeding.

146. On 11 July 2022, the Tribunal granted leave for the Respondent to introduce the *Green Power* award into the record and invited the Parties to file very short submissions, not to exceed three pages each, on the relevance (or lack of relevance) of that award to the present case, starting with Respondent by 18 July 2022, followed by the Claimants by 25 July 2022. Finally, the Tribunal invited the Parties to submit their Statements of Costs by 15 August 2022.
147. On 13 July 2022, the Respondent requested an extension of the deadline for the Parties to submit their Submission on Costs until 2 September 2022.
148. On the same day, the Tribunal invited the Claimants to comment on the Respondent's extension request by Monday, 18 July 2022.
149. On 18 July 2022, the Respondent submitted its comments on the importance and relevance of the *Green Power* award to the present case together with a copy of that award (RL-175) and a consolidated list of legal authorities (RL).
150. On the same day, the Claimants agreed to the Respondent's request for an extension of deadline for the Parties to submit their Submissions on Costs by 2 September 2022.
151. On the same day, the Tribunal took note of the Parties' agreement and therefore confirmed the extension of the deadline for the filing of the Parties' Submissions on Costs until 2 September 2022.
152. On 25 July 2022, the Claimants submitted their comments on the *Green Power* award.
153. On 2 September 2022, the Parties filed their respective Submissions on Costs.
154. On 20 December 2022, the Respondent sought leave to introduce into the record (i) the Judgment of the Svea Court of Appeal, dated 13 December 2022, annulling the arbitral award dated 15 February 2018 in the Case SCC No. V (2015/063) *Novenergia v. Kingdom of Spain*, and (ii) the Judgment rendered by the Swedish Supreme Court, dated 14 December 2022, annulling the arbitral award in *PL Holdings v. Poland*.
155. On the same day, the Tribunal invited the Claimants to comment on Respondent's request by 3 January 2023.
156. On 3 January 2023, the Claimants submitted that the Tribunal should reject the Respondent's request of 20 December 2022. In the alternative, should the Tribunal decide to admit Spain's documents into the record, the Claimants submitted in turn that the Tribunal should admit the following eight documents into the record as legal

authorities (and where those decisions were not public, arbitration media articles discussing those decisions):

- (i) *InfraRed Envtl Infra. GP Ltd. and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 – Annulment Proceeding, Decision on Annulment, 10 June 2022;
 - (ii) *RREEF Infra. (G.P.) Ltd. and RREEF Pan-European Infra. Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30 – Annulment Proceeding, Decision on Annulment, 10 June 2022;
 - (iii) *LSG Building Solutions GmbH v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022;
 - (iv) *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Respondent’s Second Request for Reconsideration, 25 July 2022;
 - (v) *Sevilla Beheer et al. v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Respondent’s Request for Reconsideration, 11 August 2022 (decision not public);
 - (vi) *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Respondent’s Second Request for Reconsideration, 19 August 2022;
 - (vii) *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Procedural Order No. 6 on the Kingdom of Spain’s Request for Reconsideration of the Tribunal’s Decisions on Jurisdiction of 31 August 2020 and 10 January 2022, 7 September 2022; and
 - (viii) *9REN Holding S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, 17 Nov 2022.
157. On 11 January 2023, the Tribunal invited the Respondent to comment on the Claimants’ alternative request included in the Claimants’ correspondence of 3 January 2023.
158. On 17 January 2023, the Respondent filed its observations on the Claimants’ alternative request.
159. On 20 January 2023, the Tribunal decided to admit into the record the two legal exhibits of the Respondent as well as the eight legal exhibits of the Claimants and requested these exhibits to be filed by 24 January 2023. The Tribunal further granted leave to the Parties to file simultaneous comments in the form of a single submission on the relevance of the new authorities by 30 January 2023, not to exceed ten pages in total.

160. On 24 January 2023, the Claimants filed their eight new legal exhibits as CL-209 to CL-216 and the Respondent filed its two new legal exhibits as RL-176 and RL-177 into the record.
161. On 30 January 2023, the Parties submitted their respective comments on the Claimants' eight new legal exhibits (CL-209 to CL-216) as well as on the Respondent's two new legal exhibits (RL-176 and RL-177).
162. By communications of 25 September 2023, 7 December 2023 and 10 June 2024, the Tribunal informed the Parties on the status of the Tribunal's work.
163. On 10 July 2024, the Respondent requested leave from the Tribunal to introduce two new documents into the record: (i) Agreement on the interpretation and application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States, 26 June 2024; and (ii) Declaration on the legal consequences of the judgment of the court of justice in *Komstroy* and common understanding on the non-applicability of Article 26 of the ECT as a basis for intra-EU arbitration proceedings, 26 June 2024.
164. On the same date, the Tribunal invited the Claimants to comment on the Respondent's request, which the Claimants did, as scheduled, on 17 July 2024, objecting to the Respondent's request of 10 July 2024.
165. On 23 July 2024, the Tribunal informed the Parties that after careful consideration of the Parties' submissions on the matter, the Tribunal had found that the Respondent has failed to demonstrate that there were "exceptional circumstances" that warranted the introduction of these documents into the record at this late stage of the proceeding, and that accordingly, the Tribunal denied the Respondent's request of 10 July 2024.

3. FACTUAL BACKGROUND

166. This case arises out of the Claimants' investments in photovoltaic (PV) plants in Spain, which aim at producing electricity using solar light. In order to understand the context of those investments, the Tribunal will set out the regulatory framework governing investments in renewable energies in Spain, including its main evolutions, before describing the Claimants' investments.
167. In doing so, the Tribunal has taken into consideration all the Parties' written and oral submissions and has weighed the numerous arguments made by the Parties in the light of all the evidence. What the Tribunal sets out below is merely a summary of the main facts of the case, which does not attempt to be an exhaustive account of all of the evidence and arguments put forward by the Parties.
168. This summary is intended to provide the background to a more detailed consideration of certain issues in the second part of this Decision, in which the Tribunal sets out its reasoning and conclusions.

3.1 The Regulatory Framework Forming the Context of Claimants' Investments in Spain

3.1.1 General Overview of Spain's Legal System

169. As a preliminary remark, there seems to be no dispute between the Parties as to the way the Spanish legal system is structured and how its components are hierarchically arranged:

- The 1978 Spanish Constitution is the supreme law of Spain.
- The Parliament enacts legislation ("**Laws**" or "**Acts**").
- Royal Decree Laws ("**RDL**") are adopted by the government in emergency situations and require subsequent legislative approval within 30 days.
- Royal Decrees ("**RD**") are promulgated by the Council of Ministers to complement or develop legislation, and ministries issue ministerial orders ("**MO**") and resolutions.

3.1.2 The Evolution of Spain's Regulatory Framework Regarding Renewable Energies

170. Spain is a large country with a highly developed economy which has experienced substantial growth over the past half-century. Spain's population has grown as well as its gross national income. The rapid growth of Spain's economy has been accompanied and fueled by substantial growth in Spain's consumption of energy.

171. In Spain, the national government holds exclusive competence to develop the energy regime in the country and to authorize energy supply in the various Autonomous Communities in Spain. Within the government, the regulation of energy matters is entrusted to the Ministry for Ecological Transition.

172. Beyond the government, the National Energy Commission ("**CNE**") — now called the National Markets and Competition Commission ("**CNMC**") — also plays a substantial role in this sector as a public agency with a policy-advisory role.¹⁹

173. In addition, each Autonomous Community can authorize power generation facilities under 50 MW within its territory.

174. Further, the Renewable Energies' Producer Association ("**APPA**") has played an important role in the drafting of legislations in the renewable energies sector.

¹⁹ The CNE was created by Law 34/1998, of 7 October 1998, on the Hydrocarbons Sector, in its Additional Provision Eleven (**R-19**). Its purpose was to promote "the competitive operation of the energy sector to guarantee the effective availability and delivery of quality and competitive services concerning the supply of electricity and hydrocarbons (liquid and gaseous) to the benefit of the market as a whole and consumers and users." (Additional Provision Eleven, Sixth, 1(a)). The CNE was integrated in the National Commission of Markets and Competition by Act 3/2013 of 4 June 2013, on the creation of the National Markets and Competition Commission (**R-22**).

175. The energy policy of Spain is set through a variety of instruments among those listed above.
176. Spain's national energy policy has increasingly focused on the development of domestic renewable energy sources to replace fossil fuels, particularly in the generation of electricity, taking into account two broad and evolving policy goals: energy security and environmental protection.
177. At the international level, during the 1990s, several international developments accelerated the efforts to address the threats posed by climate change. This resulted in Spain undertaking binding obligations, which pushed the country to move away from the traditional energy sources such as coal or petroleum to renewable sources of energy.
178. In particular, the Kyoto Protocol, signed on 28 April 1998, mandated signatories – among them Spain and the EU – to meet specific limitations on greenhouse gas emissions. Under the Kyoto protocol, which was the instrument adopted at the third conference organized under the U.N. Framework Convention for Climate Change, the EU committed to a reduction of greenhouse gas emissions of 8% until 2012.²⁰
179. Following the Kyoto Protocol, the Environmental Ministers of the Member States met in Luxembourg to allocate the burden of complying with the targets agreed upon (the “2106th Council Meeting”). The countries with the highest carbon dioxide emission levels agreed to reduce their emissions, while countries with below the EU average committed to cap future emissions increases. As a result, Spain's emissions increase was capped at 15% above its 1990 output.
180. To comply with the Kyoto Protocol and achieve the targets, the European Parliament and Council adopted in 2001 the Directive 2001/77/EC on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market (the “**Directive 2001/77/EC**” or the “**2001 Renewables Directive**”). The Directive stated that by 2010 Spain was required to obtain 29.4% of its electricity production from renewable energy sources. Additionally, the Directive 2001/77/EC required that Member States publish biennial reports outlining the steps taken to achieve the renewable-energy targets imposed on them.
181. In economic terms, it is not disputed that, given a series of characteristics associated with the available technology, renewable-energy sources were, at the relevant times, less competitive than hydrocarbon sources, especially in the absence of government intervention and support:
- First, it is a fact that the costs incurred when installing a facility in this sector are higher than those of other energy sources. While maintenance and

²⁰ C-62, Kyoto Protocol of the United Nations Framework Convention on Climate Change adopted, 11 December 1997, entered into force 16 February 2005.

operational costs remain low, the initial capital cost represents a substantial investment.

- Further, renewable energies are less reliable, and a higher per-unit cost is associated with them since they only produce power intermittently.
- Price volatility is aggravated by the intermittency of the sources (sun, rain, or wind).

182. Governments have recourse to different policy mechanisms to address these difficulties. One such mechanism is the feed-in tariff (“**FITs**”). FITs allocate risks between investors and the government by providing investors with a performance-based amount per MWh of electricity generated. Governments also rely on other policy tools, such as green certificates, tax breaks, or capital grants. Nevertheless, according to the European Commission and Spanish agency CNE, feed-in tariffs provide the most efficient manner to incentivize foreign investment in the domain of renewable energies.

3.1.3 Law 54/1997

183. In 1996, the European Commission issued Directive 96/92/EC (the “**Directive 96/92**”) with the aim of liberalizing the energy market to drive prices down and to increase energy efficiency. In response, Spain enacted Law 54/1997 to implement the aforementioned directive.²¹

184. Law 54/1997 partially opened up the electricity sector to competition and put an end to the previous State-controlled system.

185. Law 54/97 established the overall legal framework for the electricity sector in Spain, including its governing principles.

186. As stated in its preamble,

“[T]his Law achieves compatibility between an energy policy based on the progressive liberalization of the market and the attainment of other goals that are also inherent in that policy, such as the improvement of energy efficiency, consumption reduction, and environmental protection. The special regime for electricity generation, the demand management programs, and, especially, the promotion of renewable energies improve its insertion into our legal system.”²²

187. In order to encourage the production of energy from renewable sources, Law 54/1997 distinguished between an “Ordinary Regime” applicable to conventional sources of energy production (such as coal-fired power plants) and a “Special Regime”

²¹ C-33.1, Law 54/1997, 27 November 1997 (“**Law 54/1997**”).

²² *Id.*, Preamble.

applicable to electricity production facilities of less than 50MW which generated electricity from non-consumable (renewable) energy sources.

188. Law 54/1997 provided a broad overview with general guidelines, leaving it to the government to decide how the premium system would be structured or implemented, as explained in Article 16(7) of the Law:

“7. The remuneration for surplus energy defined in Section 30.2, transferred by special regime producers, shall be the same as the remuneration for electricity production, in accordance with subsection 1, plus, as the case may be, a premium to be determined by the Government, upon a consultation with the Autonomous Communities, under Section 30.4” (emphasis added).

189. In particular, under the Special Regime, remuneration was supplemented by a premium, the determination of which was left to the Spanish government in accordance with the following factors set out in Article 30(4) of Law 54/1997:

“To determine the premiums, voltage levels delivered to the grid shall be considered, as well as the actual contribution to environmental improvement, primary energy savings and energy efficiency, and the investment costs incurred [.] to obtain reasonable rates of return with regard to the cost of money in the capital markets.”²³

“Para la determinación de las primas se tendrá en cuenta el nivel de tensión de entrega de la energía a la red, la contribución efectiva a la mejora del medio ambiente, al ahorro de energía primaria y a la eficiencia energética, y los costes de inversión en que se haya incurrido, al efecto de conseguir unas tasas de rentabilidad razonables con referencia al coste del dinero en el mercado de capitales.”

190. The Parties disagree as to the meaning and legal consequences of the term “reasonable rate of return” in Law 54/1997 and as generally used in other regulations and policy statements as well as by Spanish courts. This issue is addressed by the Tribunal at a later stage in this Award.

191. In addition, Article 31 required all eligible electricity installations to be registered into the Administrative Register of Electricity Generation Installations (or **RAIPRE** in Spanish) in order to qualify for the Special Regime:

“Special regime electric power generation facilities shall be duly registered with the Administrative Registry for Special Regime Generation Facilities referred to under Section 21(4) hereof. Registration shall specify, in each particular case, the remuneration regime to which each is subject.”

²³ *Id.*, Article 30(4) (emphasis added).

192. Finally, it is also worth noting that the Sixteenth Transitory Provision of Law 54/1997 required the drawing up of a plan to promote renewable energies:

“In order for renewable sources of energy to cover at least 12% of Spain's total energy demand by 2010, a Renewable Sources of Energy Promotion Plan shall be established, whose purposes shall be taken into account when setting the premiums.”²⁴

3.1.4 Royal Decree 2818/1998

193. On 23 December 1998, the Spanish government enacted Royal Decree 2818/1998 in order to implement the parameters of Law 54/1997 applicable to the Special Regime.²⁵

194. In conformity with Article 28(3) of RD 2818/1998, qualified solar, wind, geothermal, tidal, hydro, and biomass electricity producers could choose (i) to sell the whole electricity production to distributors in exchange for a feed-in tariff for each kWh produced or (ii) to sell their electricity on the wholesale market and receive a premium on top of the market price. That same article also contains the tariff and premium rates applicable depending on the technology.²⁶ Furthermore, Article 9 established the Administrative Registry for Production Facilities under the Special Regime (*“Registro Administrativo de Instalaciones de Producción en Régimen Especial”* or **“RAIPRE”**).²⁷

195. Article 23 provided for a *“premium or incentive”* in addition to the market price, for facilities with power equal to or less than 50 MW that were registered in the RAIPRE.²⁸

196. Article 28(2) allowed the Spanish government to adjust the premium rates annually in light of the market price for electricity:

*“The premiums for [PV plants] shall be adjusted annually by the Ministry of Industry and Energy in line with the variation in the average electricity sale price and shall be applied to the total of the market price and the premium. To work this out, the Ministry of Industry and Energy must likewise estimate the annual average market price”.*²⁹

197. In addition, Article 32 established that the premiums would be revised every four years:

²⁴ *Id.*, Sixteenth Transitory Provision.

²⁵ **C-74**, Royal Decree 2818/1998 of 23 December 1998, on electricity generation by facilities supplied with renewable energy sources, waste, and cogeneration, 30 December 1998 (**“RD 2818/1998”**).

²⁶ **C-74**, RD 2818/1998, Article 28(3).

²⁷ *Id.*, Article 9.

²⁸ *Id.*, Article 23.

²⁹ *Id.*, Article 28.

*“Every four years, the premiums set in this chapter of this Royal Decree and the values stipulated for the facilities covered by Royal Decree 2366/1994 shall be revised, without prejudice to the stipulations of the eighth transitory provisions of the 1997 Electricity Act, by taking into account the evolution of the price of electric power on the market, the participation of these facilities in coverage of demand and their impact on the technical management of the system”.*³⁰

3.1.5 Royal Decree 436/2004

198. On 27 September 2001, and as mentioned *supra*, the European Parliament and Council enacted Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market. This Directive notably set a target for Spain to satisfy 29.4% of the demand for electricity from renewable energy by 2010.³¹
199. In light of the EU targets and of the criticisms addressed to RD 2018/1998 on the grounds of lack of legal certainty and insufficient attractiveness,³² Spain sought to improve the legal regime applicable to renewable energy producers.
200. In March 2004, following the recommendations of the Energy National Commission (the “**CNE**”),³³ Spain replaced RD 2818/1998 with a new regulatory framework, Royal Decree 436/2004 (“**RD 436/2004**”).³⁴
201. As did the previous regime, RD 436/2004 allowed the owners of the facilities eligible to participate in the Special Regime to choose between (i) transferring the electricity to the electricity distribution company and receiving a unique, regulated fixed tariff, or (ii) selling the electricity on the market through the bidding system managed by the market operator, complemented by an incentive and, if applicable, a premium.³⁵
202. RD 436/2004 allowed producers to make an annual election to switch between the fixed tariff and the market-plus-premium option. RD 436/2004 also revised the rate scale for tariffs, premiums, and incentives.³⁶

³⁰ *Id.*, Article 32.

³¹ **C-64/ RL-16**, Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market published in the Official Journal of the EU OJ L 283, 27 September 2001 (“**Directive 2001/77/EC**”).

³² See notably the criticisms raised by **C-77**, the Renewable Energies Producers Association (APPA), Report, *Introduction to Remuneration Schemes of Renewable Energy in the EU. The Vision of Producers* February 2003 (“**APPA 2003 Report**”): “The compensatory incentives to be received throughout the life of the investment should be explicitly secured following the approach taken in other countries with feed-in tariff systems, which guarantee a certain price or prices during a certain period of time commencing when the facilities are put into use.... It is thus necessary to give greater certainty and predictability to the returns on these investments.”

³³ **C-81**, 2003 CNE Report: *Proposed methodology for the revision of premiums and prices under the special regime, 1 April 2003* (“**2003 CNE Report**”).

³⁴ **C-84**, Royal Decree 436/2004, establishing the methodology for updating and systematizing the legal and economic regulation of the production of energy under the special scheme, 12 March 2004 (“**RD 436/2004**”).

³⁵ **C-84**, RD 436/2004, Article 22 (1); **R-45**.

³⁶ **C-84**, RD 436/2004, Section 3.

203. One of the key provisions of RD 436/2004 – which has been frequently referred to by the Parties in this arbitration – is Article 40(3), which dealt with the revision of tariffs, premiums, incentives and supplements for new plants:

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

204. Under RD 436/2004, the specific incentive amounts were calculated as a percentage of the AET, an index that the government published annually based on a set of factors affecting the cost of the electricity system.
205. Nevertheless, because the cost of electricity generation was a primary input into the AET formula, that formula created the potential for a “feedback loop”, which means that, all else being equal, the AET would increase as a result of the addition of more costly renewable capacity to the system, which in turn would increase the AET, and so on. Unless corrected, that defect had the potential for renewable incentives to increase arbitrarily for reasons that were both unanticipated and unrelated to any increase in costs.

3.1.6 The 2005 PER

206. On 26 August 2005, after the enactment of RD 436/2004, the Council of Ministers approved a new Plan for Renewable Energies for the period 2005-2010 (the “**2005 PER**”).³⁷
207. The 2005 PER had two objectives: (i) to maintain the commitments to cover 12% of overall energy consumption through renewable sources by 2010 in compliance with the targets set out in Directive 2001/77/EC, and (ii) to include the target regarding 29.4% of the generation of electricity through renewable sources also required by the Directive. The 2005 PER established new installed capacity targets for the various types of technology.
208. In order to determine the cost of reaching the energy targets set out in the Plan, the 2005 PER set out the following principles:

“To successfully achieve the objectives established herein, a detailed assessment of the investment has been conducted, which is envisaged to be provided during the period, on the nature of this investment and state aid required to achieve the objectives. The methodology and criteria for the economic and financial analyses remained the same as those that were implemented during the Development Plan in 1999. The analysis, based on the specificities of each technology (level of maturity, costs,

³⁷ **C-26**, Ministry of Industry, Tourism and Trade – IDAE, Plan for Renewable Energy in Spain 2005-2010, PER 2005; **C-70**, Summary of Renewable Energy Plan 2005-2010 (“**2005 PER**”); **R-62**, Spain Renewable Energy Plan 2005-2010.

contribution to the overall objective)– is held in the balance of all factors, so as to achieve private and public profitability, mobilising resources required to carry out the envisaged investments.

*Since the significant growth of renewable sources is a component of an economic, social and environmental strategy, and since the costs of conventional energies do not currently reflect the negative impacts that are caused, public support for renewable energy is a key factor to help balance market competition for various energy sources”.*³⁸

209. The 2005 PER also defined how the financing needs for each technology should be determined:

“Taking the proposed energy objectives as a starting point, financing requirements were determined for each technology on the basis of their financial performance, defining several standard projects for the calculation of model.

*These standard projects have been characterized by technical parameters relative to their size, equivalent operating hours, unit costs, implementation periods, service life, operation costs and maintenance and sales costs for the final energy unit. Likewise, some assumptions for funding have been applied, as well as a series of measures and financial aid, designed according to the requirements of each technology”.*³⁹

210. The 2005 PER further observed that “the overall estimated volume of investment needed to achieve the energy targets in the period considered totals 23,599 million euros. This will require equity finance of 4,720 million euros, with the rest being provided by the market (18,198 million euros) and public investment aid (681 million euros)”.⁴⁰

211. The 2005 PER therefore emphasized the need to make renewable-energy technologies attractive to investors:

*“As the table above shows, the bulk of finance for the Plan is expected to come from the financial markets. **Debt finance** for the investments envisaged over the period 2005-2010 **is estimated at 18,198 million euros or 77.1% of the total investment.** It is therefore essential to place the various technologies in a position where they are sufficiently profitable to be attractive to investors and to facilitate access to bank loans. It is in this context, for the reasons already cited, that public aid is required as it*

³⁸ R-62, Spain Renewable Energy Plan 2005-2010, p. 272.

³⁹ R-62, Spain Renewable Energy Plan 2005-2010, p. 280.

⁴⁰ C-70, Summary of Renewable Energy Plan 2005-2010 (“2005 PER Summary”), p. 57.

*represents an essential factor in stimulating the growth of the various renewable energy sectors”.*⁴¹

212. With respect to the photovoltaic sector in particular, the 2005 PER observed a substantial growth potential, noting in particular:

*“Generating electricity directly using the photovoltaic effect currently offers unquestionable advantages in energy, manufacturing, environmental, and social terms, etc. These include the fact that the **implementation of solar photovoltaic power on as wide a scale as possible will contribute to the future development of the technology.** This will make this means of electricity generation ever more competitive with other forms of power generation”.*⁴²

3.1.7 RDL 7/2006

213. On 23 June 2006, Spain introduced Royal Decree Law (“**RDL 7/2006**”) on the adoption of urgent measures for the energy sector. The main purpose of this Royal Decree Law was to correct the “feedback loop” created by the AET formula set out in RD 436/2004 and to cut back the resulting windfall profits which accrued to certain RE investors enrolled under this regime.⁴³
214. The Preamble of RDL 7/2006 highlighted the inefficiency of the then current remuneration system. Therefore, Transitional Provision Two thereof froze the Special Regime subsidies until a new remuneration scheme could be developed based on the amendments that RDL 7/2006 made to Law 54/1997. The new remuneration scheme referred to in RDL 7/2006 was adopted by Royal Decree 661/2007 (which is discussed *infra*).
215. The changes introduced by RDL 7/2006 included delinking the premiums from the AET.

3.1.8 Royal Decree 661/2007

216. On 14 February 2007, the National Energy Commission issued a report addressing a proposed Royal Decree for the regulation of the generation of electricity under the special regime and of specific facilities using comparable technologies under the ordinary regime. (the “**CNE Report 3/2007**”).⁴⁴
217. It set out the criteria that, in the opinion of the CNE, should apply to the special regime: (a) reaching the planning targets; (b) minimizing regulatory uncertainty; (c)

⁴¹ C-70, 2005 PER Summary, p. 59.

⁴² C-70, 2005 PER Summary, p. 28.

⁴³ C-91 / R-33, Royal Decree-Act 7/2006 establishing urgent measures in the energy sector, 23 June 2006 (“**RD-Law 7/2006**”).

⁴⁴ C-69, National Commission of Energy (“**CNE**”), Report 3/2007, 14 February 2007 (“**CNE Report 3/2007**”).

facilitating operation of the system; and (d) incentivizing voluntary integration in the market.⁴⁵

218. With respect to minimizing regulatory uncertainty, the CNE Report 3/2007 stated:

*“[T]he CNE’s view that the transparency and predictability of economic incentives in the future reduce regulatory uncertainty, which operates as an incentive for investments in new capacity and minimizes the projects’ funding costs, thus bringing down the end costs for consumers. Regulations should offer sufficient guarantees to ensure that the economic incentives are stable and predictable throughout the entire life of the facilities, establishing, where applicable, transparent mechanisms for annual adjustments, tied to changes in strong indexes (such as the average or reference rates, the CPI, and ten-year bonds), and periodic reviews, for instance, every four years, affecting new facilities only, as regards the investment costs, with the possibility of affecting a reduction in the operating costs of existing facilities as well”.*⁴⁶

219. On 25 May 2007, RD 436/2004 was repealed and replaced by RD 661/2007 (“**RD 661/2007**”), a regulation which is at the core of the Parties’ dispute in the present arbitration.⁴⁷

220. Without reproducing the text of this piece of legislation *in extenso*, the Tribunal will simply recall some of its key provisions that are particularly relevant for the purposes of this dispute.

221. As an introduction to RD 661/2207, it is useful to refer, in part, to the Explanatory Statement of RD 661/2007, which sets out the main features of the Special Regime provided for in this Royal Decree:

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

To this effect, a system which is analogous to that provided in Royal Decree 436/2004, of 12 March, is maintained, in which the owner of the

⁴⁵ C-69, CNE Report 3/2007, p. 18 *et seq.*

⁴⁶ C-69, CNE Report 3/2007, p. 19.

⁴⁷ C-106, Royal Decree 661/2007, 25 May 2007 (“**RD 661/2007**”).

facility may opt to sell their energy at a regulated tariff, which will be the same for all scheduling periods, or alternatively to sell this energy directly on the daily market, the term market, or through a bilateral contract, in this case receiving the price negotiated in the market plus a premium.⁴⁸

222. As to the scope of the application of RD 661/2007, Article 2.1.b) expressly includes “facilities which use solar radiation alone as their primary energy by means of photovoltaic technology” (identified as “Sub-Group b.1.1”) among the facilities that may avail themselves of the special regime established under RD 661/2007.⁴⁹

223. Article 17 defines the rights of the producers under the special regime, including, under sub-section c), the right to a regulated tariff or a premium:

“Without prejudice to the provisions of Article 30.2 of Law 54/1997, of 27 November, the proprietors of production facilities under the special regime shall enjoy the following rights:

a) To connect their generating unit or units in parallel to the grid of the distribution or transport company.

b) [To] Transfer to the system their net production of electrical energy or energy sold, by way of the distribution or transport company upon condition that it is technically possible for it to be absorbed by the grid.

c) [To] Receive, for the total or partial sale of their net electrical energy generated under any of the options appearing in Article 24.1, the compensation provided in the economic regime set out by this Royal Decree. The right to receive the regulated tariff, or if appropriate the premium, shall be subject to final registration of the facility in the Register of production facilities under the special regime of the General Directorate of Energy Policy and Mines, prior to the final date set out in Article 22.

d) To sell all or part of their net production by way of direct lines.

e) To enjoy priority in access and connection to the electricity grid under the terms and conditions set out in Annex XI of this Royal Decree, or in such regulations as may supersede them.”

224. Article 24 further defines the remuneration mechanisms for electricity producers enrolled under the Special Regime and recalls, in paragraph one, the choice offered to them between compensation through a regulated tariff or through a market price, supplemented by a premium:

⁴⁸ C-106 / R-46, RD 661/2007 (emphasis added).

⁴⁹ C-106, RD 661/2007, Article 2.1(b).

“1. In order to sell their net production of electrical energy in full or in part, the proprietors of facilities to which this Royal Decree is applicable should elect one of the following options:

- a) Sell the electricity to the system through the transport or distribution grid, receiving for it a regulated tariff, which shall be the same for all scheduling periods expressed in Euro cents per kilowatt/hour.
- b) Sell the electricity in the electrical energy production market. In this case the sale price of the electricity shall be the price obtained in the organised market or the price freely negotiated by the proprietor or the representative of the facility, supplemented where appropriate by a premium, in Eurocents per kilowatt/hour”.

225. The notion of “regulated tariff” is defined in Article 25 as follows:

“The regulated tariff Indicated in Article 24.1.a) comprises a fixed sum which shall be the same for all scheduling periods and shall be determined as a function of the Category, Group, of Sub-Group to which the facility belongs, and the installed power, and where applicable the length of time since the date of commissioning under Article 35 to 42 of the present Royal Decree”.

226. With respect to solar plants, the applicable regulated tariff for facilities listed in Category b), i.e. including PV plants, is defined in Article 36, Table 3, the relevant part of which reads as follows:

Group	Sub group	Power	Duration		Regulated tariff c€/kWh	Premium of Reference c€/kWh	Upper limit c€/kWh	Lower limit c€/kWh
			First [-] years	As from then				
Grupo	Subgrupo	Potencia	Plazo		Tarifa regulada c€/kWh	Prima de referencia c€/kWh	Limite Superior c€/kWh	Limite Inferior c€/kWh
b.1	b.1.1	P≤100 kW	primeros 25 años		44,0381			
			a partir de entonces		35,2305			
		100 kW<P≤10 MW	primeros 25 años		41,7500			
			a partir de entonces		33,4000			
	10<P≤50 MW	primeros 25 años		22,9764				
		a partir de entonces		18,3811				
b.1.2			primeros 25 años		26,9375	25,4000	34,3976	25,4038
			a partir de entonces		21,5498	20,3200		

227. According to Article 36, PV plants belonging to the category b.1.1 with a power comprised between 100 kW and 10 MW were therefore entitled to a regulated tariff (i) of € 41,7500 cents per kWh for the first 25 years of operation as from their date of commissioning and (ii) of € 33,4000 cents per kWh thereafter.

228. In addition, it is worth noting that Article 37 set a specific target reference installed power for solar energy:

“Without prejudice to the provisions of Article 36 above for facilities of Group b.1 and to the provisions of Article 44, to the effects of the provisions of Article 17.c) and 22, the target reference installed power for Sub-Group b.1.1 is set at 371 MW and for Sub-Group b.1.2 it is set at 500 MW.”

229. Finally, Article 44(3), a key provision in the present dispute, addresses the revision of tariffs, premiums and supplements and has given rise to much debate among the Parties in the course of this arbitration.

230. Article 44(3) provides as follows:

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

*The revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed”.*⁵⁰

231. In substance, the Parties disagree as to whether Article 44(3) RD 661/2007 included a commitment not to carry out a future revision of the tariff established for facilities that had been registered with the RAIPRE at the time, an issue which the Tribunal will address at a later stage.

3.1.9 Royal Decree 1578/2008

232. The market’s response to RD 661/2007 was robust regarding PV projects. Indeed, by September 2007, Spain had reached 85% of the capacity target for new photovoltaic facilities.

⁵⁰ C-106, RD 661/2007, Article 44.3.

233. In accordance with Article 22 of RD 661/2007, Spain set a final 12-month deadline for allowing facilities to benefit from the Special Regime offered by RD 661/2007, with a cut-off date of 30 September 2008.⁵¹
234. In order to attract further renewable energy investors, Spain worked on a new piece of legislation designed to maintain the existence of a Special Regime, while taking account of the rapid technological advances of this sector.
235. On 29 July 2008, the CNE issued a report on the draft measure, notably focusing on the need to ensure stability and predictability of the economic incentives which, according to CNE, “*reduce regulatory uncertainty and encourages investments in new capacity, while minimising the cost of financing, lowering the final price paid by consumers*”.⁵²
236. On 26 September 2008, a few days before the cut-off date for enrolling under RD 661/2007, Spain enacted RD 1578/2008 which purported to extend RD 661/2007, albeit with several modifications.⁵³
237. In substance, in light of the decrease in production costs of PV technology, RD 1578/2008 reduced the remuneration for the facilities enrolled under its regime, although it sought to maintain attractive tariffs for them. RD 1578/2008 did not affect the remuneration of the facilities registered under RD 661/2007.
238. The rationale behind RD 1578/2008 is encapsulated in its Preamble, which notably reads:

“Also, the framework intended to support [Photovoltaic] technology, provided in Royal Decree 661/2007, of May 25, governing the activity of electricity production under the special regime, which has proved successful/effective, shall adapt rapidly enough to technological change to ensure its effectiveness. While insufficient remuneration would render investments non-viable, excessive compensation may impact significantly the costs of electrical system, and discourage research and development, thus reducing the excellent prospects in the medium- and long-term for this technology. Therefore, the rationalization of retribution is deemed necessary and, consequently, the royal decree issued hereby adjusts downwards the financial regime, in line with the forecasted evolution of this technology, from a long-term perspective. [...]

In order to guarantee a minimum market [level] for the photovoltaic sector’s development, and at the same time, [to guarantee] the continuity of the support scheme, [the royal decree establishes] a mechanism for allocation of remuneration through registration in an registry of allocation of remuneration, at an early stage of the project development, in order to

⁵¹ C-106, RD 661/2007, Article 22.1.

⁵² C-163, National Energy Commission (CNE) Report 30/2008, 29 July 2008 (“CNE Report 30/2008”), p. 9.

⁵³ C-159 / R-47, Royal Decree 1578/2008, 26 September 2008 (“RD 1578/2008”).

provide the necessary legal certainty for promoters in relation to the remuneration to be obtained by the facility, once it [will be] commissioned".⁵⁴

239. Pursuant to Article 2, RD 1578/2008 was to apply to photovoltaic power facilities registered in the RAIPRE after 29 September 2008.
240. One of the main changes introduced by RD 1578/2008 was that it established annual quotas of power capacity that would be eligible for the feed-in tariff, which gave Spain more control over the number of facilities that would benefit from the new regime.
241. As a result, in order to benefit from the tariffs of RD 1578/2008, Article 4 required PV plants to register in a Pre-Allocation Registry under the control of the national government:

"1. For the proper monitoring of the production of photovoltaic installations projects in the special regime, a subsection is set forth in the second section of the Administrative Registry of Electricity Power Generation Facilities mentioned in Article 21.4 of Law 54/1997, of November 27, on the Electricity Sector, under the authority of the Ministry of Industry, Tourism and Trade. This subsection shall be referred to as "Pre-allocation Registry" hereinafter.

2. In order to be entitled to the compensation provided in this Royal Decree, prior registration of facility projects or of facilities in the Pre-allocation Registry of Remuneration shall be mandatory.

3. Registrations in the Compensation Pre-allocation Registry are associated to temporary time-periods referred to hereinafter as "Calls", granting the remuneration fixed for such temporary periods of time".⁵⁵

242. Calls to allocate the yearly capacity were made on a quarterly basis every year (starting in 2009) in the order of registration in the pre-allocation registry.⁵⁶ Applications were considered chronologically, according to the latest date of the required documents (called the "reference date").⁵⁷ In each quarterly round, the government awarded allocations to projects with the earliest reference date, continuing until the quarterly capacity cap was met. Once an eligible plant secured a place in the pre-allocation registry, the investor had one year to complete the plant and secure its final RAIPRE registration before receiving the feed-in tariff set out in RD 1578/2008.

⁵⁴ C-159, RD 1578/2008.

⁵⁵ C-159, RD 1578/2008.

⁵⁶ C-159, RD 1578/2008, Article 5.

⁵⁷ C-159, RD 1578/2008, Articles 6(3) and 6(4).

243. Those tariffs were lower than those provided for under RD 661/2007 and were granted for a “*maximum duration of twenty-five years*” as set out in Article 11 of RD 1578/2008, which is partly reproduced below:

“1. The rates of regulated tariffs for the sub-group b.1.1 facilities of Article 2 of Royal Decree 661/2007, of May 25, 2007, that are registered in the Pre-Allocation Registry, associated with the first notice, are fixed as follows:

Type		Regulated Tariff (c€/kWh)
Type I	Subtype I.1	34.00
	Subtype I.2	32.00
Type II		32.00

[...]

5. The applicable regulated tariff to a facility, in accordance with this royal decree, shall be maintained for a maximum duration of twenty-five years, as from the latest of the two following dates: the date of commissioning, or the date of the registration of the facility in the Compensation Pre-Allocation Registry, Such [sic] compensation shall never be applicable prior to the date of such registration”.

244. In addition, the Fifth Additional Provision to RD 1578/2008 provided that:

“In the course of 2012, in the light of technological developments in the sector and in the market, and of performance of the remunerative framework, the compensation for electricity power generation with solar photovoltaic technology, may be amended”.

245. In an official press release of the same day, the Spanish executive further clarified the main features of RD 1578/2008:

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

*The remuneration period for each facility is 25 years and the annual updating of the remuneration [is] in line with the IPC-0.25 or 0.50, in both cases the same as in the previous Royal Decree”.*⁵⁸

3.1.10 Royal Decree-Law 6/2009

246. On 7 May 2009, in the context of the world financial crisis, Spain published Royal Decree-Law 6/2009 (“**RDL 6/2009**”) with a view to addressing the issue of the tariff deficit that had significantly increased in Spain as a result of a sharp drop in electricity demand, as explained in its Preamble:

*“[...] The growing tariff deficit, i.e. the difference between that collected from the regulated tariffs set by the government and that which the consumers pay for their regulated supply and from the access tariffs set by the liberalised market, and the real costs associated with these tariffs, is producing serious problems, which in the current context of international financial crisis is profoundly affecting the system. This puts at risk not only the financial situation of companies in the electricity sector, but also the sustainability of that system. This maladjustment is unsustainable and has serious consequences, by deteriorating the security and capacity of the financing of investment needed for the supply of electricity at the levels of quality and security that Spanish society demands [...]”.*⁵⁹

247. As a result, RDL 6/2009 required the elimination of the tariff deficit by 2013, established the Electricity System Deficit Securitisation Fund (“FADE”) bond system to finance the existing tariff deficit,⁶⁰ and introduced a pre-allocation registry for new renewable energy projects.⁶¹
248. In particular, in order to remedy the tariff deficit, Spain provided for an annual adjustment of the access fees charged to consumers.⁶²

3.1.11 The Case Law of the Spanish Supreme Court

249. In parallel to the evolution of the regulatory framework, the Spanish Supreme Court issued various decisions in relation to the renewable energy sector, the relevance

⁵⁸ **C-160**, Ministry Industry, Tourism and Trade, Press Release: *The Government approves the new economic regime for solar photovoltaic technology installations*, 26 September 2008 (“**Press Release on RD 1578/2008**”); see also **C-368**, *Memoria Justificativa* of RD 1578/2008 Section 5 (Translation): “5. Economic regime - 5.1 Tariffs [...] During the year 2012, a revision and, if applicable, upward modification of the percentage of reduction [of the tariff] will be carried out if, in light of the technological developments in the sector, it is clear that there has been a reduction in the cost of this technology that is greater than the expected maximum decrease curve, in which case the power target will be increased for the following call [in the pre-allocation registry], in the same percentage by which the regulated tariff is reduced.

The tariff applicable to a facility will be maintained for a maximum period of 25 years from its commissioning, as with the facilities that receive the remuneration envisaged in Royal Decree 661/2007”.

⁵⁹ **R-34**, Royal Decree-Law 6/2009, 30 April 2006 (“**RDL 6/2009**”), Preamble.

⁶⁰ **R-34**, RDL 6/2009, Preamble, para. 5 and Article 1.

⁶¹ **R-34**, RDL 6/2009, Preamble, paras. 8 and 9; Article 4 and Fourth Additional Provision.

⁶² **R-34**, RDL 6/2009, Article 1.

and scope of which are also in dispute between the Parties. Without purporting to be exhaustive, the Tribunal reproduces some extracts of the most relevant ones hereafter.

3.1.11.1 The Supreme Court Judgment of 15 December 2005

250. On 15 December 2005, the Supreme Court dismissed a challenge against the validity of RD 431/2004 filed by electricity producers enrolled under the special regimes of RD 2366/1994 and RD 2818/1998 alleging several procedural and substantial grounds for nullity.⁶³

251. As part of its reasoning, the Supreme Court notably affirmed that:

*“There is no legal obstacle to the Government, in the exercise of its regulatory powers and the broad authority it has in such a heavily regulated field as that of electricity, modifying a specific remuneration system providing it remains within the framework laid down by the LSE. And although it may be necessary to establish transitory measures for adaption to the new system for already existing companies in virtue of the principle of legitimate expectation, in no way does said requirement go to the extreme of respecting the previous regime without the slightest change over a fairly prolonged period of time”.*⁶⁴

3.1.11.2 The Supreme Court Judgment of 25 October 2006

252. On 25 October 2006, the Supreme Court dismissed a challenge against Articles 6 and 8 of RD 2351/2004, which amended the system for calculating premiums set out in RD 436/2004. This action was brought by electricity producers registered under RD 2818/1998 on the ground that these provisions allegedly breached the principles of legal certainty, legitimate expectations, and good faith set out in Article 9.3 of the Spanish Constitution.

253. The Supreme Court dismissed the appeal, holding *inter alia* that the remuneration offered to special regime electricity producers was not guaranteed to remain unchanged:

“As declared by the State Attorney, the owners of electric power production facilities under the special regime have no “unmodifiable right” to the fact that the financial scheme that regulates the receipt of premiums will remain unaltered. Indeed, said scheme attempts to promote the use of renewable energies through an incentivising mechanism that, like all mechanisms of this kind, has no assurance that it will remain without being modified in the future.

⁶³ R-79 / C-372, Judgment from the Third Chamber of the Supreme Court (App. 73/2004).

⁶⁴ *Id.*

It is true that in the case that concerns us, the setting of the premiums is subject to certain regulatory guidelines, as we have set out, but it is also true that the Council of Ministers can, duly respecting these, introduce quantitative variations in the formulas through which the premiums are regularly updated or in the calculation of these premiums. If the modification has not deviated from these legal guidelines and, we repeat, there has been no claim of infringement of article 30 of the Electricity Sector Act, it would be difficult to consider this as contrary to law.

The value of “legal certainty” cannot be addressed at a regulatory modification as an argument that allegedly invalidates this. It is true that the rules must provide a certain stability to the regulatory frameworks of economic activities (in fact, the introduction of Royal Decree 436/2004, amended by the one that is now challenged, stated that “(...) the security and stability offered by this new methodology to calculate the special regime remuneration should help it to foster investment in this kind of plants”), but it is also true that legal certainty is not incompatible with regulatory changes from the perspective of the validity of these changes, the sole factor on which we must decide on in law.

The same consideration is applicable to the principle of legitimate expectation, increasingly and unduly given as an argument of the several regulatory changes that some economic agents claim are more or less detrimental to their interests. The appellants claim that their investments in the activity of electric power production under the special regime were made at a certain point in time, thereby “trusting that the Administration would not change the legal conditions that were determinant so that (...) they would decide to build the facilities”, which is the premise from which they deduce that the reduction of the premiums after Royal Decree 2351/2004 with respect to those established in Royal Decree 435/2004 would be contrary to said principle.

Such reasoning, referring to an incentivising mechanism such as that of the premiums in question, cannot be shared. For so long as it is not replaced by any other, the aforementioned legal regulation (article 30 of the Electricity Sector Act) permits the companies involved to aspire to a relevant factor of the premiums being that of the incorporation of “reasonable rates of return with regard to the cost of money in capital markets” or, in the words of the preamble to Royal Decree 436/2004, “a reasonable return on their investments”. The remuneration scheme that we analyse does not guarantee the intangibility of a particular level of profit or income for owners of facilities under the special scheme in

*relation to that which was obtained in previous years, or the indefinite permanence of the formulas used to set the premiums”.*⁶⁵

3.1.11.3 The Supreme Court Judgment of 20 March 2007

254. On 20 March 2007, the Spanish Supreme Court dismissed a challenge against Annex IV of RD 2392/2004 brought by the owners of thermal and electric power generation facilities covered under RD 2818/1998.
255. In substance, the petitioners asked for the annulment of Annex IV, which set the premium to be received for 2005, and argued that such premiums should instead be calculated in accordance with the provisions of Article 30(2) of RD 2818/1998, and Transitory Provision 2, section 5 of Royal Decree 436/2004, which were more favorable to them.
256. In the petitioners’ opinion, the application of RD 2392/2004 to the calculation of their premium amounted to a violation of the principles of legal certainty, legitimate expectations, and good faith, considering that significant investments had been made under a legal framework that, when changed, led to a modification of potential profitability that could result in a loss.
257. The Supreme Court largely referred to its holding in the decision of 25 October 2006 and dismissed the challenge, after notably holding that:

“[...] Based on these terms, the appeal cannot be admitted. As clearly stated by the State Attorney, the owners of electricity production facilities operating under the special regime do not enjoy an “unmodifiable right” to maintain the economic regime that regulates the collection of premiums, without alteration. This regime is intended, in effect, to promote the use of renewable energy by means of an incentive mechanism that, like others of its type, does not have a period in which it is guaranteed to remain in place.

It is true that, in the case at hand, the setting of premiums is subject to certain regulatory guidelines, as we have already explained, but it is also true that the Council of Ministers may, so long as they respect these, introduce quantitative variations in the formulae used to update the premiums periodically, or in their calculation. If the amendment has not deviated from these legal guidelines – and, we repeat, no claim has been made against the violation of Article 30 of the Electricity Sector Law – it can hardly be considered as being contrary to law.

It is not possible to simple assign the characteristic of “legal certainty” to a regulatory modification as an argument for its alleged invalidation. It is true that the rules should provide a certain stability to the regulatory

⁶⁵ **R-80**, Judgment of Chamber Three of the Supreme Court (App. 12/2005). Reference El Derecho EDJ 2006/282164, 25 October 2006; **C-373**, Spanish Supreme Court, Judgment No. 2006/282164, Appeal No. 12/2005, 20 March 2007.

frameworks for economic activities (in fact the preamble of the Royal Decree 436/2004, amended by that which is currently in dispute, affirms that "(...) this new methodology for the calculation of the compensation of the special regime, by the security and stability that it offers, should contribute to the development of the investment in this type of facility"), but it is also true that [sic] legal certainty is not, the end, incompatible with changes in rules from the perspective of the validity of the latter, which is the only factor that is relevant in making a legal decision.

The same consideration is applicable to the principle of legitimate confidence, growingly and inappropriately claimed as an argument of disqualification for not a small number of regulatory modifications that some economic agents claim are more or less damaging for their interests. The appellants argue that their investments in the production of electrical energy under the special regime were made at a certain time "trusting that the Administration would not change the legal conditions that were determining to them (...) deciding to build the facilities", and as such they deduce that the lowering of premiums following Royal Decree 2351/2004 compared to the premiums set in Royal Decree 435/2004 was, in fact, a violation of said principle.

This reasoning, referring to an incentivising mechanism such as the premiums in question, cannot be shared. As long as it is not replaced by another, the aforementioned legal regulation (article 30 of the Electricity Sector Act) allows the corresponding companies to expect that obtaining "reasonable rates of return in relation to the cost of money in the capital market", or, to once again use the phrasing of the preamble to Royal Decree 436/2004, "a reasonable return for investors" are considered in the act of setting premiums. The remuneration regime we are analysing does not, on the other hand, guarantee to owners of special regime facilities at certain level of profit or income in relation to those obtained in previous years, nor the indefinite permanence of the formulas used to set the premiums".⁶⁶

3.1.11.4 The Supreme Court Judgment of 9 October 2007

258. On 9 October 2007, the Spanish Supreme Court ruled on a challenge against the validity of RD 1454/2005 amending RD 436/2004 brought by the owner of a 417 MW cogeneration plant.⁶⁷
259. The petitioner argued that the challenged regulation made the right of cogeneration companies to receive a premium dependent on the discretion of the Government and therefore breached several provisions, including Article 15 of Law 54/1997

⁶⁶ **R-81**, Judgment from the Third Chamber of the Supreme Court (App. 11/2005). Reference El Derecho EDJ 2007/18059, 20 March 2007; **C-374**, Spanish Supreme Court, Judgment No. 2007/18059, Appeal No. 11/2005, 20 March 2007.

⁶⁷ **R-82**, Judgment from the Third Chamber of the Supreme Court (App. 13/2006). Reference El Derecho EDJ 2007/175313, 9 October 2007.

(objectivity, transparency and non-discrimination in setting the remuneration for the activities regulated by the Law) and Article 32(4) of RD 436/2004.

260. The Spanish Supreme Court dismissed the challenge, notably on the ground that Law 54/1997 excluded facilities with an installed capacity exceeding 50 MW from the Special Regime.

261. The Court further held that:

“[T]he appellant understands that there was a previous establishment of the premium by the previous rules, which obligated keeping it in what is now under scrutiny, specifically the art. 41.2 of Royal Decree 436/2004 and the Agreement of the Council of Ministers of the 25 February of 2005. However, the principle of regulatory hierarchy does not make impossible that a rule of the same rank be modified or quashed by another, though this take place in the manner of an implicit contradiction, which in any event is the relationship that arose between the Royal Decree in dispute and the previous Royal Decree 436/2004, as well as with the cited Agreement of the Council of Ministers given the rank of the organ from which they emanate, and moreover nothing impedes the titleholder of the regulatory authority to change previous dispositions of equal hierarchical levels to adapt these to the circumstances that political or economic circumstances demand at different times, A variation of this character may generate damages for titleholders of previous rights, which shall make tenable, where appropriate an indemnification, but not as a consequence of the nullity of the act or disposition, which is what is referred to in art. 71.1.d) of the Jurisdictional Act, but rather as a derivative of an asset liability of the Administration for the normal functioning of public services through the procedures provided for that end, which in no case is the present matter, as we shall see in continuation here.

FIFTH.- As stated by this Chamber in its ruling of 25 October 2006, reiterated by the ruling of 20 March 2007: “(...) the owners of electrical production facilities under the special regime do not enjoy an “immutable right” that the economic system they are subject to, which regulates the receipt of premiums, shall remain unaltered. The regime in question involves promotion the use of renewable energy by means incentivizing mechanism that, like all those of this type, is not guaranteed to be permanent without modifications in its future.

It is not possible to simply oppose the value of “legal certainty” for a regulatory modification as an argument that supposedly invalidates the aforementioned. It is true that the rules should provide a certain stability to the regulatory frameworks for economic activities (in fact the preamble of the Royal Decree 436/2004, modified by that which is currently in dispute, affirms that “(...) this new methodology for the calculation of the compensation of the special regime, by the security and stability that it

offers, should contribute to the development of the investment in this type of facility”), but it is also under juridical security, and it is not in the end incompatible with changes in rules from the perspective of the validity of the latter, which is the only factor which is relevant for making a legal decision.

The same consideration is applicable to the principle of legitimate confidence, growingly and inappropriately claimed as an argument of disqualification for not a small number of regulatory modifications that some economic agents claim are more or less damaging for their interests. The appellants claim that their investments in the activity of electrical energy production under a special regime were made in a specific moment “trusting that the Administration would not change the juridical conditions that were determinative so that (...) they decided to construct the facilities”.

The companies that freely decide to place themselves in a market such as that of electricity generation under a special regime, knowing before that it is in large part dependent on the determination of economic incentives by public authorities, are or should be conscious that these may be modified, within legal guidelines, by the said authorities. One of the “Regulatory Risks” that they submit themselves to, and which they are required to take into consideration, is precisely that of variation in the parameters of the premiums or incentives, that the Electrical Sector Act may adjust – in the meaning previously described before – but will not exclude”.

3.1.11.5 The Supreme Court Judgment of 3 December 2009

262. On 3 December 2009, the Supreme Court dismissed a challenge against Transitory Provision 1 of RD 661/2007, holding that the owners of electrical energy production facilities under the special regime do not have an immutable right that the economic system that regulates the receipt of the premiums is to remain unchanged.⁶⁸

263. The Supreme Court notably held that:

“The plea for nullification of First Transitory Provision, section 4 of Royal Decree 661/2007, of 25 May, regulating electricity production activity under a special regime, which is based on the infringement of the principles of legal certainty and legitimate expectation resulting from article 9.3 of the Constitution and article 3.1 of Act 30/1992, of 26 November, on the Legal System of the Public Administrations and the Common Administrative Procedure, due to it affecting the guarantee of non-retroactivity established by article 40.3 of Royal Decree 436/2004, of

⁶⁸ **R-83**, Judgment of the Third Chamber of the Supreme Court (Appeal 151/2007). Reference El Derecho EDJ 2009/307349, 3 December 2009.

12 March, establishing the methodology for the update and systematisation of the legal and economic system of electricity production activity under a special regime, which applies to all facilities in group b.1., irrespective of the date of its entry into force, should be rejected since the setting-in-stone or freezing of the remuneration system for owners of electrical power production facilities under the special regime cannot be understood from the prescriptive contents of Act 54/1997, of 27 November. Nor can recognition of the right of producers under the special regime to the immutability of this regime be understood, since the Government, according to the intent of the Legislator, holds a margin of assessment to determine the energy outputs offered, in line with clear targets inherent in the execution of the economic, energy and environmental policies, and taking into consideration in the exercising of its regulatory power the obvious and essential general interests involved in the correct operation of the electricity production and distribution system and, in particular, the rights of the users.

The variability or mutation of the remuneration regime for producers under the special regime is also found in article 40 of Royal Decree 436/2004, of 12 March, the first paragraph of which states that “during 2006, in light of the result of the follow-up reports on the level of compliance with the Renewable Energies Development Plan, the tariffs, premiums, incentives and supplements defined in this Royal Decree will be revised, thereby considering the costs associated with each of these technologies, the level of participation of the special regime in covering demand and its impact on the technical and economic management of the system and which stipulates that every four years, from 2006, a new review will take place. [...]

The argument that the Transitory provision being judged involves undermining of the principle of legal certainty acknowledged in article 9.3 of the Constitution because it produces, as alleged, a situation of uncertainty of the legal system regarding regulation of the activity of the electrical energy producers under the special regime, should be rejected since it cannot be deduced that this standard does not respond to the requirements of the principle of legal certainty, which does not include any right to the freezing of the existing legal system. Therefore, nor are there any grounds for challenging Transitory provision one, section 4 of the Royal Decree contested, as infringing the principle of legitimate expectation, given that the mercantile companies appealing, as companies that operate in the electricity production business, as the owners of two photovoltaic facilities located in Casarrubias del Monte (Toledo) do not have a right for the remuneration regime of the electricity sector to remain unaltered, given that, as we upheld in the judgement of this Chamber of Contentious-Administrative Matters of the Supreme Court of 15 December 2005, “there is no legal obstacle to prevent the

Government, in the exercise of regulatory powers and broad entitlements that it has in such a strongly regulated matter as electricity, from modifying a specific system of remuneration providing that this remains within the framework established through the Electricity Sector Act”.

The principle of legitimate expectation, which originates from German Administrative Law (Judgement of 14/05/1956 of the Contentious-Administrative Court of Berlin), and which is today, since the Judgements of the European Court of Justice 22/03/1961 and 13/07/1965 (Lemmerz-Werk case), a general principle of Community law, which has finally been acknowledged by our Supreme Court since 1990 and also by our legislation (Act 4/99, amending Act 30/92, Section 3.1.2). Thus, the Judgement of the Supreme Court of 10/5/99 Az 3979, recalls “the doctrine on the principle of protection of legitimate expectation, related to the most traditional principles in our system of legal certainty and good faith in relations between the Administration and individuals, and whereby, according to the doctrine of the European Court of Justice and the case law of this Court, the public authorities cannot take actions that are contrary to the expectations induced by reasonable stability in its decisions, and depending on which individuals have taken certain decisions. In other words, the virtuality of the aforementioned principle may void an act or rule and at least require a response, within the Community framework of the alteration (without foreknowledge, without sufficient transitional measures for those concerned to adapt their behaviour and proportionate to the public interest at stake, and without the appropriate corrective or compensatory measures) of the normal and stable circumstances that generate expectations based on maintenance. However, the principle of legitimate expectation does not guarantee the perpetuation of the existing situation, which can be modified within the framework of the discretionary power of public institutions and capacities to impose new regulations in appreciation of needs of general interest”.

The claim for recognition for photovoltaic facilities, and particularly those with installed capacity equal to or less than 100 kW, of the right to choose established in Transitory Provision One of Royal Decree 661/2007, so that the immediate application of the remuneration regime stipulated in this regulation to the facilities in question is avoided, insofar as the tariffs are disconnected from the average or reference electricity tariff, should be dismissed because it has not been demonstrated that the decision of the holder of the regulatory power to establish a different remuneration regime for the facilities included in categories a), b) and c) of article 2 of Royal Decree 436/2004, of 12 March, with respect to those belonging to group b 1), lacks objective justification because it is not appropriate, from the point of view of functionality, transparency and efficiency of the electricity system, to defer the application of the Royal Decree, with respect to this type of facilities, given their relevant weight in the group of

facilities that produce electrical power with renewable sources. Nor has it been accredited that this differentiated legal and economic treatment is harmful to the appellant companies, to the extent that, as explained by the State Attorney, the remuneration contained in Royal Decree 661/2007 for photovoltaic facilities is identical for 2007 as that contained in Royal Decree 436/2004 and the remuneration that they receive is 45.5134 CE/kWh, compared to 44,0381 kWh that they will receive in application of the transitory regime being appealed against.”⁶⁹

3.1.11.6 The Supreme Court Judgment of 9 December 2009

264. On 9 December 2009, the Supreme Court ruled on a challenge brought against RD 661/2007 by the owner of a cogeneration facility which notably requested the nullity of Articles 28, 45.4 and 5 and of RD 661/2007, as well as declaration of validity of Articles 40(2) and (3) of RD 436/2004.⁷⁰
265. The appellant notably complained that Articles 28, 45(4) and 5 of RD 661/2007 excluded the payment of subsidies to facilities of more than 100 MW in violation of the Government’s official support of cogeneration regardless of the size of the facilities. The petitioner invoked a frustration of its legitimate expectations, in light of the fact that RD 436/2004 had created a stable legal framework to attract investments in the sector.
266. The Supreme Court dismissed the appeal, notably on the basis that the appellant had made its investment prior to the entry into force of RD 436/2004:

“As pointed out by the State Attorney, the plaintiff constructed and commissioned its facility prior to the incentives provided by the above-mentioned Royal Decree and, therefore, also prior to the approval of Directive 2004/8/EC, which contains Community support for cogeneration. This situation, which is more than verifiable, is explicitly admitted by the party in its writ of claim and contradicts all its arguments on the principles of legitimate expectation and legal certainty. It is not enough for it to base its complaint on the argument that the subsidies discussed in Royal Decree 436/2004 were to confirm “a stable system with the necessary legal certainty for the aforementioned operators to make these large investments,” since the policy of encouraging the production of energy by new methodologies that did not depend on fuel importation did not imply that this policy would necessarily foresee the existence of premiums for all future technology of that nature. In particular, the Electricity Sector Act did not mention cogeneration and it was only in 2007, much later than the provision of the cogeneration subsidy in the above-mentioned Royal Decree 436/2004, when the

⁶⁹ **R-83**, Judgment of the Third Chamber of the Supreme Court (Appeal 151/2007). Reference El Derecho EDJ 2009/307349, 3 December 2009.

⁷⁰ **R-84**, Judgment from the Third Chamber of the Supreme Court (App. 152/2007). Reference El Derecho EDJ 2009/307357, 9 December 2009.

reference to cogeneration was incorporated into the text of the Act. The only possible conclusion is that the appellant made its investment in the facility in this case solely due to its foreseeable profitability, confirmed by the data referred to by the State Attorney. [...]

It is difficult to accept, in view of this information, that the investment was made in the “expectation” provided by a regulation that did not even exist at the time (Royal Decree 436/2004 is dated 12 March). The only expectation that the company that owned the facility could legitimately have was that provided by the Electricity Sector Act, that is, that of obtaining reasonable rates of profitability in relation to the cost of money in the capital market or, in other terms, a reasonable return on its investment. And at no time has it been denied that its “investment effort” in constructing the San Roque combined cycle plant ceased to provide it with that profitability.”

267. The Supreme Court further referred to its own precedents where it considered that there is no right for an electricity producer to benefit from a special regime for an indefinite period of time:

“Regarding the first two grounds, there is no basis for sustaining that, in relation to its combined cycle plant, the new RD 661/2007 has deprived it, contrary to the principle of legitimate expectation and retroactively, of any rights that it may have had recognised at the time when the regulation was approved. Nor are there any grounds for considering the nullity of articles 28 and 45.5 of the Royal Decree from a more general point of view, i.e. outside the specific situation of the appellant’s combined cycle plant. On the one hand, we have already explained how the transitory regime allows those affected the option of continuing, under certain conditions, to be covered by the previous system. On the other hand, regarding generation facilities of more than 100 MW obliged to sell their energy directly to the market, whether or not they include cogeneration components, there are valid reasons not to recognise for them the complement allocated to those with lower installed capacity when the holder of the regulatory power, in view of the market conditions, reasonably considers that the return provided by it is enough to guarantee a suitable return on the investments.

Furthermore, in both the claim and in the conclusions statement (though it is true that the latter does contain a reference that is somewhat more detailed) “Nueva Generadora del Sur, S.A.” does not pay sufficient attention to the case law of this Chamber that has been specifically handed down regarding the principles of legitimate expectation and non-retroactivity applied to the successive systems of incentives for the generation of electricity. They refer to the considerations included in our judgement of 25 October 2006 and reiterated in the judgment of 20 March

2007, among others, regarding the legal situation of the owners of electrical energy production facilities under the special regime, for whom it is not possible to recognise a “non-modifiable right” to keep the remuneration framework approved by the holder of the regulatory authority unaltered in the future, as long as the prescriptions of the Electricity Sector Act regarding the reasonable returns on the investments are respected. [...]

Based on what we have said so far - i.e. based on the principle that it is not acceptable to claim that a certain system of aid must remain unaltered over time, irrespective of the evolution of circumstances and the Government’s energy policy - it is clear that the complainant has no grounds for their complaint. On the one hand, in general terms, recognition of a particular advantage does not imply any right to that advantage remaining unchanged over time. Therefore, whatever the actor claims to be recognised by the aforementioned Royal Decree 436/2004, the right to receive a particular premium does not mean that they have a right to this premium becoming an intangible benefit in the future. The suppression of an incentive when there is no right either to its existence or its maintenance does not therefore represent illegitimate retroactivity. The appellant is only entitled to receive benefits to which they are entitled whilst the benefit remains applicable: there is no right for this to be maintained over time. [...]

Where applicable, and as we also said in the Judgement dated 9 October 2007 (fourth legal grounds, in fine, also reproduced in the fourth legal grounds of this Judgement), if the holder of a right recognised by a regulation - in this case, by Royal Decree 436/2004 - had this right prejudiced by a subsequent provision, they could, if applicable, claim compensation by way of the pecuniary liability of the State for the normal operation of public services through the procedure legally provided for, but not claim the nullity of a provision that legitimately modifies the regulatory standards in that sector. In the case in hand, having discarded the infringement of the principle of legitimate expectation - and, therefore, that of legal certainty -, as a result of the suppression of a benefit that the appellant was not expecting at the time of making its investment, it would have to prove that its removal involved a specific and effective prejudice for it that it was not obliged to support, apart from the obvious loss of the premium that was taken away.”

3.1.11.7 The Supreme Court Judgment of 12 April 2012

268. On 12 April 2012, the Supreme Court dismissed an appeal filed against Article Ten of the first section of Royal Decree 1565/2010 after notably recalling that:⁷¹

“[...] the owners of electric power production facilities under the special scheme have no “unmodifiable right” to the financial scheme regulating the receipt of premiums remaining unaltered, when they themselves have opted to benefit from a system of public price setting, rather than going to the market (a possibility that is always open to them), and instead profiting from a public regulatory system for them. The almost total elimination of business risk by sheltering under regulated tariffs, without competing on price with other agents in the market, represents an advantage over other electricity sector operators that are subject to the vicissitudes of free competition. The flip side of this advantage is, among others, the possibility that the government will change its measures in response to outside circumstances (with respect to certain minimum levels of returns that are not relevant in this case).

Private agents and operators who renounce the market, even if they are induced to do so to a greater or lesser extent by the generous remuneration offered by the regulatory framework, without the counterparty assumption of significant risks, are aware, or should be aware, that this regulatory framework, which is of a public nature and approved at a particular time, and consistent with the economic scenario and forecasts of electricity demand at the time, cannot subsequently be unaware of major changes in basic economic data, to which the public administration is logically bound to adapt. If these mean adjustments in many other production sectors, with obvious difficulties for their activity, it is not unreasonable that such adjustments should also extend to the renewable energies sector, which would like to continue receiving regulated rates instead of resorting to market mechanisms (bilateral contracting and sale in the organised market). And this is even more so in situations of a generalised economic crisis, and in the case of electrical energy, in view of the growth of the rate deficit, which to a certain extent is derived from the impact by the remuneration of those energies through the regulated rate on the calculation of the access tolls, with respect to the cost attributable to the electric system”.

3.1.11.8 The Supreme Court Judgment of 12 November 2012

269. On 12 November 2012, the Supreme Court ruled in favor of the developer of a solar PV plant against Endesa, the distribution grid operator. Endesa had breached its statutory obligation to respond to the developer’s request to connect its PV plant to

⁷¹ **R-87**, Judgment of the Third Chamber of the Supreme Court (App. 35/2011). Reference El Derecho EDJ 2012/69822, 12 April 2012.

the grid within a prescribed time, which precluded the plant's registration in the RAIPRE by the required deadline (29 September 2008) to be registered under RD 661/2007.

270. The plaintiff claimed damages for the profits it lost under RD 661/2007, which the Supreme Court found to be appropriate because Endesa's action had:

“frustrated a very specific business as the plaintiff lost the right to receive a very beneficial remuneration regime that, in order to encourage this type of renewable energy facilities, was set forth in RD 661/2007. It is the established nature of the so frustrated business, that corresponded to the predictable nature of the amount of investment required, the energy generation output and the guaranteed sale of electricity, as well as the incentivized remuneration established in the regulation and a useful life of the facility (at least 25 years) that allow the conclusion -in this particular case- that the profits not obtained [by the plaintiff] were plausible and reasonable and therefore meet the criteria for compensation for loss of profit. [...]

[T]he frustration of the business provoked something more than a mere loss of chance (the disappearance of the probability of a favorable event) but has rather jeopardized the realization of a future foreseeable gain.”⁷²

3.1.11.9 The Supreme Court Judgment of 21 January 2016

271. On 21 January 2016, the Supreme Court dismissed an appeal brought by PV investors against RD 1565/2010, RDL 14/2010, and Law 2/2011 on the ground that these regulatory changes had resulted in financial losses, infringing upon their legitimate expectations and rights acquired under the previous legal framework of RD 661/2007.

272. The Supreme Court notably stated that:

“We do not understand the RD [661/2007] in question as establishing a permanent tariff regime, nor that the Government or legislator, in exercising their regulatory power, cannot adapt or modify this regime to account for new circumstances (be they economic, productive, technological, or of any other kind) which may be produced over such a long period of time.”⁷³

3.1.11.10 The Supreme Court Judgment of 20 April 2016

273. On 20 April 2016, the Supreme Court upheld the claims of an investor who had developed a PV facility with the expectation of benefitting from RD 1578/2008 but who was unable to enroll the facility in the pre-allocation registry to obtain the

⁷² C-376, Spanish Supreme Court, Judgment No. 662/2012, Appeal No. 618/2010, 12 November 2012.

⁷³ R-94, Judgment from the Supreme Court 63/2016, 21 January 2016 (Administrative App. 627/2012).

incentive tariffs before Spain closed RD 1578/2008 in 2012.⁷⁴ The Supreme Court found that:

“The 2008 Royal Decree itself was what created solid expectations for facilities’ titleholders that they would achieve registration in the [pre-allocation registry] and the resulting energy remuneration under the terms established in [RD 1578/2008. This] is confirmed in the Preamble [of that decree] [...]

As it can be easily inferred, the 2008 Royal Decree is an outward sign from the Government, which we deem conclusive enough to induce reasonable stakeholders to expect, when meeting the stringent requirements set forth in Annex II, they would achieve the facilities’ registration with the pre-allocation registry, with [all] consequences inherent in such registration [...]

We understand, therefore, that the regulatory change introduced by Royal Decree-Law 1/2012 was unexpected and violated the principle of legitimate expectations [...]

Certainly, as repeatedly noted by this Division, the regulatory system enables changes derived from technologies evolution and economic circumstances, allowing to require to bear the so-called regulatory risk. Such “alterability” of the regulatory framework would remove the unlawfulness of any potential harm, because the operator needs to consider the possibility of alterations, which would be tempered also by the obvious advantage of benefitting from a remuneration regime developed, in its entirety or in part, aside from the market (depending on the choice of regulated tariffs or premium rates).

However, the regulation setting out the economic regime for photovoltaic facilities to which regulated tariffs values under Royal Decree 661/2007 were not applicable contained some determinations from which it could not be inferred, not even hypothetically, that the regulatory risk of the sector could lead to its suspension only three and a half years after its implementation, precisely because the Government, when approving the 2008 regulation, had considered all the circumstances that the recipients of the rule could take into account in order to make the appropriate business decision to project photovoltaic facilities and apply for its registration in the section of the pre-allocation registry created by the aforementioned 2008 Royal Decree.

In other words, the regulatory provision encouraging beneficiaries to undertake such project [of a photovoltaic energy facility] contemplated already the exponential growth of the installed capacity and the fact that

⁷⁴ C-14, Supreme Tribunal (Contentious Division), 20 April 2016, Decision No. 434/2014.

the targets established would likely be exceeded. And this is precisely why (because the Government took also into account such growth), the decision was made to “provide those investments with continuity and expectations, and also to determine a progressive pattern for the implementation of this technology,” creating a new economic regime “of support to this technology,” which brought the Claimant [in this case], relying legitimately upon the regime’s continuity, to incur expenses/costs, as required in order to qualify, and achieve registration where appropriate, with the register” (emphasis added).

3.2 The Claimants’ Investments in Spain

274. The Claimants separately invested in several Spanish PV plants:

- DCM’s investments include six PV projects (3.2.1),
- HL Sun Invest’s investments include three PV projects (3.2.2),
- Edison’s investments include four PV projects (3.2.3).

3.2.1 DCM 1 and DCM 2’s Investments

275. As explained by the Claimants, DCM was a leading independent German issuing house of closed-fund companies. DCM’s funds invested in a variety of market sectors, including real estate, renewable energy, and aviation. DCM organized investments both within Germany and abroad.

276. DCM created two investment funds in which it placed several Spanish PV projects. Those investment funds are DCM 1 and DCM 2.

277. Ultimately, DCM 1 and DCM 2 invested in six PV projects in Spain, all registered under RD 661/2007.

278. In the context of these investments, DCM received legal advice from the Spanish law firm Frühbeck Abogados.⁷⁵ In addition, the banks that financed DCM also received legal advice from several law firms, including Freshfields,⁷⁶ Linklaters,⁷⁷ Herbert Smith,⁷⁸ and Monereo.⁷⁹

⁷⁵ First Witness Statement of Mr. Stefan Raster, 8 November 2018 (“**First Raster WS**”), paras. 14-15; Second Witness Statement of Mr. Stefan Raster, 15 July 2019 (“**Second Raster WS**”), para. 5; **C-410**, Email from Dr Frühbeck to HHKL Law, 22 January 2008; **C-413**, Dr Frühbeck Memorandum, 12 June 2007.

⁷⁶ **C-236**, Freshfields, Legal Due Diligence Review, 1 December 2008.

⁷⁷ **C-189**, Linklaters Red Flag Due Diligence Report: Project Sevilla, 13 October 2009.

⁷⁸ **C-205**, Herbert Smith Due Diligence on Project Bovera, 25 September 2009.

⁷⁹ **C-213**, Monereo, Meyer, Marinell-Io Abogados, Capacity Opinion, 2 March 2010.

3.2.1.1 DCM 1's Investments

279. DCM organized four PV projects into DCM 1: two greenfield investments, (a) Project Sevilla and (b) Project Alicante, and two brownfield investments, (c) Project Bovera, and (d) Project Cam Mestre.

(a) Project Sevilla

280. Project Sevilla is a 700 kW rooftop PV installation located on an Aldi distribution center in Spain developed by the project developer Pohlen Solar GmbH ("**Pohlen**"). Pohlen was responsible for the construction and registration of any Aldi rooftop plant, which it developed and sold to DCM 1.

281. Pohlen constructed Project Sevilla and secured RAIPRE registration under RD 661/2007 on 25 September 2008.

282. On 29 November 2008, DCM 1 purchased all of the shares in Solarpark Sevilla GmbH & Co. KG, the company that owned Project Sevilla.⁸⁰

283. On 13 October 2009, the law firm Linklaters issued a Red Flag Due Diligence Report in relation to this Project for the benefit of Deutsche Bank AG and Deutsche Bank Luxemburg, which provided financing to DCM 1.⁸¹

(b) Project Alicante

284. Project Alicante is a 600 kW rooftop PV installation located on an Aldi distribution center in Spain and also developed by Pohlen.

285. On 26 September 2008, the plant received its RAIPRE registration under RD 661/2007.

286. On 8 September 2009, DCM 1 acquired all the shares in the holding companies that owned Project Alicante. Specifically, DCM 1 acquired all the shares in the German limited partnership Solarpark Alicante GmbH & Co. KG, which in turn had a Spanish branch Solarpark Alicante GmbH & Co. KG, Sucursal en España.

(c) Project Bovera

287. Project Bovera is a 1 MW PV plant developed by the project developer (Wirsol Energia S.L.U., "Wirsol"). It received its definitive RAIPRE registration under RD 661/2007 on 23 September 2008 and had a thirty-year lease agreement.

288. On 13 August 2009, DCM 1 entered into a purchase agreement with Wirsol to acquire all the rights associated with the 1 MW PV plant Project Bovera for a total price of

⁸⁰ **C-186**, Share Purchase Agreement Between DCM Energy GmbH & Co. Solar 1 KG (Purchaser) and Mr. Holger Pohlen (Seller) for Solarpark Sevilla GmbH & Co. KG, 29 November 2011, ("**Purchase Agreement Between DCM & Co. Solar with Mr. Holger Pohlen**") through **C-188**.

⁸¹ **C-189**, Linklaters Red Flag Due Diligence Report: Project Sevilla, 13 October 2009.

nearly € 7 million, plus a bonus on income from electricity production over a certain threshold.

289. To finance the purchase (in part), DCM 1 submitted a drawdown notice to the Deutsche Bank consortium for €5.29 million; the remaining €1,612,280 necessary to complete the purchase were financed with equity.
290. Two due diligence reports were issued in relation to this project: one prepared by the law firm Herbert Smith on the request of Deutsche Bank on 25 September 2009⁸² and one prepared by the law firm Rödl & Partners on the request of Wirsol on 26 October 2009.⁸³

(d) Project Cam Mestre

291. The final Spanish PV project in which DCM 1 invested was Project Cam Mestre, a 1.9 MW project which consisted of nineteen 100kW PV facilities.
292. All of the facilities obtained registration in the RAIPRE on 31 July 2008 and were therefore entitled to benefit from the RD 661/2007 tariffs.
293. On 7 October 2009, DCM 1 (through its Spanish branch) purchased Project Cam Mestre for approximately €13.1 million plus an agent fee of approximately €0.4 million.
294. DCM 1 financed the purchase of Project Cam Mestre with equity and the loan from the Deutsche Bank consortium.

3.2.1.2 DCM 2's Investments

295. According to Claimants, DCM's head of real estate investments, Mr. Harald Lenz, came in contact with a German developer in Spain and learned of an opportunity to acquire a 3.6 MW greenfield project in Huéscar, divided into two parts: Huéscar and Granada.
296. DCM 2 waited to acquire the projects until after they were completed and had obtained their RAIPRE registrations.
297. On 8 and 9 September 2008, all of the plants comprising Huéscar and Granada obtained their respective RAIPRE registrations, which entitled them to benefit from the RD 661/2007 tariffs.
298. On 10 September 2008, DCM 2 finalized its acquisition of all the shares of the companies that owned Huéscar and Granada.

⁸² C-205, Herbert Smith Due Diligence on Project Bovera.

⁸³ C-204, Rödl & Partner Due Diligence Report, Project Bovera, 26 October 2009. Prior to this due diligence report, Rödl & Partners issued a first report on 11 March 2009, confirming that it had reviewed, among other things, all of Project Bovera's registration documents and that "[a]s of September 23, 2008, the PV project was registered in the RAIPRE of the Autonomous Municipality of Catalonia under RD 661/2007, with 1 MW nominal output" (C-203).

299. To fund the acquisitions, DCM 2 obtained more than € 25 million in financing from HSH Nordbank.
300. HSH Nordbank retained the international law firm Freshfields Bruckhaus Deringer LLP to perform legal due diligence on the investments. Freshfields issued its Legal Due Diligence Report on 1 December 2008.⁸⁴
301. On the basis of such due diligence, HSH Nordbank agreed to finance over 70% of the total funds invested to purchase Projects Huéscar and Granada.

3.2.2 HL Sun Invest's Investments

302. Hannover Leasing was the investment arm of a German bank. It manages more than 200 closed-end equity funds and public funds.
303. One of the closed-end funds that was initiated and is still managed by Hannover Leasing is Claimant HL Sun Invest KG, the investment fund, a German limited partnership that holds 100% of Claimant HL Sun Invest GmbH.
304. The Claimants explain that, in the process of vetting potential Spanish projects to acquire, Hannover Leasing learned of the opportunity to invest in three PV plants that SunEdison LLC ("**SunEdison**") had developed in Catalonia, Spain.⁸⁵
305. In October 2008, SunEdison sent a presentation to Hannover Leasing, discussing the three PV plants known as "Cervia 2," "Alamus," and "Borges Blanques 2":
- Cervia 2 is a 1 MW PV plant that received its permanent RAIPRE registration on 29 August 2008.⁸⁶
 - Project Alamus is a 1.5 MW PV plant that received its RAIPRE registration on 3 September 2008.⁸⁷
 - Borges Blanques 2 is a 1.5 MW facility that received its RAIPRE registration on 1 September 2008.⁸⁸
306. In the presentation that SunEdison transmitted to Hannover Leasing, the presenter stated that all three plants were "*fully constructed, interconnected and have secured permanent registration under RD 661/2007.*"⁸⁹
307. The Claimants further explain that Hannover Leasing proposed the investment opportunity to one of its long-term business partners, a German bank and wealth

⁸⁴ C-236, Freshfields, Legal Due Diligence Review, 1 December 2008.

⁸⁵ Cl. Mem., para. 284.

⁸⁶ C-238, Cervia II RAIPRE Registration, 29 August 2008.

⁸⁷ C-243, Alamus RAIPRE Registration, 3 September 2008.

⁸⁸ C-248, Borges Blanques 2 RAIPRE Registration, 1 September 2008.

⁸⁹ C-237, SunEdison Investment Presentation, October 2008.

manager called Hauck & Aufhäuser (“**H&A**”) to act as “*placement agent*” and find the end-investors to provide equity for the project.

308. In the context of this investment, HL Sun obtained legal advice from Freshfields by way of two legal reports on 18 March 2009.⁹⁰
309. On 7 May 2009, the investment fund Hannover Leasing created HL Sun Invest and purchased 100% of the shares of three Spanish holding companies that, in turn, owned the three projects Cervia 2, Alamus, and Borges Blanques 2.⁹¹
310. In order to finance the three projects, H&A provided bridge financing in the amount of €8 million.⁹²
311. By June 2009, Bayerische Landesbank (“**BayernLB**”), a publicly regulated bank based in Munich, Germany, agreed to provide over €20 million in non-recourse long-term financing.⁹³

3.2.3 Edisun Power’s Investments

312. According to Mr. Toggweiler, one of the founders of Edisun Power, Edisun has been developing and investing in solar power plants, first in Switzerland, and later throughout Europe, since 1997. Edisun decided to expand its operations to Germany, and then into Spain with the founding of a subsidiary, Edisun Power Iberia, in Barcelona in the spring of 2006.⁹⁴
313. In anticipation of the adoption of RD 661/2007, Edisun worked with a prospective development partner called Energés and its Spanish legal counsel Mr. Carlos Llobel to identify and develop potential solar projects in Spain that could eventually qualify for the feed-in tariff under the new regime.
314. Ultimately, Edisun invested in four greenfield PV projects, two registered under RD 661/2007, *i.e.* (3.2.3.1) El Tesoro and (3.2.3.2) El Trujillo, and two registered under RD 1578/2008, *i.e.* (3.2.3.3) Valle Hermoso II and (3.2.3.4) Salinas.

⁹⁰ **C-260**, Freshfields Bruckhaus Deringer LLP, Payments in the Electricity System From the Perspective of Solar Photovoltaic Plants / Project Solar, 13 March 2018 (“**Freshfields on Payments**”); **C-261**, Freshfields Bruckhaus Deringer LLP, Legal Due Diligence Review for Hannover Leasing GmbH & Co. KG, 13 March 2009 (“**Freshfields Legal Due Diligence**”).

⁹¹ **C-265**, Deed of Share Sale Between Hannover Leasing Sun Invest 2 Spanien Beteiligungs GmbH (Purchaser) and Promociones Solares Sunergy S.L.U. (Seller) for the Shares in Parsosy Alamus S.L.U., Parsosy Borges Blanques 2 S.L.U., and Parsosy Cervia II S.L.U., 7 May 2009 to **C-271**, Deed of Extension of Share Capital, Statutory Modification, Parsosy Cervia II S.L.U., 1 September 2009.

⁹² **C-272**, Bridge Financing Agreement Between Hannover Leasing Sun Invest 2 Spanien GmbH & Co. KG (Borrower) and Hauck & Aufhäuser Privatbankiers KgaA (Creditor), 6 May 2009.

⁹³ **C-276**, Financing Agreement Between Parsosy Alamus S.L.U., Parsosy Borges Blanques 2 S.L.U., and Parsosy Cervia II S.L.U. (Borrowers), HANNOVER LEASING Sun Invest 2 Spanien GmbH (Guarantor), and Bayerische Landesbank (Creditor), 10 June 2009.

⁹⁴ First Witness Statement of Mr. Peter Toggweiler, 8 November 2018 (“**First Toggweiler WS**”), paras. 5-6.

3.2.3.1 Project El Tesoro

315. The first project in Spain in which Edisun invested was El Tesoro, a greenfield project developed and built as a 1 MW project comprised of ten 100 kW plants. Five units were financed by Edisun Power, and five units were transferred to other investors.⁹⁵
316. On 16 January 2007, Edisun Power Iberia and four of its subsidiaries, Edisun Beta, Edisun Delta, Edisun Epsilon, and Edisun Gamma each entered into a separate EPC contract with Energés to acquire a single 100 kW unit of the El Tesoro PV project for approximately € 314,000.⁹⁶
317. The El Tesoro plants were completed on 27 February 2008 and received RAIPRE registrations on 16 July 2008, allowing them to be enrolled under RD 661/2007 before the cut-off date.⁹⁷

3.2.3.2 Project El Trujillo

318. In parallel, Edisun and Energés developed a similar project called El Trujillo composed of five 100 kW plants.
319. On 8 September 2007, anticipating that El Trujillo also would be enrolled in RD 661/2007, Edisun entered into an EPC contract with Energés to acquire the facilities.⁹⁸
320. The El Trujillo plants were completed on 27 May 2008 and received RAIPRE registrations on 11 August 2008, allowing them to be enrolled under RD 661/2007 before the cut-off date.⁹⁹
321. As Edisun was undergoing an IPO in Switzerland around this time, it was required to conduct thorough due diligence on its investments throughout Europe, which was led by the Swiss auditor Oppenheim Research.¹⁰⁰
322. For its activities in Spain, Edisun hired the Spanish law firm Marimón Abogados to carry out that diligence. On 25 July 2008, Marimón Abogados issued a legal report in connection with the IPO discussing Projects El Tesoro, El Trujillo, and two other projects that Edisun was in the process of developing in Spain at that time, *i.e.* Valle Hermoso II and Valle Hermoso I.¹⁰¹

⁹⁵ First Toggweiler WS, para. 8.

⁹⁶ **C-288**, Contract for Work and Labor Between Edisun Power Iberia Beta S.A. (Purchaser) and Energés Gestión Medioambiental S.L. (Contractor), 16 January 2007 to **C-292**, Contract for Work and Labor Between Edisun Power Iberia S.A. (Purchaser) and Energés Gestión Medioambiental S.L. (Contractor), 16 January 2007.

⁹⁷ **C-300.1** through **C-300.5**, El Tesoro RAIPRE Registrations.

⁹⁸ **C-296**, Contract for Work and Labor Between Edisun Power Europe A.G. (Buyer) and Energés Gestión Medioambiental S.L., 8 September 2007.

⁹⁹ **C-301.1** through **C-301.5** El Trujillo RAIPRE Registrations.

¹⁰⁰ **C-15**, Oppenheim Research, Report Regarding Edisun Power Europe AG, 1 September 2008 ("**Oppenheim Report**").

¹⁰¹ **C-302**, Marimón Abogados, Due Diligence Report for Edisun Power Europe AG, 25 July 2008 ("**Marimón Due Diligence Report**").

3.2.3.3 Project Valle Hermoso II

323. Project Valle Hermoso II is a 200 kW PV plant in Alcolea del Rio.
324. On 4 March 2009, Edisun Beta entered into a turnkey purchase agreement for the development of Project Valle Hermoso II.¹⁰²
325. On 5 May 2009, the plant was registered in the Pre-Allocation Registry under RD 1578/2008 and was assigned a tariff of 32.00 c€ per kW/h.¹⁰³
326. It received its final RAIPRE registration on 12 July 2010.¹⁰⁴

3.2.3.4 Project Salinas

327. Project Salinas consists of nine rooftop PV plants with capacities between 30 kW and 100 kW each, for a total of 658 kW.
328. On 12 January 2009, Edisun Iberia entered into an EPC contract for development and purchase of the plants.¹⁰⁵
329. Each plant secured a place in the Pre-Allocation Registry under RD 1578/2008 and was assigned an incentive tariff of 32.00 c€ per kW/h.¹⁰⁶
330. After the nine facilities were completed, each received its RAIPRE registration between 6 July and 5 August 2009.¹⁰⁷

3.3 The Disputed Measures

331. As of 2010, Spain enacted a number of legislative and regulatory measures in the sector of renewables energies (the “**Disputed Measures**”) which are at the core of the Claimants’ claims in this arbitration.
332. These Disputed Measures include: RD 1565/2010 (addressed in subsection 3.3.1), RDL 14/2010 (3.3.2), Law 15/2012 (3.3.3), RDL 2/2013 (3.3.4), and the New Regulatory Regime, comprised of RDL 9/2013, Law 24/2013, RD 413/2014, and Ministerial Order IET/1045/2014 (3.3.5). For the sake of completeness, the Tribunal will also briefly discuss RDL 17/2019, which the Parties have also discussed in the course of the proceedings (3.3.6).

¹⁰² **C-303**, EPC Contract Between Edisun Power Iberia S.A. (Purchaser) and Energes Gestión Medioambiental S.L. (Contractor), 4 March 2009.

¹⁰³ **C-285**, Valle Hermoso II Registration in the Pre-Allocation Registry, 5 May 2009.

¹⁰⁴ **C-304**, Valle Hermoso II RAIPRE Registration, 12 July 2010.

¹⁰⁵ **C-305**, Contract for Work and Labor Between Edisun Power Iberia S.A. (Purchaser) and Zela Capital S.L. (Contractor), 12 January 2009.

¹⁰⁶ **C-312**, Salinas Registration in the Pre-Allocation Registry, 4 December 2007.

¹⁰⁷ **C-306.1** through **C-306.9**, Salinas RAIPRE Registrations, 21 July 2008 to 6 July 2009.

3.3.1 Royal Decree 1565/2010

333. On 19 November 2010, Spain issued Royal Decree 1565/2010 (“**RD 1565/2010**”) to regulate and modify certain aspects of electricity production under the special regime.¹⁰⁸

334. The main - and most relevant - feature of RD 1565/2010 was the suppression of the right of Special Regime electricity producers to receive the feed-in tariffs provided for under Article 36 of RD 661/2007 after twenty-five years. In contrast, RD 661/2007 had provided for an entitlement to 100% of the feed-in tariffs for twenty-five years and 80% thereof for the remainder of the life of the plant.

335. Article 1(10) of RD 1565/2010 provided as follows:

“Ten. In Table 3 of article 36 [of RD 661/2007] the values of the feed-in tariffs indicated for type b.1.1 facilities are removed as from the year twenty sixth” (emphasis added).

336. Spain subsequently extended the period of entitlement to the feed-in tariffs to twenty-eight years through RDL 14/2010¹⁰⁹ and then to thirty years through RDL 2/2011.¹¹⁰

3.3.2 Royal Decree-Law 14/2010

337. On 23 December 2010, Spain promulgated Royal Decree-Law 14/2010 (“**RDL 14/2010**”) which imposed two limits – one temporary and one permanent – on the annual operating hours for which PV facilities could receive feed-in tariffs.¹¹¹

338. According to the Preamble, RDL 14/2010 was meant to alleviate the effects of the economic crisis that Spain was experiencing and to require special-regime electricity producers to contribute to decreasing the Spanish tariff deficit:

“The impact of global crisis, which traverses the Spanish economy, has led to a significant decline in the demand for electric energy [...] Thus, a set of provisions is established, so that all industry agents contribute, in a further and combined effort, to the reduction of the deficit of the electricity system.

[...] [S]pecial attention and care has been taken not to affect the economic-financial balance of companies within the sector [...] [to ensure that] [...] power generation companies under the special regime, [...] have secured adequate and reasonable compensation. [...]

[...] it is deemed reasonable that producers under the special regime also make a contribution to mitigate the additional costs on the system; and

¹⁰⁸ **C-316**, Royal Decree 1565/2010, 23 November 2010 (“**RD 1565/2010**”).

¹⁰⁹ **C-319**, Royal Decree-Law 14/2010, of 23 December 2010 (“**RDL 14/2010**”), First Final Provision.

¹¹⁰ **C-320**, Law 2/2011, of 4 March 2011 (“**Law 2/2011**”), 44th Final Provision.

¹¹¹ **C-319**, RDL 14/2010, First Additional Provision.

*such contribution must be proportionate to the characteristics of each technology, to the degree of participation in the generation of such additional costs and to the current extent for compensation, whose reasonable return, nonetheless, is guaranteed. Thus, for the same purpose, there has been Government approval, over recent months, for regulatory measures directed at producers of wind, solar thermal and co-generation electricity”.*¹¹²

339. As a result, RD 14/2010 established two limits: (i) a permanent cap on operating hours of PV facilities, starting from 1 January 2011 onwards for facilities registered under RD 1578/2008 and from 1 January 2014 onwards for facilities registered under RD 661/2007; and (ii) a transitory cap on operating hours of PV facilities registered under RD 661/2007 from 1 January 2011 until 31 December 2013.
340. The First Additional Provision of RD 14/2010 limited the equivalent working hours for all photovoltaic facilities:

“1. Solar and photovoltaic technology facilities will have the right, where appropriate, to settle each year under the primary economic system acknowledged to them, until they reach the equivalent amount of hours, considering 00:00 hours of January 1 of every year as the starting point.

2. The equivalent reference hours for these facilities, in relation to the solar climate zone where the facilities are located, according to the climate zones classification, based on the average solar radiation in Spain, determined by Royal Decree 314/2016 of March 17, which approves the Technical Code for Building, will be the following:

Technology	Equivalent reference hours per year				
	Zone I	Zone II	Zone III	Zone IV	Zone V
Fixed installation	1,232	1,362	1,492	1,632	1,753
Installation with a single-axis tracking system	1,602	1,770	1,940	2,122	2,279
Installation with a double-axis tracking system	1,664	1,838	2,015	2,204	2,367

*For this purpose, the amount of equivalent working hours of an electric power plant is defined as the ratio between the annual net production, expressed in kWh, and the nominal power of the facility, expressed in kW”.*¹¹³

341. The Second Transitory Provision of RDL 14/2010 introduced a temporary limitation until 31 December 2013 of the equivalent working hours for photovoltaic facilities registered under RD 661/2007:

¹¹² C-319, RDL 14/2010; R-35.

¹¹³ C-319, RDL 14/2010.

“Notwithstanding the provisions of the first additional disposition, until December 31, 2013, the equivalent reference hours for solar and photovoltaic technology facilities that are subject to the economic system established by Royal Decree 661/2017 of May 25, which regulates the electricity production activity under a special regime, shall be the following:

Technology	Equivalent reference hours per year
Fixed installation	1,250
Installation with a single-axis tracking system	1,644
Installation with a double-axis tracking system	1,707

342. In addition, RDL 14/2010 introduced a temporary access toll for transmission and distribution networks to be paid by electric energy producers:

*“Starting on January 1, 2011, and as long as the tolls that must be paid for by electric energy producers are not legally settled, carriers and distributors shall charge the producers that are connected to their systems an access toll of 0.5 EUR per MWh for their systems, or the amounts set by the Ministry of Industry, Tourism and Commerce within the limits established, where appropriate, by the European Union regulations”.*¹¹⁴

343. Finally, as mentioned earlier, RDL 14/2010 re-extended the duration of the entitlement of Special Regime energy producers enrolled under RD 661/2007 to receive feed-in tariffs from 25 years to 28 years.¹¹⁵ Law 2/2011 subsequently extended such duration to 30 years.¹¹⁶

3.3.3 Law 15/2012

344. On 27 December 2012, Spain enacted Law 15/2012 on fiscal measures for energy sustainability. This law, which entered into force on 1 January 2013, imposed a 7% tax on all revenues issued from the generation of electricity (“**TVPEE**”).
345. According to its Preamble, the purpose of this measure was to address the tariff deficit and environmental concerns:

“I. In current society, the everyday higher incidence of energy generation and consumption in the environmental sustainability requires a legal and regulatory framework that guarantees the adequate functioning of the

¹¹⁴ C-319, RDL 14/2010, First Temporary Provision.

¹¹⁵ C-319, RDL 14/2010, First Final Provision.

¹¹⁶ C-320, Law 2/2011, 44th Final Provision.

energetic model to every agent and that, additionally, contributes to preserve our rich environmental heritage. [...]. For that purpose, the present Law regulates three new taxes: the tax over the value of production of electricity, the tax over production of spent nuclear fuel and [...].

II. In this sense and with the objective of facilitating a balanced budget, it is established in Title I of this Law, a tax over the value of production of electricity, with direct character and real nature that levies the performance of activities such as production and incorporation of electricity to the system within the Spanish electricity system.

This tax will levy the financial capacity of the producers of electricity whose facilities generate relevant investments in the transmission and distribution networks of electricity to be able to evacuate the energy produced by these, and that involve, by themselves or as a result of their existence and development of the networks, unquestionable environmental effects, as well as the generation of very relevant costs necessary for the maintenance of the security of supply. The tax will be applicable to the production of all of the generation facilities”.¹¹⁷

346. As a result, Title I of Law 15/2012 introduced a “*tax over the value of production of electricity*”, the relevant sections of which are reproduced hereafter.

347. Pursuant to Article 1, “*Nature*”,

“The electrical energy production value tax is a direct trade tax on the carrying out of electrical energy production activities and said energy’s incorporation into the electricity system, measured in power station busbars by means of one of the installations stated in article 4 of this Law”.

348. Pursuant to Article 4 “*Taxable event*”,

“1. The taxable event is the production and incorporation of energy into the electricity system at busbar costs, including the mainland electricity system and non-mainland and outside mainland territories, in any of the facilities referred under Title IV of Law 54/1997, of 27 November, of the Electricity Sector”.

349. Pursuant to Article 6 “*Taxable base*”,

“1. The taxable base will comprise the total amount it stands to receive from each taxpayer for the production and incorporation of electrical energy into the electricity system, measured in busbars at the power station, for each installation during the taxation period. To this end, when

¹¹⁷ C-327, Law 15/2012, 28 December 2012 (“**Law 15/2012**”).

calculating the total amount, due consideration will be given to the revenues foreseen in all economic systems deriving from the stipulations of Law 54/1997 of November 27, 1997, on the Electric Sector, during the attendant tax period as well as those foreseen in the specific economic regime in the event of electrical energy production activities and said energy's incorporation into the electricity system in the island and non-island territories".

350. Pursuant to Article 8 "Rate of tax",

"The rate of tax will be 7 per cent".

3.3.4 Royal Decree-Law 2/2013

351. On 1 February 2013, Spain issued Royal Decree-Law 2/2013 on urgent measures in the electrical system and the financial sector ("**RDL 2/2013**").¹¹⁸

352. RDL 2/2013 notably replaced the Consumer Price Index ("**CPI**"), which served as the index for updating the value of the premiums and feed-in tariffs, with a revised CPI which excluded from the calculation unprocessed foods, energy products, and some tax effects.

353. This is reflected in Article 1 which reads:

*"Effective as of January 1, 2013, for all methodologies that are linked to the Consumer Price Index and that govern remunerations, rates and premiums updates earned by users of the electrical system as a result of the enforcement of industry rules, the index will be substituted [replaced] with the constant tax Consumer Price Index, calculated by excluding unprocessed foods and energy products".*¹¹⁹

3.3.5 The New Regulatory Regime

354. In the course of 2013 and 2014, Spain enacted several measures which, taken together, form the new regulatory regime that applied to renewable energy producers as of 2013 (the "**New Regulatory Regime**").

355. The New Regulatory Regime is comprised of four pieces of legislation: RDL 9/2013 (3.3.5.1), Law 24/2013 (3.3.5.2), RD 413/2014 (3.3.5.3) and Ministerial Order IET/1045/2014 (3.3.5.4).

356. At this stage, the Tribunal will limit itself to a brief presentation of these texts and of their salient features. It will discuss the relevant provisions thereof in due course to the extent relevant for the resolution of the present dispute.

¹¹⁸ **C-330**, Royal Decree-Law 2/2013, 1 February 2013 ("**RDL 2/2013**").

¹¹⁹ **C-330**, RDL 2/2013, Article 1.

3.3.5.1 Royal Decree-Law 9/2013

357. On 12 June 2013, Spain enacted Royal Decree-Law 9/2013 on urgent measures to guarantee the financial stability of the electricity system (“**RDL 9/2013**”).

358. In substance, and as explained in more detailed *infra*, RDL 9/2013 entirely repealed the Special Regime provided for in RD 661/2007 and RD 1578/2008 and announced the establishment of a new framework for the regulation of electricity, and notably the remuneration of renewable energy producers.

359. In the Preamble to RDL 9/2013, Spain first recalled that the electricity system was based on a balance between adequate income and adequate remuneration of the agents taking part of the sector (*i.e.* the “*economic sustainability*” of the energy sector):

“Since Law 54/1997 of 27 November regulated the Power Sector and started a liberalization process in the areas of electricity generation and commercialization activities. [sic] The Spanish power sector has been organized on the basis of the income adequacy principle and adequate remuneration for the various agents taking part in the sector.

Ratification by Spain of the European Energy Charter Treaty on December 11, 1997 and the continuous addition of community legislation into domestic law has also implied an acceptance of the principles underlying such legislation, including measures to encourage renewable energy sources, the creation of favorable conditions to foster thrifty and environmentally friendly energy uses and to promote energy efficiency.

Together with the principles defining the model, public intervention by means of regulation is intended to guarantee security of supply, in the assumption that the operation of the market enables the economic and financial sustainability of the power sector, and the various agents taking part therein must accommodate the specific circumstances of an ever changing sector, if so required to guarantee such security”.

360. Spain then explained that the tariff deficit had become a structural issue over the years and recalled the various measures taken in the previous years to correct this issue:

“Notwithstanding the aforementioned, for the past decade, the Spanish electricity system has generated a tariff deficit that, over time, has turned into a structural deficit. This is due to the fact that real costs associated with regulated activities and with the operation of the electric power industry prove higher than the proceeds from the tolls set by the Administration and paid for by consumers. [...]”.

361. Spain nonetheless pointed out that, despite these measures, the situation had worsened in the first half of 2013 because of two unexpected developments which

Spain essentially identified as (i) exceptional weather conditions (“*rainfall levels and wind conditions were far in excess of the historical average*”) and (ii) a higher than anticipated contraction of the demand for electricity “*due to the decline in economic activity and the impact of the economic crisis on domestic economies.*”¹²⁰

362. As a result, Spain explained that it had to take urgent measures to address this critical economic situation:

“Such circumstances evidence both the need to immediately adopt a number of urgent measures to guarantee the financial stability of the electricity system, as well as to conduct a review of the regulatory framework so as to accommodate the developments which shape the sector’s reality in any given period, in order to maintain the sustainability of the electricity system. [...]

On the basis of these principles, and consistently with the described changes, this royal decree-law sets forth a series of urgent measures which are proportionate, sensible and broad in scope, intended to guarantee the electricity sector financial stability as an inescapable requisite for economic sustainability and security of supply, addressed to all the activities involved in the electricity sector.”

363. Spain therefore authorized the government to enact a new regulatory framework in replacement of the former, thereby amending Article 30 of Law 54/1997:

“Firstly, the Government is authorized to approve a new legal and economic system for existing electric energy production facilities that handle renewable energy sources, cogeneration and waste materials. Therefore, article 30.4 of the Law 54/1997 of November 27 of the Electricity Sector, is modified to introduce concrete principles regarding those which will resolve said regime, with the object of delimiting the margin of performance of the Government in the development of the tax regimes for these installations. This will be based on the received income derived from the market share, with an additional compensation that, in case it is deemed necessary, covers those investment costs that an efficient and well-managed company cannot recover from the market. In this regard, according to community case-law, an efficient, well-managed business shall be that which is endowed with the necessary means for the development of its activity, and its costs shall be those of a business which is efficient in said activity, taking into account the corresponding income and reasonable benefits for the performance of its functions. The objective is to guarantee that the high costs of an inefficient company are not used as a reference.

¹²⁰ C-331, Royal Decree-Law 9/2013, 13 July 2013 (“**RDL 9/2013**”), Preamble.

In this manner, the idea is to cover additional costs of these installations in reference to the rest of the technologies in the market.

*This framework shall articulate a retribution that will allow for facilities that handle renewable energy sources, cogeneration and waste materials to cover the necessary costs in order to compete in the market as equals with the rest of the technologies, and to obtain a reasonable profitability”.*¹²¹

364. Spain then went on to describe how to calculate the specific remuneration for a standard installation:

“To calculate the specific remuneration for a standard installation, the following will be considered: the income from the sale of the valued energy generated at the price of the production market; the costs of means of exploitation necessary to carry out the activity; and the value of the initial investment of the standard installation, all this for an efficient and well managed company.

Consequently, a compensation regime will be established based on standard parameters according to the different types of installation that are established. [...]

This new regulatory framework globally addresses the material change of circumstances which took place in recent years, on the basis of justified reasons. Investments in these technologies continue to be protected and are duly encouraged in Spain under this new legal framework, which is undoubtedly favorable to all of them as a whole, basically because a criteria [sic] is adopted to conduct a review of remuneration parameters every six years, in order to maintain a reasonable return through a predictable, time-specific method”.

365. As a point of particular relevance to the present arbitration, RDL 9/2013 **repealed both RD 661/2007 and RD 1578/2008**, although it established a transitory regime until the entry into force of the new regulatory framework:

“In order to articulate this new framework, Section 4 of Royal Decree-law 6/2009 of April 30, 2009, whereby specific measures are adopted in the energy sector and the tariff discount for small consumers was approved; the Royal Decree-law 661/2007 of May 25, 2007, whereby electricity generation activities are regulated under a special regime; and the Royal Decree 1578/2008 of September 26, 2008, on the remuneration for electricity generation from solar photovoltaic technology for facilities after the expiration of the retribution for such facilities under Royal Decree 661/2007 of May 25, 2007, are hereby repealed. However, in order to

¹²¹ C-331, RDL 9/2013, Preamble. See also Article 1(2).

*maintain both the remuneration flows to the facilities and the remaining procedures, rights and obligations, the provisions of the referred laws shall temporarily apply, to the exception of certain cases, until new regulations are approved. Thus, the facilities shall be subject, where applicable, to a provisional calculation under this temporary regime and, after the approval of the required provisions under the new economic regime, a normalization process shall be subsequently conducted with respect to the collection rights or payment obligations arising from the new method, which shall be in force from the effective date of this royal decree-law".*¹²²

366. In addition, the First additional provision of RDL 9/2013 set out certain parameters for determining the reasonable profitability of production facilities entitled to feed-in tariffs:

*"For the purposes of what is provided in the next-to-last paragraph of article 30.4 of Law 54/1997 of November 27th - for the installations that at entry into force of the present royal decree law would have the right to a prioritized economic regime - the reasonable profit will be around, before taxes, the average profit in the secondary market during the last ten years prior to the entry into force of the present royal decree-law of the Obligations of the State in ten years, all of this increased by 300 basis points, without prejudice to the review planned in the last paragraph of said article".*¹²³

367. On 17 December 2015, the Constitutional Court ruled that RDL 9/2013 was not impermissibly retroactive, since it did not "affect economic rights already consolidated and definitively incorporated into the assets of the recipient, or expired or consummated favorable legal situations".¹²⁴

368. On this occasion, the Constitutional Court further held that:

"the disputed measures certainly involve a change from the previous system, a decision that the legislature adopted as urgent in view of the situation in which the electricity system found itself. The change that has taken place cannot be described as unexpected, since the changing circumstances affecting that sector of the economy, made it necessary to make adjustments to this regulatory framework, as a result of the difficult

¹²² **C-331**, RDL 9/2013, Preamble (emphasis added). See also Sole Derogatory Provision "1. All of the rules of equal or inferior rank which contradict or go against what has been set forth in the present royal decree-law are hereby repealed.

2. The following are expressly abolished:

a) Royal Decree 661/2007 of May 25, which regulates the production of electric energy under a special regime.

b) Royal Decree 1578/2008 of September 26, about remuneration over production of electric energy through solar and photovoltaic technology for facilities that are created after the closing date for remuneration maintenance stated in Royal Decree 661/2007, of May 25, regarding said technology".

¹²³ **C-331**, RDL 9/2013, First Additional Provision (emphasis added).

¹²⁴ **R-95**, Judgment of the Constitutional Court, 17 December 2015 ("**App. 5347/2013**").

*circumstances of the sector as a whole and the need to guarantee the required economic balance and proper management of the system. There are, therefore, no grounds for arguing that changing the compensation system under review was unforeseeable for a “prudent and diligent economic operator”, based on the economic circumstances and the insufficient measures taken to reduce persistent and continuously rising deficits in the electricity system not sufficiently tackled with previous provisions”.*¹²⁵

3.3.5.2 Law 24/2013

369. On 26 December 2013, in the wake of RDL 9/2013, Spain enacted Law 24/2013 on the Electricity Sector (“**Law 24/2013**”).¹²⁶
370. Law 24/2013 repealed Law 54/1997 almost entirely and established a new legal regime to implement the new framework envisaged by RDL 9/2013 based on the principle of economic and financial sustainability of the electrical system, referred to in Article 13 thereof.¹²⁷
371. Article 14 of Law 24/13 addressed the remuneration of electricity producers in general terms, including those using renewable energy:

“7. By way of exception, the Government may set a specific remuneration regime to promote production from renewable energy sources, high-efficiency and waste cogeneration when there is an obligation to comply with energy objectives deriving from Directives or other legal standards of the European Union or when its introduction entails a reduction in the energy cost and exterior energy dependency under the terms set out below:

a) The granting of this specific remuneration regime will be set by means of competitive basis procedures.

This remuneration regime, additional to the remuneration from the sale of energy generated, valued at the production market price, will comprise one standing charge per unit of installed power which covers, where applicable, the investment costs for each installation type which cannot be recovered by the sale of energy on the market and one standing charge for the operation it covers, where applicable, the difference between the operating costs and income from participation in the production market of said installation type.

This remuneration regime will be compatible with the economic sustainability of the electrical system in accordance with the provisions of

¹²⁵ *Id.*

¹²⁶ **C-34**, Law 24/2013; **R-23**, Act 24/2013, 26 December 2013, on the Electricity Sector (“**Act 24/2013**”).

¹²⁷ **R-23**, Act 24/2013, Title III, in particular Article 13.

article 13 and will be limited, in any case, to the power objectives set out in the planning regarding renewable energies and saving and efficiency.

b) To calculate said specific remuneration, for an installation type, throughout its regulatory working life and with reference to the activity carried out by an efficient, well-managed company, the figures set out below will be assumed:

i. Standard income from the sale of energy generated, valued at the production market price.

ii. The standard operating costs.

iii. The standard initial investment figure.

[...]

The remuneration regime will not exceed the minimum level required to cover costs which allow production installations from renewable energy sources, high-efficiency and waste cogeneration to compete on an equal footing with the other technologies on the market and which allows a reasonable return to be earned on the installation type in each applicable case. This reasonable return will refer, before tax, to the mean yield on the secondary market for Ten-Year State Bonds, applying the appropriate differential.

By way of exception, the remuneration regime may also incorporate an incentive to investment and implementation by a certain deadline when their installation entails a significant reduction in costs in the systems of non-peninsular territories.

c) The initial investment value will be determined by means of the competitive basis procedure to grant the additional remuneration regime to each installation.

The additional remuneration over and above that of the market which may correspond to each installation will be that deriving from applying the provisions of the previous sections, assuming as the standard value of the initial investment that which derives from the competitive basis procedure”.

3.3.5.3 Royal Decree 413/2014

372. On 6 June 2013, further to RDL 9/2013 and Law 24/2013, Spain enacted Royal Decree 413/2014 with the purpose of regulating the activity of electric energy

production from renewable energy sources, cogeneration, and waste (“**RDL 413/2014**”).¹²⁸

373. RD 413/2014 therefore set out the new regime applicable to PV plants,¹²⁹ and notably defined the standards and parameters of the specific remuneration regime on the basis of a comparison with the parameters of a standard facility, in accordance with RDL 9/2013 and Law 24/2013.¹³⁰
374. In particular, RD 413/2014 calculated the amount of specific remuneration (on top of market revenue) necessary to provide that target rate of return to a “standard installation.”
375. The “specific remuneration” consists of two components: (i) an “investment incentive” calculated per MW of installed capacity; and (ii) an “operating incentive” calculated per MWh of electricity production. The investment incentive purports to compensate investors for the capital cost of their investment, while the operating incentive purports to compensate facilities for the gap between the operating costs of a renewable energy facility and the wholesale price of electricity.¹³¹
376. In order to determine the parameters of a standard facility, while taking account of the diversity of those facilities, RD 413/2014 grouped facilities with similar characteristics (e.g., technology type, capacity, date of installation, location, etc.), all of which receive investment and operating incentives under the same parameters. These parameters were further defined by MO IET/1045/2014 *infra*.
377. In addition, RD 413/2014 made financial support contingent on certain thresholds of “equivalent hours of operation.”

3.3.5.4 Ministerial Order IET/1045/2014

378. On 16 June 2014, the Ministry of Industry, Energy and Tourism enacted Ministerial Order IET/1045/2014 approving the remuneration parameters of standard facilities applicable to certain facilities of electrical power generation by means of renewable energy, cogeneration, and waste sources (“**MO IET/1045/2014**”).¹³²
379. MO IET/1045/2014 essentially implemented and developed the principles set out in RD 413/2014.
380. In particular, MO IET/1045/2014 further defined the parameters applicable to standard facilities. Indeed, this Ministerial Order assigned a standard facility code to

¹²⁸ **C-332**, Royal Decree 413/2014, 10 June 2014 (“**RD 413/2014**”).

¹²⁹ **C-332**, RD 413/2014, Article 2(1) which notably includes in the scope of application of the Royal Decree: “Subgroup b.1.1 Facilities using only solar radiation through photovoltaic technology as a primary energy source”.

¹³⁰ **C-332**, RD 413/2014, Title IV.

¹³¹ **C-332**, RD 413/2014, Preamble and Article 1.2.

¹³² **C-333**, Ministerial Order IET/1045/2014, 20 June 2014 (“**MO IET/1045/2014**”).

each eligible facility in Spain (“IT” in the Spanish acronym), defining the key parameters of compensation applicable to that facility. The parameters include:

- The amount of the investment incentive (in €/MW per year) (also called the “Return on investment” or “Rinv”). The investment incentive varies depending on year of initial operation and capacity;
- The operating incentive (in €/MWh) (also called the “Return on operation” or “Ro”); and
- The “regulatory useful life,” *i.e.* the duration for which the facility will receive the investment and operating incentive payments (if any). The regulatory useful life is set at 30 years from commissioning for all PV plants.¹³³

381. In addition, MO IET/1045/2014 set out the parameters that the government considered in setting the investment and operating incentives in each IT code, which include (among others):

- An imputed investment cost (*i.e.* what the government believes would be a reasonable investment cost for a hypothetical installation of the kind in that IT code);
- Estimated historical operating costs;
- Estimated future operating costs;
- Estimated hours of operation; and
- Estimated daily and intraday market prices of electricity.¹³⁴

3.3.6 Royal Decree-Law 17/2019

382. On 22 November 2019, Spain enacted Royal Decree-Law 17/2019, adopting urgent measures for the necessary adaptation of remuneration parameters affecting the electricity system and responding to the process for the discontinuance of activities in thermal power plants (“**RDL 17/2019**”).¹³⁵

383. This piece of legislation entered into force while this arbitration case was in progress, in circumstances in which Spain faced a significant number of arbitration cases brought by investors after the introduction of the New Regulatory Regime.

384. Without addressing the issue whether – and, if so, to what extent – RDL 17/2019 is relevant for the resolution of the present dispute, the Tribunal deems it proper briefly

¹³³ C-333, MO IET/1045/2014, Article 5(1).

¹³⁴ C-333, MO IET/1045/2014, Article 5(1).

¹³⁵ C-451, Royal Decree-Law 17/2019, 22 November 2019 (“**RDL 17/2019**”).

to refer to this piece of legislation, since it has been discussed by the Parties in their respective Post-Hearing Briefs.

385. At this stage, RDL 17/2019 is worth mentioning in two respects.

386. First, Spain adopted 7.09% (pre-tax) as the target rate of return for the second regulatory period (*i.e.* 2020-2025), “following the methodological and numerical proposals made by the [CNMC] for these activities”.¹³⁶

387. Second, RDL 17/2019 offered to maintain remuneration based on the 7.398% (pre-tax) rate of return through the second and third regulatory periods (*i.e.* 2020-2025 and 2025-2031) for plants whose operators and investors waive their rights to pursue remedies against Spain in court and arbitration, as explained in the minutes of the Council of Ministers accompanying this legislation:

*“The Royal Decree Law aims to provide a stable remuneration framework for facilities that were affected by the changes in the electric power plant remuneration scheme and to help bring proceedings still in progress to an end by giving the owners of facilities in operation before Royal Decree Law 9/2013 the option to accept the reasonable return value set for the first regulatory period, that is, the current period, as the value for the next two consecutive regulatory periods starting on 1 January 2020. That is to say, the reasonable return value would be left at 7.398% until 2031.”*¹³⁷

4. SUMMARY OF THE PARTIES’ CLAIMS AND PRAYERS FOR RELIEF

4.1 The Claimants

388. The Claimants’ request for relief, as updated, is formulated in their Rejoinder on jurisdiction as follows:

“For the reasons stated herein and in their previous submissions, Claimants respectfully request an Award granting it the following relief:

- *a declaration that the Tribunal has jurisdiction under the ECT for all of Claimants’ claims, thereby rejecting Respondent’s jurisdictional objections in full;*
- *a declaration that Spain has violated Part III of the ECT and international law with respect to Claimants’ investments;*
- *compensation to Claimants for all damages they have suffered as set forth in their Memorial on the Merits and in their Reply Memorial on*

¹³⁶ C-451, RDL 17/2019, Preamble and Single Article 1.

¹³⁷ C-453, Council of Ministers, Conclusions, 22 November 2019, p. 19.

the Merits and as may be further developed and quantified during the course of this proceeding;

- *all costs of this proceeding, including (but not limited to) Claimants' attorneys' fees and expenses, the fees and expenses of Claimants' experts, and the fees and expenses of the Tribunal and ICSID;*
- *pre- and post-award compound interest at the highest lawful rate from the Date of Assessment until Spain's full and final satisfaction of the Award; and*
- *any other relief the Tribunal deems just and proper."*

4.2 The Respondent

389. The Respondent's request for relief, as updated, is formulated in its Post-Hearing Brief as follows:

"In view of the arguments put forward in its Memorials, during the Hearing and in the PHB, the Kingdom of Spain respectfully requests the Arbitral Tribunal to:

a) Declares [sic] its lack [sic] jurisdiction regarding two EU Claimants' claims due to the intra-EU jurisdictional objection;

b) Declares [sic] its lack of jurisdiction regarding the TVPEE in any case for Edisun and, subsidiarily to the previous a) petition regarding the two EU Claimants;

c) In the event that the Tribunal were to decide that it has jurisdiction to hear this all or part of the controversy, it rejects all the claims of the Claimants on the merits, since we are in front of an improperly fabricated claim and, in any case, the Kingdom of Spain has not breached in any way, the ECT.

d) Secondarily, dismiss all of the compensation claims of the Claimants in as much as they do not have a right to compensation; and

e) Order the Claimants to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators' fees, and the arbitrators' fees and the fees of the legal representatives of the Kingdom of Spain, their experts and advisers, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred and the date of their actual payment."

5. JURISDICTION

390. Before addressing the Respondent's two jurisdictional objections, the Tribunal recalls that Spain considered introducing another jurisdictional objection at the Hearing, based on the ground that the Claimants allegedly failed to submit a notice of controversy before initiating the present arbitration.¹³⁸ However, the Tribunal considered this new objection inadmissible as tardy,¹³⁹ and the Respondent has subsequently withdrawn it, as expressly confirmed in the latter's PHB.¹⁴⁰

391. The Tribunal therefore considers this issue to be moot.

392. The Tribunal will now turn to Spain's objections to the jurisdiction of this Tribunal over the Dispute (5.1) and over the TVPEE of Act 15/2012 (5.2).

5.1 Does the Arbitral Tribunal Have Jurisdiction Over the Dispute?

5.1.1 The Respondent's Position

393. In substance, Spain contends that the Arbitral Tribunal lacks jurisdiction *ratione personae* and *ratione materiae* to hear an intra-EU dispute since, according to Spain, EU law, which Spain considers to be part of international law, applies to this dispute pursuant to Article 26(6) ECT, and precludes this dispute from being referred to arbitration.

394. According to Spain, this jurisdictional objection concerns the entire dispute raised by the Claimants, with the exception of the claims brought by Edisun, which is incorporated in Switzerland, *i.e.* a non-EU Member State.

5.1.1.1 With Respect to the Claims of DCM and Hannover

(a) The ECT Must Be Interpreted in Accordance with EU Law

395. Spain submits that, for the assessment of its jurisdiction, the Tribunal must apply Article 26(6) of the ECT pursuant to which "*a tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.*" According to Respondent, the reference to "*issues in dispute*" in Article 26(6) extends to jurisdictional issues.¹⁴¹

396. The Respondent further contends that, in an intra-EU relationship, the Tribunal is called upon to interpret and apply the rules and principles of European Union law as international law for two reasons: first, because fundamental freedoms (free movement of capital, freedom of establishment, freedom to provide services, and free

¹³⁸ Tr. Day 1, 140:2 *et seq.*

¹³⁹ Day 1, 144:19 to 145:9.

¹⁴⁰ Resp. PHB, para. 2.

¹⁴¹ Resp. C-Mem., para. 55; Resp. Rej., para. 53.

movement of workers) are affected in any intra-Community investment. Second, because this dispute concerns an essential EU institution: State Aid.¹⁴²

397. In support of its contention, the Respondent notably relies on the reasoning of the arbitral tribunals in the ICSID cases *Electrabel*¹⁴³ and *Blusun*.¹⁴⁴
398. More generally, the Respondent argues that EU law is “*especially relevant*”¹⁴⁵ and has a threefold dimension for the resolution of this dispute: (i) it should be considered as applicable international law to resolve this dispute in accordance with Article 26 of the ECT; (ii) it is the domestic law of any EU Member State; and (iii) it also constitutes a fundamental fact that should shape the legitimate expectations of any investor and particularly of the Claimants.¹⁴⁶
399. The Respondent further recalls that the EU rules on competition law and State Aid, insofar as they are geared to one of the Union’s basic objectives, namely the establishment of the internal market, constitute imperative and public order rules to guarantee that objective.¹⁴⁷
400. Therefore, it is necessary to take into account EU law when interpreting the ECT for the purposes of assessing jurisdiction.

(b) The ECT Must Be Interpreted as Excluding the Jurisdiction of the Tribunal in Intra-EU Disputes

401. According to Spain, there is no conflict between the ECT and EU law, in the sense that the ECT must be interpreted in such a way as to conclude that it was never signed to host intra-EU investment arbitrations. This is because the genesis, objectives, and articles of the ECT lead to the understanding that EU Member States never consented to intra-EU disputes being resolved under the ECT by means of arbitral tribunals.¹⁴⁸
402. Spain submits that EU law precludes the jurisdiction of the Tribunal in this case because such jurisdiction over an intra-EU dispute affects the primacy and autonomy of EU law and in particular the principle of mutual trust and the distribution of powers

¹⁴² Resp. Rej., para. 55.

¹⁴³ **RL-2**, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.122. (“**Electrabel**”): “*In the Tribunal’s view, all EU legal rules are part of a regional system of international law and therefore have an international legal character. This was stated clearly by the ECJ many years ago, in the famous case Van Gend en Loos.*”

¹⁴⁴ **RL-59**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 278 (“**Blusun**”): “*The Parties in effect agree that the applicable law in determining this issue is international law, and specifically the relevant provisions of the VCLT. The Tribunal agrees, but would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy. The Tribunal evidently cannot exercise the special jurisdictional powers vested in the European courts, but it can and where relevant should apply European law as such.*”

¹⁴⁵ Resp. C-Mem., para. 64.

¹⁴⁶ Resp. Rej., para. 60.

¹⁴⁷ Resp. Rej., para. 61.

¹⁴⁸ Resp. Rej., para. 67.

within the EU, including the exclusive competence of the EU to rule on EU State Aid matters.

403. Spain affirms, in that regard, that RD 661/2007 and RD 1578/2008 have been considered as State Aid by the EU Commission,¹⁴⁹ first on 29 February 2016¹⁵⁰ and then in a Decision of 10 November 2017¹⁵¹ where the Commission notably held that: *“any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in Eiser v Spain, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation”*.¹⁵²
404. Spain notably argues that EU Member States were not able to bind each other under Part III of the ECT because Part III covers matters which belong to the exclusive competence of the EU, to the exclusion of Member States, and which could only be negotiated by the EU itself. Given that the arbitration clause introduced by Article 26 refers only to disputes relating to alleged breaches of obligations under Part III of the Treaty as regards the protection of investors and investments, Spain concludes that the dispute-settlement mechanisms established in Article 26 do not apply to intra-EU disputes and that Spain was not able to grant its consent to subject these matters to arbitration.
405. Spain further asserts that the principle of primacy of EU law is reflected in several provisions of the ECT:
- Article 1(2) which defines a Contracting Party as *“a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force”*. According to the Respondent, the Contracting Parties must have agreed to link themselves and Spain cannot be linked under Part III of the ECT because it is part of the European Union;
 - Article 1(3) which defines a Regional Economic Integration Organization (REIO) as *“an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters”*. According to Spain, this provision expressly recognizes that there are matters of the ECT that must be negotiated by the EU, because its Member States no longer have competence to do so, notably

¹⁴⁹ Resp. C-Mem., paras. 64-68; Resp. Rej., paras. 107 *et seq.*

¹⁵⁰ **R-188**, Commission reply, received on 29 February 2016 on Petition No 2520/2014 by Miguel Angel Martínez Aroca (Spanish), on behalf of the Asociación Nacional de Productores e Inversores de Energías Renovables (ANPIER).

¹⁵¹ **RL-3**, Decision of the European Commission, 10 November 2017, regarding the Support for Electricity generation from renewable energy sources, cogeneration and waste (“S.A. 40348 (2015/NN)”), para. 156.

¹⁵² *Id.*, para. 165.

matters concerning the autonomy of the European Union, such as the fundamental freedoms and the State Aid.

- Article 25 which provides that:

“(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as “EIA”) to extend, by means of most favored nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.

“(2) For the purposes of paragraph (1), “EIA” means an agreement substantially liberalizing, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.”

According to Spain, it is “*not questionable*”¹⁵³ that this provision refers to EU law and expressly recognises the principle of supremacy of the latter.

- Article 36(7) which regulates voting rights and provides that: “*A Regional Economic Integration Organization shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organization shall not exercise its right to vote if its member states exercise theirs, and vice versa.*” According to Spain, this provision reflects the fact that the EU and its Member States cannot vote simultaneously. Each of them votes within the scope of its competence. This means that in some matters regulated by the ECT, the Contracting Party is the EU and in others they are its Member States. Spain recalls, in that regard, that the decision as to who is the competent Contracting Party in each matter is not the responsibility of the Arbitral Tribunal, but of the CJEU, as it stated in its Legal Opinion 1/91.

406. *Alternatively*, or in addition to the foregoing, it is Spain’s position that the principles of primacy and autonomy of EU law qualify as international custom, in the sense of Article 38 of the Statute of the International Court of Justice, which the Tribunal must apply as “*applicable rules and principles of international law*” pursuant to Article 26(6) ECT.

¹⁵³ Resp. C-Mem., para. 138.

407. Spain recalls that international custom is the evidence of a general practice accepted as law. The material element of its existence is repeated and consistent practice, while the subjective element is the *opinio iuris* or acceptance that such practice is law.
408. Spain argues that, in the present case, the autonomy and primacy of EU law meet both criteria and therefore qualify as international custom.
409. Spain affirms, in that regard, since the judgment of the CJEU in the *Costa v. ENEL* case, there can be no doubt that EU law takes precedence. According to Spain, the fact that the principle of primacy constitutes a consolidated, consistent and reiterated customary practice is shown in the many examples of disconnection clauses found in international treaties dealing with intra-EU matters.
410. By way of example, Spain explains that the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not have a disconnection clause, but that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters replaced the former in the following terms: “1. *This Regulation shall, as between the Member States, supersede the provisions of the Brussels Convention of 1968, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty establishing the European Community.*”
411. According to the Respondent, this means that the entry into force of the Council Regulation, an instrument of EU law, entailed the disconnection from the previous international treaty, in the same terms as those that are invoked here with respect to the ECT, in intra-EU cases.¹⁵⁴
412. Spain notably refers to the replacement in intra-EU cases of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters by Regulation 1348/2000 (Article 20), which constitutes, in the eyes of Spain, another manifestation of the principle of primacy and autonomy of EU law. Spain also prays in aid a number of other international conventions which, according to it, contain implied or express disconnection clauses that would reflect the existence of a “*repeated and consistent application of this international custom*” (*i.e.* the primacy of EU law).¹⁵⁵
413. Spain argues that, in all these cases, there is a *de facto* disconnection by interpretation and application of Union law. The coexistence between the intra-EU regime for Member States between themselves and the application of international

¹⁵⁴ Resp. Rej., para. 98.

¹⁵⁵ Resp. Rej., para. 101.

treaties for third countries in their relations with the Member States on the same matter is a habitual and undoubted practice of public international law.¹⁵⁶

414. According to Spain, none of these cases has triggered a denunciation of an international treaty or a reaction from a third country on the application of EU law, all of which leads to the conclusion that it is wrong to consider that the ECT applies to intra-EU disputes because there is no express disconnection clause in the ECT.¹⁵⁷

(c) In Case of Conflict Between the ECT and EU Law, EU Law Must Prevail

415. If there is a conflict between the ECT and EU law, it is Spain's position that the Tribunal should apply Articles 30(3), 34(4) and 59 of the Vienna Convention on the Law of Treaties (VCLT) and not Article 16 of the ECT to resolve that conflict, and that the application of those provisions of the Vienna Convention would inexorably lead to the application of EU Law.¹⁵⁸
416. Should the Tribunal decide that the conflict should be resolved on the basis of Article 16 ECT, the ECT can in no way be considered to prevail because the ECT neither introduces substantive rights more favorable to investors than EU law, nor does Article 26 of the ECT provide for arbitration as the sole dispute resolution mechanism.
417. Furthermore, if one examines the documentation that the Claimants have submitted in this arbitration, it is clear that when deciding to invest in Spain they took into account the regulatory framework of the EU; there is not a single mention of the ECT.
418. Finally, according to Spain, Article 16 of the ECT is designed so that if an investment treaty grants more favorable treatment to the investor than the ECT, the investment treaty should prevail, and vice versa. However, EU Law is not an investment treaty that is disciplined by Article 16 ECT.
419. In conclusion, whatever the rule applied (Article 16 ECT or VCLT), Spain contends that the result is the same: EU law should prevail and lead to the conclusion that the jurisdiction of the Tribunal is excluded.¹⁵⁹

(d) Spain's Position is Confirmed by the Rulings of the CJEU in the *Achmea* and *Komstroy* Cases

420. Spain affirms that its position is confirmed by various EU institutions and rulings.
421. First and foremost, Spain heavily relies on the rulings of the Court of Justice of the European Union ("**CJEU**") in *Achmea* and *Komstroy*.

¹⁵⁶ Resp. Rej., para. 103.

¹⁵⁷ Resp. Rej., para. 104.

¹⁵⁸ Resp. Rej., para. 69.

¹⁵⁹ Resp. Rej., paras. 144 *et seq.*

i. The CJEU Ruling in the *Achmea* Case

422. Spain places great emphasis on the judgment issued on 6 March 2018 by the CJEU in Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV* (“**Achmea**”) where the CJEU held that “*an international agreement cannot violate the order of powers set by the Treaties nor, therefore the autonomy of the European Union’s legal system, whose observance guarantees the Court of Justice of the European Union*”.¹⁶⁰
423. According to Respondent, the *Achmea* ruling calls to draw the following conclusions:
- An arbitral tribunal is not part of the judicial system of the European Union as opposed to the courts of Member States, and therefore it is not part of the European judicial system. Therefore, an arbitral tribunal cannot be classified as a “*Member State Tribunal*” in the sense of article 267 of the TFEU (para. 46) and for that reason, it does not have the right to submit a preliminary question to the CJEU.
 - Investment arbitral tribunals arise from a treaty in which the Member States agree to get away from their own tribunals’ jurisdiction and, therefore, from the judicial remedies system which the second paragraph of Article 19(1) of the ECT requires them to establish in areas covered by EU Law. And this, despite the fact that those disputes subject to the arbitral tribunals can affect the application or interpretation of EU legislation and therefore should be subject to the EU judicial system, according to article 19 ECT and 344 TFEU.
 - Through the arbitral clause, the Member States which are part of the BIT established a mechanism to resolve conflicts between an investor and a Member State that could prevent these disputes from being resolved in a way that guarantees the full efficacy of EU law, although they may affect the interpretation or application of this law.
424. According to the Respondent, *Achmea* is applicable to intra-EU disputes brought under the ECT because the three criteria analyzed in *Achmea* for holding that an arbitration clause is incompatible with EU law are met in the present case, *i.e.* (i) the Arbitral Tribunal is called on to interpret and/or apply EU law in order to solve the dispute; (ii) the principle of EU autonomy is not respected because the CJEU cannot exert its function of “*ensuring the full effectiveness of the EU regulations in all Member States and judicial protection of the rights of all people under said regulations*”; and (iii) the arbitral award is not subject to review by a tribunal of a Member State.

¹⁶⁰ Resp. C-Mem., para. 69; see also **RL-5**, Judgment of CJEU (Court of Justice of the European Union) Case C-284/16, *Republic of Slovakia v. Achmea BV*, 6 March 2018, (“**Achmea judgment** or **Judgment of CJEU Case C-284/16**”) paras. 45-55, and in part. 55.

425. The Respondent also relies on Opinion 1/17 (CETA)¹⁶¹ where the CJEU reiterated the *Achmea* reasoning.

ii. The CJEU Ruling in the *Komstroy* Case

426. Spain further affirms that its objection to jurisdiction is plainly supported by the judgment issued by the Grand Chamber of the CJEU in Case C-741/19, *Republic of Moldova v. Komstroy LLC* (“**Komstroy judgment**”, as previously defined) in which the CJEU notably held that:

“Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State”.¹⁶²

427. In substance, the Respondent argues that this judgment contains three important findings.

428. First, according to Spain, this judgment confirms that the ECT is an EU act which forms part of the EU legal framework and must be interpreted, for intra-EU affairs, in conformity with the totality of the EU legal framework.¹⁶³ This judgment also “*underlines that foreign direct investment is an exclusive competence of the EU since the entry into force of the Lisbon Treaty (paragraph 26) and, consequently, articles 10 and 26 of the ECT fall under the exclusive competence of the EU as ISDS is an essential part of the foreign direct investment regime*”.¹⁶⁴

429. Second, the *Komstroy* judgment “*reiterates that an international agreement cannot affect the allocation of powers laid down by the EU Treaties and, hence, the autonomy of the EU legal system*”.¹⁶⁵ According to Spain, the autonomy of EU law is an “*essential point*” because “[such] *autonomy is consubstantial to the integration process of the EU*”.¹⁶⁶ As such, it must be respected by all Member States under all sources of international law.¹⁶⁷

430. Third, relying notably on paragraphs 62 and 63 of the *Komstroy* judgment, Spain contends that such decision is “*pretty clear*” on the fact that “*the ECT cannot be interpreted as allowing intra-EU investment arbitration*”.¹⁶⁸

¹⁶¹ **RL-123**, Opinion 1/17 of the Full Court of the CJEU, 30 April 2019, Opinion pursuant to Article 218(11) TFEU— Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) (“**CJEU Opinion 1/17**”).

¹⁶² **RL-167**, Judgment of EUCJ Case C-741/19 (*Republic of Moldova v. Komstroy LLC*, successor in law to the company Energoalians), 2 September 2021 (“**Komstroy judgment**” or **Judgment of EUCJ Case C-741/19**”), para. 66.

¹⁶³ Respondent’s *Final comments on the Komstroy judgment*, 5 October 2021, paras. 34-35.

¹⁶⁴ *Id.*, para. 36.

¹⁶⁵ *Id.*, para. 38.

¹⁶⁶ *Id.*, para. 39.

¹⁶⁷ *Id.*, paras. 42-43.

¹⁶⁸ *Id.*, para. 44.

431. In its concluding remarks, the Respondent affirms that the *Komstroy* judgment is *res judicata* and binding on Germany (including German investors) and Spain. In particular, according to Respondent, “*Member States have committed by the ratification of the EU Treaties (being the Lisbon Treaty ex post to the ECT) to accept the compulsory and binding effect of the CJEU rulings and there is a ruling saying crystal clear that the ECT cannot be interpreted as accepting intra-EU investment arbitration.*” The Respondent notes, in that regard, that the Lisbon Treaty would constitute not only *lex posterior* but also *lex specialis*. Indeed, according to Respondent, since the ratification of the Lisbon Treaty, the foreign investment regime is an exclusive competence of the EU.¹⁶⁹
432. In other words, the *Komstroy* judgment confirms, according to Respondent, that the Tribunal lacks jurisdiction over this intra-EU arbitration.¹⁷⁰

(e) Spain’s Position is Also Confirmed by Other EU Institutions

i. The European Commission

433. In addition to the foregoing, Spain has relied on the position of (i) the EU Commission, as expressed both as *amicus curiae* in this arbitration and publicly in other *fora*, as well as (ii) EU Member States.
434. In particular, the Respondent contends that the EU Commission provided evidence in its *amicus curiae* brief that the ECT was signed by EU Member States only on the grounds that, under EU Law, the matters addressed by the ECT so demanded it. Thus, Article 26 ECT was never intended to be applied to disputes between Member States.
435. According to Spain, the EU Commission also provided evidence of the significance of the *Achmea* judgment and its applicability to this dispute. The EU Commission further demonstrated that in the event of a conflict between the ECT and EU law, EU law must prevail. Based on the above, the EU Commission concluded that Article 26 ECT cannot be regarded as an offer to arbitrate between Member States of the EU.
436. Finally, Respondent recalls that the EU Commission recognized that the support mechanisms for renewable energies that are the subject of this arbitration constitute State Aid. Also, the Commission recalled that there is no immutable right to a certain State Aid, and that State Aid must incorporate the expectations of a minimally diligent investor.
437. In support of its contention, Respondent has also referred to (i) the EC Communication CM(2018) 574 of 19 July 2018 (filed as Annex 1 to the EC First Application for leave to intervene)¹⁷¹ in which the EU Commission considered that

¹⁶⁹ *Id.*, para. 50.

¹⁷⁰ *Id.*, para. 52.

¹⁷¹ Annex 1, p. 3: “*The Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-*

the *Achmea* reasoning applied equally to intra-EU arbitrations brought under Article 26 of the ECT, as well as to (ii) the Decision of 13 November 2017 of the EU Commission in *Ayudas de Estado S.A.*¹⁷²

ii. The EU Member States

438. The Respondent also recalls that several EU Member States have made declarations excluding the jurisdiction of arbitral tribunals in intra-EU disputes and relies, in this regard, on the First Declaration of 15 January 2019 signed by 22 Member States,¹⁷³ the Second Declaration of 16 January 2019 (Malta, Finland, Luxemburg, Slovenia and Sweden),¹⁷⁴ and the Third Declaration of 16 January 2019 signed by Hungary.¹⁷⁵

(f) Spain's Position Has Also Been Endorsed by the Arbitral Tribunal in the Green Power Award

439. Finally, Spain contends that its position has been recently endorsed in the *Green Power* award in which an SCC arbitral tribunal sitting in Stockholm decided that it lacked jurisdiction to hear an ECT-based dispute between a Danish investor and Spain,¹⁷⁶ as detailed in its observations of 18 July 2022.¹⁷⁷

440. The Respondent notably submits that the fact that the seat of the arbitral tribunal in *Green Power* was in Stockholm was not decisive in the conclusion reached by the

State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States."

¹⁷² **RL-3**, Decision No. SA.40348 (2015/NN) of the European Commission, 10 November 2017 ("**State Aid S.A. 40348 (2015/NN)**"): "any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in *Eiser v Spain*, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation."

¹⁷³ **C-341**, Declaration of the Representatives of Governments of the Member States on the *Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union*: "Furthermore, international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied."

¹⁷⁴ **C-342**, Declaration of the Representatives of Governments of the Member States on the *Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union*: "it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty."

¹⁷⁵ **C-343**, Declaration of the Representative of the Government of Hungary on the *Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union*: "the *Achmea* judgment concerns only the intra-EU bilateral investment treaties" and "does not concern any pending or prospective arbitration proceedings initiated under the ECT... The ongoing and future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States"

¹⁷⁶ **RL-175**, *Green Power K/S and SCE Solar Don Benito v. Kingdom of Spain*, SCC-2016/135, Award, 16 June 2022 ("**Green Power**").

¹⁷⁷ Respondent's Comments on the *Green Power* Award, 18 July 2022 ("**Resp. Comments on Green Power award**").

tribunal, since the latter found that EU law applied to the intra-EU objection either as international law or an integral part of Swedish national law, and that, as a result, there had never been a valid offer of Spain to arbitrate intra-EU disputes based on the ECT (which the tribunal held to be an EU act forming part of European law).¹⁷⁸ The Respondent further observes that the arbitral tribunal in *Green Power* held that subsidies to the renewable energy producers were state aid according to EU Law and that upholding jurisdiction over such disputes would violate EU law and the autonomy thereof.¹⁷⁹ According to Spain, the *Green Power* tribunal also gave weight to the rulings in *Achmea* and *Komstroy*, noting that the rulings of the CJEU have interpretative value and that such interpretation has *ex tunc* effects.¹⁸⁰

441. More generally, Spain submits that the value of the *Green Power* award is “undeniable given that it is the first one that, by carrying out an in-depth analysis of the nature and status of the Parties in dispute (i.e. a European investor vs. an EU Member State) as members of a REIO such as the European Union and the value that this has for the purposes of the ECT, has declared the lack of jurisdiction of an Arbitral Tribunal to hear an intra-EU dispute”.¹⁸¹

5.1.1.2 With Respect to the Claims of Edisun¹⁸²

442. Spain does not dispute that its intra-EU jurisdictional objection does not extend to Edisun, which is a Swiss corporation and is therefore not an EU investor.
443. However, Spain maintains that EU Law, as international law, is applicable to the merits of this dispute in relation to all the Parties in the controversy, including Edisun.
444. In addition, even if EU Law were not applicable (*quod non*), EU Law would nevertheless frame the expectations an investor might have.
445. Indeed, according to Spain, the dispute this arbitration is addressing is an international dispute. Therefore, to define the applicable law to any international dispute, it is necessary to start from the enumeration of the sources of international law, as provided by Article 38 of the ICJ Statute. Spain submits that, in accordance with all the direct sources of international law, EU Law is applicable as international law to the controversy and also to Edisun’s investments.

¹⁷⁸ *Id.*, para. 5.

¹⁷⁹ *Id.*, para. 6.

¹⁸⁰ *Id.*, paras. 12-16.

¹⁸¹ *Id.*, para. 19.

¹⁸² Resp. PHB, Section III, B.

5.1.2 The Claimants' Position

5.1.2.1 With Respect to the Claims of DCM and Hannover

446. In substance, the Claimants argue that the Tribunal has jurisdiction under the ECT. Claimants submit that Spain's objection to jurisdiction is unfounded, and that EU law is irrelevant to the determination of the Tribunal's jurisdiction.

(a) Interpretation of the ECT

447. According to the Claimants, the jurisdiction of the Tribunal derives from the plain terms of the ECT (Articles 26(3) and (4)), which contain no exception for intra-EU arbitration, as confirmed by the arbitral tribunal in *Eskosol*.¹⁸³

448. The Claimants contend that the Tribunal must interpret the provisions of a treaty with reference to the natural and ordinary meaning of words, following Articles 31 and 32 of the Vienna Convention. The plain meaning of the terms of Article 26(3) is that every Contracting Party to the ECT, including every EU Member State that has signed the ECT, has given its "unconditional consent" to settle investor-State disputes in accordance with that article. Apart from the limitations in subparagraphs (b) and (c) of Article 26(3), the ECT does not contain any other exceptions to the Contracting Parties' consent given in Article 26.¹⁸⁴ The Claimants argue that Spain has unconditionally consented to the jurisdiction of the Tribunal as it has not invoked either of the two exceptions to consent under Articles 26(3)(b) and (c).

449. The ECT, interpreted in accordance with Articles 31 and 32 of the Vienna Convention, establishes the Tribunal's jurisdiction.¹⁸⁵ Article 26(6) of the ECT¹⁸⁶ does not apply to the Tribunal's assessment of its jurisdiction but only to the merits.¹⁸⁷ Indeed, the Claimants argue that the word "*dispute*" in "*issues in dispute*" is defined by Article 26(1) which refers to disputes relating to Part III of the ECT which deals with the substantive protections granted by the ECT and does not include the provisions on dispute settlement, as confirmed by the arbitral tribunal in *Vattenfall*.¹⁸⁸

450. In addition, the Claimants refute the existence of any express or implied disconnection clause in the ECT which would exclude intra-EU disputes from the scope of the ECT.¹⁸⁹

451. According to the Claimants, EU Member States could and would have included a disconnection clause if that had been their intent. Yet, the *travaux préparatoires*

¹⁸³ Cl. Reply, Section II, A., 1; Cl. Rej., para. 19.

¹⁸⁴ Cl. Rej., paras. 15 *et seq.*

¹⁸⁵ Cl. Reply, Section II, A., 1), a.; Cl. Rej., para. 26.

¹⁸⁶ ECT, Article 26(6): "A Tribunal established [to hear this dispute] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

¹⁸⁷ Cl. Reply, paras. 63 *et seq.*

¹⁸⁸ Cl. Reply, para. 65, relying on **CL-98**, *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 ("**Vattenfall, Decision on Achmea Issue**").

¹⁸⁹ Cl. Reply, Section II, A., 1), c.; Cl. Rej., para. 10.

demonstrate that the European Commission did try to introduce such a clause, but that it was ultimately dropped from the draft treaty. The fact that it was proposed and yet not adopted disproves the existence of such a clause.¹⁹⁰

452. The Claimants further note that neither Spain nor Germany has made exceptions to the applicability of the ECT upon ratification. Indeed, such a reservation could not have been made because of Article 46 of the ECT, which provides that “[n]o reservations may be made to this treaty”.¹⁹¹ In addition, after ratification, the European Commission or EU Member States could have invoked the amendment mechanism of the ECT, had they wished to add an unequivocal disconnection clause. Yet, no ECT Contracting Party has taken such steps to date.¹⁹²
453. The Claimants further address the Respondent’s argument according to which Part III of the ECT is inapplicable among the members of the EU because the EU is an REIO. The Claimants do not dispute that the ECT recognizes that REIOs can be party to the ECT but disagrees with the point that such recognition operates a transfer of exclusive authority from Contracting Parties to the relevant REIO.¹⁹³
454. More generally, the Claimants recall that ICSID cases have unanimously confirmed that the ECT applies to intra-EU disputes and emphasize the fact that not a single tribunal has declined its jurisdiction on the basis of the intra-EU objection.¹⁹⁴

(b) EU Law is Irrelevant to the Determination of the Jurisdiction of the Arbitral Tribunal

455. The Claimants further submit that, even if Article 26(6) of the ECT were deemed to apply to jurisdictional issues, EU law would not qualify as “*rules and principles of international law*”, as it is regional law, not universally accepted principles of international law. The Claimants notably refer, in that regard, to the findings of the arbitral tribunals in *Vattenfall* and *Eskosol*.¹⁹⁵
456. The Claimants recall that numerous tribunals have rejected Spain’s argument that the reference to “international law” in Article 26(6) of the ECT included EU law, which

¹⁹⁰ C-338, Note for the Attention of Ambassador Rutten from Secretary General Clive Jones, 19 February 1993 (“**Note for Ambassador Rutten**”).

¹⁹¹ Cl. Reply, para. 79.

¹⁹² Cl. Reply, para. 86.

¹⁹³ Cl. Reply, para. 89-92.

¹⁹⁴ Cl. Reply, Section II, A., 2; Cl. Rej., para. 9. For the sake of clarity, the Tribunal recalls that this assertion was made prior to the issuance of the *Green Power* award.

¹⁹⁵ Cl. Reply, paras. 67 *et seq.*; para. 115: “*The Tribunal considers that, although EU law is undoubtedly international law, it is not general international law, but rather a special species of international law. The narrower question with which the Tribunal is faced here is whether EU law is encompassed in the expression “rules and principles of international law.”*”; para. 117: “*Similar to the Vattenfall tribunal, this Tribunal has no doubt that the EU Treaties qualify as one type of international law, namely the one described in Article 38(1) of the ICJ Statute as “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.” But that is not the operative question, since ECT Article 26(6) does not state that all other international treaties concluded as between the host State and the investor’s home State are automatically incorporated into the applicable law of the ECT. Rather, Article 26(6) uses the particular phrase “applicable rules and principles of international law.” Textually, this phrase incorporates two different notions: (a) “principles of international law,” and (b) “rules ... of international law”*”; Cl. Rej., para. 31.

would have required an explicit inclusion by the drafters of the ECT. Yet, the Arbitral Tribunal's jurisdiction is not determined on the basis of the European legal order, and it is therefore not subject to any requirements of such legal order.¹⁹⁶

457. Holding otherwise would mean that there would be different kind of obligations applicable to different Contracting Parties to the ECT (*i.e.* EU vs. non-EU), which would be contrary to the Vienna Convention, in particular Article 31(1).¹⁹⁷
458. The Claimants further observe that EU State aid law goes to the merits of the case and is irrelevant for the purposes of assessing jurisdiction. In any event, the Claimants recall that RD 661 and RD 1578 have never been qualified as illegal State aid by the EU Commission.

(c) Even if EU Law is Relevant, There Is No Conflict Between the ECT and EU Law

459. The Claimants submit that, even assuming that EU law would be relevant for assessing jurisdiction, there is no conflict between the ECT and EU law:¹⁹⁸ (i) the ECT and EU law do not address the same subject matter and, (ii) even if they did, the ECT and EU law are not incompatible. Rather, the ECT complements and enhances the protections provided to EU investors under EU law.¹⁹⁹
460. First, the Claimants point out that the ECT and EU law do not share the “same subject matter”, within the meaning of Article 30 of the Vienna Convention, insofar as the ECT grants investors a right to international arbitration, which the EU legal framework does not offer.²⁰⁰
461. Second, even if the ECT and EU treaties were to be considered as having the same subject matter, the Claimants submit that there is no incompatibility between the ECT and the EU legal framework. The Claimants stress that there is no legal rule or principle of EU law preventing the Tribunal from exercising its functions in accordance with Article 26 of the ECT, relying on the *Electrabel* tribunal's finding.²⁰¹ The

¹⁹⁶ Cl. Reply, paras. 71 *et seq.*

¹⁹⁷ Cl. Reply, para. 41; Cl. Rej., Section I, A., 2).

¹⁹⁸ Cl. Reply, Section II, C.; Cl. Rej., para. 51.

¹⁹⁹ Cl. Reply, para. 171; Cl. Rej., paras. 33 and 41.

²⁰⁰ Cl. Reply, paras. 167 *et seq.* **CL-151**, *Eskosol*, para. 146: The Tribunal saw “no reason to depart from consistent case law finding that the EU Treaties deal with a different subject matter than investment treaties.... Moreover, although the “same subject matter” test in Article 30 [VCLT] is stated in terms of treaties as a whole, the key parts of the ECT for present purposes (ECT Parts III and V) address very specific topics of investment promotion and protection, and involve substantive and procedural protections that are not coincident with (or arguably, even of the same nature as) those offered under the EU Treaties’ internal market provisions... Not surprisingly given these different regimes, the content of the standards is far from coextensive. The mere fact that protections under both regimes could be afforded in certain circumstances to the same investors—at least in the context of direct rather than indirect investment—does not conclusively demonstrate that the ECT and the EU Treaties themselves have the same subject matter for purposes of international law.”

²⁰¹ Cl. Reply, para. 170; Cl. Rej., para. 42. **CL-2**, *Electrabel*, para. 4.196: “the Tribunal concludes that there is in this case no material inconsistency between the ECT and EU law.”

Claimants also refer to the *STEAG* tribunal, which found that Article 26 of the ECT and Article 344 of the TFEU “*can coexist and be applied simultaneously*”.²⁰²

(d) In Case of Conflict Between EU Law and the ECT, the ECT Would Prevail

462. The Claimants further contend that, even if there were a conflict between ECT and EU law, the ECT would prevail.
463. The Claimants disagree with the Respondent’s argument that EU law trumps all other international law for Members States and that the adoption of the Lisbon Treaty, which entered into effect after the ECT, granted the EU control over intra-EU energy investments. The Claimants submit that such a conclusion would constitute a violation of the explicit terms of the ECT, as well as the Vienna Convention.
464. Indeed, the *lex specialis* conflict rule in Article 16 of the ECT should apply and lead to the conclusion that the ECT prevails over EU law, since its provisions, in particular its dispute- settlement mechanism (Article 26) giving a choice of forum to investors, are more favorable to investors than the EU treaties.²⁰³
465. In support of their interpretation, the Claimants refer to a number of arbitral awards including, *inter alia*, *Vattenfall* where the tribunal held that Article 16 ECT poses an “*insurmountable obstacle*” to the proposition that EU law prevails over the ECT.²⁰⁴
466. In addition, according to *Vattenfall*, the *lex posterior* rules are subsidiary to the *lex specialis* conflict rule and it is not established that the EU Treaties, as revised, would be deemed as posterior to the ECT, since the relevant EU provisions already existed in the earlier versions of the EU Treaties.²⁰⁵

(e) The CJEU Rulings in *Achmea* and *Komstroy* Are Irrelevant

467. According to the Claimant, *Achmea* is irrelevant to this dispute for the following reasons.²⁰⁶
468. *First*, *Achmea* does not extend to the ECT: (i) the *Achmea* judgment is concerned only with Bilateral Treaties between EU Member States to which the EU is not a

²⁰² Cl. Comments on the *Komstroy* judgment, 19 October 2021, p. 7.

²⁰³ Cl. Reply, Section II, C.; Cl. Rej., 32-33.

²⁰⁴ Cl. Reply, para. 165. Claimants also refer to **CL-6**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID No. ARB/14/1, Award, 16 May 2018, para. 149 (“**Masdar**”); **CL-144**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC 2015/095, Final Award, 5 December 2018, para. 341 (“**Greentech**”); **CL-137**, *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 141 (“**Plama, decision on jurisdiction**”).

²⁰⁵ Cl. Rej., Section II, B., 3), para. 50. **CL-98**, *Vattenfall*, Decision on *Achmea* Issue, paras. 217-218: “*There are several difficulties with applying the rule of lex posterior to the present case. One is that the Tribunal agrees with Claimants that the general rule of lex posterior contained in Article 30 VCLT is a subsidiary one. Where a treaty includes specific provisions dealing with its relationship to other treaties, such as appear in Article 16 ECT, the lex specialis will prevail. In addition, it is by no means clear that the EU Treaties are the “later treaty” under Article 30 VCLT. The current Articles 267 and 344 TFEU have existed in substantively similar form since a time prior to the conclusion of the ECT, and have only been renumbered in the successive versions of the EU Treaties.*”

²⁰⁶ Cl. Reply, Section II, B., 1); Cl. Rej., Section I, A., 2).

Party²⁰⁷ and (ii) the governing law provision of the Netherlands-Slovakia BIT at issue in *Achmea* that was of concern to the ECJ is not present in the ECT.²⁰⁸

469. *Second*, the ruling of an EU Court is not binding on this ECT Tribunal: see notably *Eskosol*, para. 178: “*the decisions of the ECJ with respect to EU law are not binding on an international investment tribunal empaneled under a different legal order*”.²⁰⁹
470. *Third*, arbitral tribunals continue to reject the intra-EU objection post-*Achmea*.²¹⁰
471. *Fourth*, *Achmea*'s theoretical future impact (if any) upon enforcement is not a relevant issue for this Tribunal.²¹¹
472. In the same vein, the Claimants consider that the CJEU ruling in *Komstroy* is equally irrelevant (and flawed) for the purposes of determining the jurisdiction of the Tribunal in the present case, for the following reasons.²¹²
473. *First*, a decision from the CJEU is not relevant to — much less binding upon — this ECT and ICSID Tribunal and therefore cannot deprive it of jurisdiction. Claimants indeed recall that this Tribunal is constituted under the ECT, which is “*the exclusive source of its jurisdiction*”, as confirmed by several ICSID tribunals, notably in *ESPF et al. v. Italy*, *Cube et al. v. Spain*, and *Eiser v. Spain*. The Tribunal must determine its own jurisdiction based exclusively on the jurisdictional requirements of the ECT and the ICSID Convention, therefore the Claimants submit that a decision from a court of the European legal order can have no bearing on the Tribunal's determination.²¹³
474. *Second*, the Claimants submit that, even if there is now a conflict between the ECT and EU law as a result of the *Komstroy* judgment, such conflict would have to be solved by reference to Articles 16 and 26 of the ECT, which remain valid, binding, and unmodified unless and until the ECT is amended pursuant to its terms (*i.e.* the procedure provided in Article 42), or terminated, and none of this has occurred.²¹⁴
475. *Third*, in case of conflict between the ECT and EU law, the Tribunal would have to apply Article 16 of the ECT, as the *lex specialis* conflict rule and resolve such conflict in favor of intra-EU arbitration. Indeed, according to Claimants, “*Article 16 of the ECT is the “firewall” that provides for the supremacy of the ECT over any less favorable legal rule—including a rule relating to “dispute resolution”—found or based in another treaty, including the EU Treaties*”, as confirmed by a number of ICSID tribunals,

²⁰⁷ Cl. Reply, Section II, B., 1), a.; Cl. Rej., para. 34.

²⁰⁸ Cl. Reply, Section II, B., 1), b.; Cl. Rej., para. 34.

²⁰⁹ Cl. Reply, Section II, B., 2).

²¹⁰ Cl. Reply, Section II, B., 3); Cl. Rej., Section I, A., 3).

²¹¹ Cl. Reply, Section II, B., 4).

²¹² Cl. Comments on the *Komstroy* judgment, 19 October 2021.

²¹³ *Id.*, pp. 2-3.

²¹⁴ *Id.*, pp. 4-5.

notably in *SolEs Badajoz v. Spain*, *Masdar v. Spain*, and *Vattenfall v. Spain*, regardless of which treaty is later in time.²¹⁵

476. *Fourth*, the Claimants submit that, in any event, the *Komstroy* judgment is irrelevant because such decision cannot apply retroactively to the determination of this Tribunal's jurisdiction (which was established on 17 October 2017), or retroactively invalidate Spain's consent to arbitrate.²¹⁶ Claimants refer on this point to "*the fundamental and well-settled principle of international law that events taking place after the date on which judicial proceedings were instituted—including subsequent changes in the law—are irrelevant to a determination of jurisdiction*".²¹⁷

477. *Fifth*, it is the Claimants' position that the CJEU's analysis in the *Komstroy* judgment is flawed, because it assumed facts that are contradicted by contemporaneous evidence regarding the intended purpose and scope of the ECT. In particular, after noting that the question of the compatibility of the ECT with EU law was raised by the CJEU *ultra vires*, the Claimants submit that this decision was based on two incorrect assumptions.

- The first incorrect assumption of the CJEU is that the ECT requires an arbitral tribunal to apply EU law and that this violates the autonomy of the EU legal order. According to the Claimants, this is incorrect because EU law is not part of the governing law under the ECT.
- The second incorrect assumption is to disregard the relevance of the multilateral (and international) character of the ECT by claiming that the ECT merely contains a bundle of bilateral obligations between two Contracting Parties and thus is comparable to intra-EU BITs such as the one at issue in *Achmea*. According to the Claimants, this is equally incorrect because the *travaux préparatoires* of the ECT show that the ECT was considered by all Contracting Parties, including the EU, as containing multilateral rights and obligations and as applying intra-EU.²¹⁸

(f) The Declarations of the EU Commission and EU Member States Are Irrelevant

478. In response to the EU Commission's applications to intervene as a non-disputing party, the Claimants contended that the applications did not satisfy the standard for non-disputing parties under ICSID Arbitration Rule 37(2), insofar as the Commission (i) would not bring a perspective, particular knowledge or insight to the proceeding

²¹⁵ *Id.*, pp. 5-7.

²¹⁶ *Id.*, p. 8.

²¹⁷ *Id.*; see also Cl. letter to the Tribunal of 17 September 2021, p. 3, citing Christoph Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009).

²¹⁸ *Id.*, pp. 8-10.

different to the Respondent's and (ii) did not have a valid "significant" interest in this proceeding.²¹⁹

479. As to the merits of the EU Commission's arguments, the Claimants submit that:
- Numerous investment treaty tribunals have rejected the intra-EU objection, including in cases in which the tribunals issued their awards after the ECJ's *Achmea* decision;²²⁰
 - The ECT does not contain any express or implied disconnection clause;²²¹
 - The Commission's argument according to which Article 26(6) of the ECT makes EU law applicable law under the Treaty would be a "back door" supersession of the governing law provision of the ECT and would therefore be impermissible under the Vienna Convention.²²²
480. The Claimants also challenge the relevance of some other acts of the CJEU relied upon by the Respondent in support of the intra-EU objection. In particular, the Claimants contend that the Respondent's reliance on CJEU's Legal Opinion 1/91 is irrelevant because the Tribunal will not need to interpret or apply EU law to resolve the present dispute.²²³
481. The Claimants contend that the Commission relies on its own public communications concerning the *Achmea* judgment, which carry no legal weight, and is not legally authorized to interpret a judgment of the CJEU, as that power resides with the EU's judicial institutions rather than the EU's executive branch.²²⁴ The Claimants criticize the EU Commission's interpretation as serving its own political agenda of ending intra-EU investment arbitration, in disregard of the protections granted to investors in investment treaties.²²⁵
482. In addition, the Claimants hold that the Declarations of the EU Member States demonstrate that there is no common ground within the EU as to the meaning of *Achmea*.
483. In any event, according to the Claimants, the declarations of the EU Member States are political statements which are not EU legal instruments and do not have an

²¹⁹ Cl. Response to the EU Commission's Request to Intervene, 16 November 2018; Cl. Response to the EU Commission's Second Request to Intervene, 19 April 2019.

²²⁰ Cl. Response to the EU Commission's Request to Intervene, p. 5-6; Cl. Response to the EU Commission's Second Request to Intervene, p. 6-7.

²²¹ Cl. Response to the EU Commission's Request to Intervene, p. 7-10; Cl. Response to the EU Commission's Second Request to Intervene, p. 7-12.

²²² Cl. Response to the EU Commission's Request to Intervene, p. 11.

²²³ Cl. Reply, paras. 174-177.

²²⁴ Cl. Response to the EU Commission's Second Request to Intervene, p. 15.

²²⁵ *Id.*, p. 17.

interpretative effect regarding EU law (as notably held by the ICSID tribunal in *Rockhopper v. Italy*) and therefore are not relevant to this dispute.²²⁶

(g) The *Green Power* Award Is Also Irrelevant and, in Any Event, Unpersuasive

484. Finally, the Claimants submit that the *Green Power* award is irrelevant and unpersuasive and must be distinguished from the present dispute.²²⁷
485. First, the *Green Power* tribunal was seated in Stockholm and applied the SCC Arbitration Rules. In contrast with the present case, the ICSID Convention did not apply. Because the tribunal was seated in the EU, the *Green Power* tribunal found that the intra-EU objection required consideration of EU law. While Claimants disagree with that view, it is irrelevant here, because as a proceeding governed by the ICSID Convention, the Tribunal is not seated in the EU, and hence EU law does not apply to the Tribunal's analysis of jurisdiction under the ECT and the ICSID Convention.²²⁸ The Claimants further recall that, pursuant to Article 25(1) of the ICSID Convention, once consent to ICSID arbitration has been given, it may not be withdrawn unilaterally.
486. Second, the Claimants also contend that the *Green Power* award is unpersuasive. First, it adopts an extreme view of the relevant factual and legal issues that, to date, has not been adopted by any other arbitral tribunal, it being recalled that at least 45 ECT tribunals and ICSID annulment committees — including at least seven SCC tribunals seated in the EU — have rejected the intra-EU jurisdictional objection. Second, the reasoning of the *Green Power* tribunal is faulty and illogical. The Claimants notably argue (i) that the tribunal misapplied international law on treaty interpretation; (ii) that it incorrectly interpreted and applied the so-called principle of EU “primacy”, (iii) that it failed to take appropriate account of the drafting history of the ECT, including the negotiating parties' refusal to allow the EC to include a disconnection clause for intra-EU disputes, (iv) that it conflated its mandate to determine a dispute under the ECT with the EC's competence to determine the compatibility of state aid regimes and (v) that its entire conclusion is based on an assumption that Swedish courts will apply the *Komstroy* judgment to “disapply” the ECT to intra-EU disputes and that the courts will do so retroactively, when those matters are far from settled and when doing so would violate international law.²²⁹

5.1.2.2 With Respect to the Claims of Edisun Power²³⁰

487. According to the Claimants, EU law has no relevance to Edisun's legal claims on either jurisdiction or the merits.

²²⁶ Cl. Reply, Section II, D.; Cl. Rej., Section I, A., 4).

²²⁷ Claimants' Comments on the *Green Power* award, 25 July 2022 (“Cl. Comments on *Green Power* award”).

²²⁸ *Id.*, p. 1.

²²⁹ *Id.*, pp. 2-3.

²³⁰ Cl. PHB, Section I, 2.

488. The Claimants recall that there is no dispute as to the Tribunal’s jurisdiction over Edison, as confirmed by the Respondent’s declaration at the Hearing that the intra-EU “*jurisdictional objection only applies to two of Claimants, by the way; it doesn’t apply to Edison.*”

5.1.3 The European Commission’s Position as *Amicus Curiae*

5.1.3.1 The ECT Must Be Interpreted in Accordance with EU Law and Therefore Excludes the Jurisdiction of the Tribunal in Intra-EU Disputes

489. In its applications for leave to intervene²³¹ and its observations as a non-disputing party,²³² the EU Commission submits that the Tribunal needs to take EU law in consideration when interpreting the extent of the Respondent’s offer for arbitration in Article 26 of the ECT.

490. Relying on the rules of customary international law on treaty interpretation (notably Article 31(1), (2)(b) and (3)(a)), the EU Commission submits that the ECT must be read within its wider context and with consideration to the status of many of the Contracting Parties as being Member States of the EU.²³³ According to the EU Commission, the “*historical context in which the ECT came about unequivocally indicates that it was not intended to bind the Member States inter se*”.²³⁴

491. The EU Commission points to the ECT’s provisions acknowledging the power of the EU to make binding decisions on behalf of the Member States (Article 1(3) of the ECT) and to vote with its Member States as a single block at the Energy Charter Conference (Article 36(7) of the ECT). Therefore, the EU Commission contends that the ordinary meaning of Article 26 of the ECT provisions, in light of its context, excludes from its scope EU investors investing within the EU.

492. The EU Commission also refers to the Statement made by the EU to the ECT Secretariat pursuant to Article 26(3)(b)(ii) of the ECT on May 2, 2019, which reaffirms that the EU exercises competence when it is transferred to it from the Member States and that the EU and its Member States each have their respective competences.²³⁵ The fact that the Member States signed the ECT because the EU did not yet have exclusive external competence with regard to all matters covered by the ECT ties into the context of the ECT and how it should therefore be interpreted.²³⁶

²³¹ EU Commission’s First Application for Leave to Intervene as a Non-Disputing Party, 29 October 2018; EU Commission’s Second Application for Leave to Intervene as a Non-Disputing Party, 5 April 2019.

²³² EU Commission’s *amicus curiae* brief, 13 June 2019.

²³³ EU Commission’s First Application for Leave to Intervene as a Non-Disputing Party, para. 25; EU Commission’s Second Application for Leave to Intervene as a Non-Disputing Party, para. 38; EU Commission’s *amicus curiae* brief, para. 8.

²³⁴ EU Commission’s *amicus curiae* brief, para. 9.

²³⁵ *Id.*, para. 12.

²³⁶ *Id.*, para. 13.

493. The EU Commission adds that neither Germany nor Spain have adopted the view that intra-EU arbitration was permitted under EU Treaties. Instead, both Member States share the interpretation developed in the *amicus curiae* brief.²³⁷

494. According to the EU Commission, Article 26 of the ECT is to be interpreted as not containing an offer for arbitration by Spain to investors from other Member States, but as being only directed to investors from third countries.²³⁸ Therefore, the Tribunal is prevented from establishing jurisdiction in respect of the German investors.

5.1.3.2 In Case of Conflict Between the ECT and EU Law, EU Law Must Prevail

495. In the event that Article 26 ECT is found to apply intra-EU, the EU Commission submits that it would be in conflict with primary law (Article 267 and 344 TFEU) and would therefore need to be set aside in any intra-EU dispute, in accordance with the hierarchy of norms.²³⁹

496. The EU Commission disagrees with the approach taken by the *Masdar v. Kingdom of Spain* and *Vattenfall v. Germany* tribunals.²⁴⁰

497. According to the EU Commission, the CJEU holds that the TFEU prohibits the Member States from offering to resolve intra-EU investment disputes before international arbitral tribunals (*Achmea*). The interpretation of EU law set out in *Achmea* is (i) binding and (ii) applies *erga omnes* beyond the specific Dutch-Slovak BIT, as confirmed in the CJEU's Opinion 1/17 of 30 April 2019 (CETA).²⁴¹

498. On that basis, the EU Commission submits that:²⁴²

- EU law is international law applicable between all Member States;
- EU law qualifies as “*applicable rules and principles of international law*” within the meaning of Article 26 of the ECT and is recognized as binding under the ECT in intra-EU disputes. Due to the principle of primacy, EU law takes precedence over other international law obligations and Article 16 of the ECT must be set aside in case of conflict with the principle of primacy of EU law,²⁴³ as recognized in *Electrabel v. Hungary*,²⁴⁴
- Arbitral tribunals are not considered to be “national courts or tribunals” as per Article 267 TFEU and any decision from an intra-EU arbitral tribunal

²³⁷ *Id.*, para. 16.

²³⁸ EU Commission's First Application for Leave to Intervene as a Non-Disputing Party, para. 25.

²³⁹ *Id.*, para. 26; EU Commission's *amicus curiae* brief, para. 18.

²⁴⁰ EU Commission's First Application for Leave to Intervene as a Non-Disputing Party, paras. 27-37; EU Commission's Second Application for Leave to Intervene as a Non-Disputing Party, paras. 40-50; EU Commission's *amicus curiae* brief, para. 27.

²⁴¹ EU Commission's *amicus curiae* brief, para. 19.

²⁴² *Id.*, para. 20.

²⁴³ *Id.*, para. 27(b).

²⁴⁴ EU Commission's First Application for Leave to Intervene as a Non-Disputing Party, para. 24; EU Commission's Second Application for Leave to Intervene as a Non-Disputing Party, para. 37.

established under the ECT could therefore “*pose a threat to the integrity of the Union legal order and the principles of sincere cooperation and mutual trust*”;²⁴⁵

- There is no full review of the award by a court in a Member State.

499. According to the EU Commission, the TFEU should therefore be given priority in a conflict scenario with the ECT.

5.1.4 The Tribunal’s Analysis

500. As a preliminary remark, the Tribunal deems it necessary to distinguish between DCM 1, DCM 2 and HL Sun Invest, which are German entities (the “**German Claimants**”), on the one hand, and Edisun Power, which is a Swiss entity.

501. Indeed, according to the Respondent’s latest submissions, the intra-EU objection to jurisdiction raised by the Respondent now appears to relate only to the German Claimants, as entities of an EU Member State, and not to Edisun Power, which is an entity incorporated under the laws of Switzerland, and therefore outside of the European Union.

502. As a result, the Tribunal will first address the issue of its jurisdiction over the claims brought by the German Claimants in light of the Respondent’s intra-EU objection (5.1.4.1) before briefly addressing, for the sake of completeness, the question of its jurisdiction over the claims of Edisun Power, which the Tribunal understands is no longer in dispute (5.1.4.2).

5.1.4.1 Does the Tribunal Have Jurisdiction Over the Claims of DCM 1, DCM 2 and HL Sun Invest?

(a) Interpretation of the Terms of the ICSID Convention and the ECT

503. The starting point of the Tribunal’s analysis must be the plain terms of the ICSID Convention and the ECT, which are the legal instruments on the basis of which the Claimants have introduced the present arbitration.

504. In order properly to interpret such terms, the Tribunal shall refer to the principles of treaty interpretation laid down in the Vienna Convention on the Law of Treaties of 23 May 1969 (the “**VCLT**”), and in particular its Article 31, which sets out the following general rule of interpretation:

*“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.*²⁴⁶

²⁴⁵ EU Commission’s *amicus curiae* brief, para. 23.

²⁴⁶ **CL-11**, Vienna Convention on the law of treaties, 23 May 1969 (“**VCLT**”), Article 31, 1.

505. In addition, Article 32 of the VCLT, titled “*supplementary means of interpretation*,” provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

*(b) Leads to a result which is manifestly absurd or unreasonable”.*²⁴⁷

506. It is by reference to those rules that the Tribunal must interpret the terms of the ICSID Convention and those of the ECT to assess its jurisdiction.

507. First, the Tribunal recalls that, pursuant to Article 25 of the ICSID Convention,

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention. [...].”

508. In the present case, and based on the evidence on record, the Tribunal observes:

²⁴⁷ *Id.*, Article 32.

- that Spain and Germany are both Contracting States to the ICSID Convention;²⁴⁸
- that the German Claimants were incorporated in Germany at the time they consented to ICSID arbitration²⁴⁹ and therefore qualify as “*nationals of another Contracting State*” for the purposes of Article 25(2)(a) of the ICSID Convention,
- that the dispute at hand qualifies as “*a legal dispute arising directly out of an investment*” in the sense of Article 25(1) of the ICSID Convention, and
- that the Parties consented to ICSID arbitration.

509. In light of the foregoing – which does not appear to be in dispute between the Parties²⁵⁰ – the Tribunal is satisfied that it has jurisdiction over the present dispute from the standpoint of the ICSID Convention.

510. Now, turning to the jurisdictional requirements of the ECT, the Tribunal recalls that such requirements are set out in Article 26 thereof, which deals with the “[s]ettlement of disputes between an Investor and a Contracting Party.”

511. The relevant paragraphs of Article 26 of the ECT state as follows:

“(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to

²⁴⁸ C-13, ICSID: List of Contracting States and Other Signatories of the Convention (as of 12 April 2016).

²⁴⁹ The Tribunal understands that the German Claimants are still incorporated in Germany at the present time.

²⁵⁰ Cl. Mem., paras. 43, 45, 49, 51-54.

international arbitration or conciliation in accordance with the provisions of this Article.

(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or [...]

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; [...].

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

512. Pursuant to a combined reading of Articles 26(1), 26(2) and 26(3), the Tribunal first notes that "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former", if not settled, may be submitted to international arbitration (among other fora) by the investor that is party to such dispute.

513. In particular, Article 26(3)(a) incorporates the Contracting Parties' "*unconditional consent*" to arbitrate such disputes, subject to certain exceptions listed in Article 26(3)(b) and (c) which are not relevant to the present case and have not been invoked by the Parties to this arbitration.
514. In addition, the consent of the Investor to arbitration is deemed effective pursuant to Article 26(4) where the Investor "*further provide[s] its consent in writing for the dispute to be submitted to*" one of the types of arbitration listed in Article 26(4), and notably ICSID arbitration listed in Article 26(4)(a).
515. The Tribunal considers that its jurisdiction, from the ECT standpoint, must be assessed by reference to these provisions, and in particular to Article 26(3) and 26(4) which, taken together, encapsulate the consent of both Parties to submit a dispute based on the substantive provisions of the ECT to ICSID arbitration.
516. The Respondent submits that its objection to jurisdiction should rather be assessed by reference to Article 26(6) and, in particular, to "*applicable rules and principles of international law*" (which Respondent views as encompassing EU law).²⁵¹ The Claimants, for their part, consider that Article 26(6) only applies to the merits of the case and is irrelevant to the determination of the Tribunal's jurisdiction.²⁵²
517. After full consideration of the Parties' positions on this issue, the Tribunal is persuaded that Article 26(6) does not apply to jurisdiction.
518. While it is correct that, in the abstract, the term "*issues in dispute*" in Article 26(6) *could* be construed to include *jurisdictional* issues, the Tribunal finds that such a construction would not be a proper interpretation of Article 26(6) under the rules of interpretation of the VCLT, already discussed.
519. Indeed, the interpretation of "*issues in dispute*" must be made within the relevant context. In the Tribunal's view, the term "*issues in dispute*" must be read together with the reference to "*disputes*" in Article 26(1), such "*disputes*" expressly referring to those "*which concern an alleged breach of an obligation [of a Contracting Party] under Part III,*" *i.e.* the substantive obligations undertaken by Contracting Parties with respect to "*investment promotion and protection.*" *A contrario*, this definition of "*disputes*" does not include those relating to the dispute settlement provisions set out in the subsequent paragraphs of Article 26.
520. Therefore, even if the phrase "*applicable rules and principles of international law*" contained in Article 26(6) were to encompass EU law (an issue which will be addressed *infra*), such law could not form part of the law applicable to jurisdiction because it is part of a provision which does not apply to jurisdiction but to the merits. Whether EU law applies to the merits is another matter which the Tribunal will also address in due course.

²⁵¹ Resp. Rej., paras. 53 *et seq.*

²⁵² Cl. Reply, paras. 63 *et seq.*; Cl. Rej., para. 31.

521. The Tribunal further observes that its interpretation of Article 26(6) finds support in a number of earlier ICSID awards which have dealt with the same issue.
522. For instance, the arbitral tribunal in *Vattenfall v. Germany* held that:
- “Thus, as described in Article 26(1) ECT, the “dispute” or “issues in dispute” in Article 26(6) ECT, or in any other part of Article 26 ECT, are those that concern Part III of the ECT. Part III of the ECT sets out the substantive standards of treatment and protection to which investments are entitled. It does not include the provisions on dispute settlement, which appear in Part V of the ECT. Accordingly, the provision concerning the applicable law set out in Article 26(6) is not relevant to issues concerning the dispute settlement clause in Article 26 ECT”.*²⁵³
523. Such reasoning was also considered “*persuasive*” and expressly endorsed by the arbitral tribunal in *Eskosol*,²⁵⁴ and more recently, for instance, in *Stadtwerke*.²⁵⁵
524. The Tribunal therefore considers that the determination of its jurisdiction is governed by Articles 26(1) to 26(4) of the ECT and not by Article 26(6).
525. Turning to the relevant requirements set out by Articles 26(1) to 26(4), it appears undisputed that Germany and Spain are both Contracting Parties to the ECT for the purposes of these provisions.
526. As seen above, Germany and Spain are also both Contracting States to the ICSID Convention and therefore “*parties*” to this Convention for the purposes of Article 26(4)(a)(i) of the ECT, which allows a qualified investor to bring an ECT claim against a Contracting Party to the ECT before an ICSID arbitral tribunal, as in the present case.
527. In addition, it is common ground between the Parties that the German Claimants qualify as “*Investors*” and that their claims in this arbitration constitute a dispute relating to an “*Investment*” in the sense given to those terms by Articles 1(7) and 1(6) of the ECT respectively.
528. Nevertheless, Spain, with the support of the EU Commission,²⁵⁶ appears to dispute that the “*investment*” of the German Claimants would have made “*in the Area of [another Contracting Party]*” for the purposes of Article 26(1) and (2). More generally, it submits that this Tribunal has no jurisdiction over the German Claimants because the present dispute would be an intra-EU dispute, which would accordingly fall outside the scope of Article 26 of the ECT.

²⁵³ **CL-98**, *Vattenfall*, Decision on *Achmea* Issue, para. 116.

²⁵⁴ **CL-151**, *Eskosol*, para. 113.

²⁵⁵ **RL-131**, *Stadtwerke München GMBH, Rweinnogy GMBH, and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 (“*Stadtwerke*”), para.137.

²⁵⁶ EU Commission’s *amicus curiae* brief, para. 9.

529. Spain notably contends that the Tribunal would lack jurisdiction on the basis of Article 26(1) because Spain and Germany would form part of the same Contracting Party, *i.e.* the European Union which is a self-standing Contracting Party to the ECT and a “*Regional Economic Integration Organization*” (or “*REIO*”).
530. In addition, according to Spain, Germany and Spain cannot have intended to bind one another to Part III of the ECT (“*Investment promotion and protection*”) because Part III would fall within the exclusive competence of the EU, *a fortiori* since the entry into force of the Lisbon Treaty. Spain concludes, by way of consequence, that the dispute-resolution mechanisms set out in Article 26 in case of alleged breach of Part III obligations cannot apply in the present case.²⁵⁷
531. In a similar vein, Spain further alleges that Article 26 would contain an implied disconnection clause, meaning that the Contracting Parties to the ECT would have impliedly accepted that intra-EU disputes should be excluded from the ECT.
532. The Tribunal is not convinced by any of these lines of argument for the following reasons.
533. First, the Tribunal notes that, even if the European Union is indeed a Contracting Party to the ECT since 16 December 1997, Germany and Spain have also become self-standing Contracting Parties thereto on the same date with the same rights and obligations under the ECT as the European Union.
534. In addition, the Tribunal observes that the present dispute has not been brought against the European Union itself but against Spain, which, as seen above, is a Contracting Party to the ECT in its own right.
535. In the same vein, the German Claimants are incorporated in Germany under the form of German companies (KG or GmbH), as opposed to a *societas europaea* (or SE) and must therefore be considered as investors of Germany for the purposes of the ECT.
536. Second, the Tribunal fails to identify any provision in the ECT that would prohibit an investor of one Contracting Party to initiate an arbitration against another Contracting Party under the ECT simply because both Contracting Parties would be part of the same REIO, *i.e.* the EU here. None of the provisions quoted by Respondent in this regard, and notably Articles 1(2), 1(3), 25 and 36(7), supports such an interpretation:
- Article 1(2) of the ECT simply defines what a “*Contracting Party*” means, *i.e.* “*a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.*”
- Article 1(3) of the ECT defines what a “*Regional Economic Integration Organization*” is, *i.e.* “*an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed*”

²⁵⁷ Resp. C-Mem., para.134 *et seq.*

by this Treaty, including the authority to take decisions binding on them in respect of those matters.” This provision merely acknowledges the existence of REIOs to which certain Contracting Parties may also be parties.

None of these provisions prevents a State from being simultaneously a self-standing Contracting Party and a member of a REIO.

- Article 25 (“*Economic Integration Agreements*”) and Article 36(7) (“*Voting*”) of the ECT are also of no assistance to the Respondent, as they deal with distinct issues and also contain no such prohibition.

537. On this point, the Tribunal further observes that a similar argument was rejected in several earlier arbitral awards rendered in cases to which the Respondent was a party. For instance, in *Novenergia v. Spain*, the arbitral tribunal held that:

*“However, in making this argument, the Respondent fails to recognise the fact that, even though the EU itself is a Contracting Party of the ECT, this does not eliminate the EU Member States’ individual standing as respondents under the ECT. The Tribunal is convinced that with a correct application of Article 26(1) of the ECT, interpreted in light of the VCLT, there is no basis for any requirements other than that the investor shall be a national of an ECT Contracting State other than the host State. Put differently, the Tribunal cannot deduce from Article 26(1) of the ECT a limitation to the effect that an investor is not a national of an ECT Contracting Party to the extent that such a Contracting Party is also a member of the same REIO (i.e. the EU) as the host State. The Tribunal therefore rejects the Respondent’s argument that the Tribunal lacks jurisdiction on the basis of Article 26(1) of the ECT”.*²⁵⁸

538. The Tribunal shares this reasoning and deems it applicable in the present case.

539. Third, the Tribunal is not satisfied that the obligations incumbent on each Contracting Party pursuant to Part III of the ECT would fall, in the case of an intra-EU situation, under the exclusive competence of the EU, with the consequence that an investor of a EU Contracting Party would today find itself deprived of the possibility to bring an arbitration against another EU Contracting Party in relation to an alleged breach of Part III.

540. Indeed, in its *amicus curiae* brief, the EU Commission seems to acknowledge that, at least at the time the ECT was signed, there was a shared competence between the EU and the Member States with respect to foreign investment protection.²⁵⁹ As for the present time, it is not clearly established by the evidence on record whether, as a matter of EU law following the entry into force of the Lisbon Treaty on 1 December

²⁵⁸ **RL-74**, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Arbitration (2015/63), Final Award, 15 February 2018 (“**Novenergia**”), paras. 449-453. See also **RL-8**, *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC Arbitration V2013/153, Award, 12 July 2016 (“**Isolux**”), paras. 630-640.

²⁵⁹ EU Commission’s *amicus curiae* brief, paras. 9 and 13.

2009, the Member States subsequently lost the competence to bind themselves to one another under Part III of the ECT.

541. In particular, according to Opinion 2/15 of the CJEU, and following the entry into force of the Lisbon Treaty, a distinction now has to be drawn between foreign direct investment, now under the exclusive competence of the EU, and foreign indirect investment, which remains within the competence of the Member States.²⁶⁰ But neither the Respondent (nor the EU Commission) has demonstrated that the German investments in dispute in the present arbitration qualify as “*foreign*” (despite being made between two EU Member States) or as “*direct*.” In any event, the Tribunal notes that the German investments were made before the entry into force of the Lisbon Treaty on 1 December 2009.
542. It is also relevant to note that, in the same Opinion 2/15, the CJEU considered that the approval of a dispute-settlement mechanism in the EU-Singapore Free Trade Agreement allowing an investor to submit a dispute under such Agreement to arbitration “[fell] *not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States*”.²⁶¹
543. Finally, the Tribunal fails to see, notably in light of Article 28 VCLT (“*Non-retroactivity of treaties*”),²⁶² and absent any demonstration to the contrary, how the Lisbon Treaty could have had the effect of retroactively invalidating the binding commitments made by the Contracting Parties (including those which are EU Member States) in Part III of the ECT, and the “*unconditional consent*” to arbitration provided in Article 26(3).
544. In light of the foregoing, the Tribunal therefore dismisses Spain’ objection to the Tribunal’s jurisdiction on the ground that Germany and Spain are part of the same REIO, *i.e.* the EU, and allegedly have relinquished their competence to bind themselves to Part III of the ECT in intra-EU situations.
545. Fourth, and for the same reasons set out above, the Tribunal is unable to accept Spain’s argument that Article 26 should be read as including a disconnection clause whereby the Contracting Parties to the ECT would have agreed to exclude intra-EU disputes from the scope of Article 26.
546. There is no debate that the express terms of Article 26 do not provide for any exception for intra-EU disputes, so that the disconnection clause invoked by Spain could not be other than an implied clause.
547. However, the Tribunal finds nothing in the text of the ECT, interpreted in good faith and in accordance with their ordinary meaning of its terms, which would support the

²⁶⁰ **C-349**, European Court of Justice, Opinion, Case 2/15, 16 May 2017 (“**ECJ Opinion 2/15**”), para. 249.

²⁶¹ **C-349**, ECJ Opinion 2/15, para. 293.

²⁶² **CL-11**, VCLT, Article 28: “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

existence of such an implied clause, nor does it find any evidence on the record to that effect. In fact, the record evidence points to the contrary. If the Contracting Parties to the ECT had intended to disconnect intra-EU disputes from the scope of Article 26, and more generally from Part III of the ECT, they could and would have done so explicitly to avoid any misunderstanding as to the proper scope of the ECT. It is precisely because such a clause would have substantially reduced the scope of the ECT that one would have expected to see it clearly expressed in the text of the ECT. Such an implied clause also appears inconsistent with Article 46 of the ECT, pursuant to which “[n]o reservations may be made to this Treaty.”

548. The Tribunal further notes that the Respondent’s argument for the recognition of an implied disconnection clause has been consistently rejected by earlier ICSID and non-ICSID arbitral tribunals. For instance, in *RREEF v. Spain*, the tribunal dismissed a similar allegation by Spain notably on the ground that it was inconsistent with the “*basic public international law principle of pacta sunt servanda*”:

“ However, when the very essence of a treaty to which the EU is a party is at issue, such as it would be for the ECT if the interpretation proposed by the Respondent were correct, then precisely because the EU is a party to the treaty a formal warning that EU law would prevail over the treaty, such as that contained in a disconnection clause, would have been required under international law.

This follows from the basic public international law principle of pacta sunt servanda. If one or more parties to a treaty wish to exclude the application of that treaty in certain respect or circumstances, they must either make a reservation (excluded in the present case by Article 46 of the ECT) or include an unequivocal disconnection clause in the treaty itself. The attempt to construe an implicit clause into Article 26 of the ECT is untenable, given that that article already contains express exceptions to the ‘unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article’ that had been agreed amongst the States Party”.²⁶³

549. While those earlier decisions do not bind this Tribunal, they remain a relevant factor in its decision-making process, insofar as they provide valuable insight as to how other tribunals have approached similar issues of interpretation, especially so where the factual background was comparable to the one at hand.
550. The Tribunal’s view is further confirmed by the preparatory work of the ECT which, pursuant to Article 32 of the VCLT, the Tribunal may refer to “*in order to confirm the meaning resulting from the application of article 31 [of the same].*” The *travaux préparatoires* of the ECT indeed demonstrate that, when this instrument was

²⁶³ **CL-108**, *RREEF Infra. (G.P.) Ltd. & RREEF Pan-European Infra. Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (“**RREEF, decision on jurisdiction**”), paras. 84-85 (see, more generally on this issue, paras. 81 to 86).

negotiated in 1993, the European Community suggested, among other proposals, to insert the following text in Article 27 of the ECT:

*“3) In their mutual relations, Contracting Parties which are members of the EC shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concern”.*²⁶⁴

551. In response to this proposal, the Secretary General of the European Energy Charter expressed his concern in the following words:

*“Point (iii) is not easy to understand, given the existence of 27(6). The Community should be asked to explain its concerns; otherwise suspicions will certainly be aroused”.*²⁶⁵

552. The Tribunal understands from the evidence on record that the European Community subsequently withdrew this proposal, which accordingly never made its way into the final text of the ECT.

553. In the Tribunal's eyes, this is a clear indication that all Contracting Parties to the ECT ultimately agreed *not* to include a disconnection clause, whether express or implied, for intra-EU disputes.

554. In addition, the Tribunal is also unpersuaded by Spain's argument that the existence of such implied disconnection clause in treaties involving intra-EU situations would result from the application of the principles of primacy and autonomy of EU law taken as *“international custom”*.²⁶⁶

555. It is correct that, pursuant to Article 31(3)(c) of the VCLT, the Tribunal must take account, when interpreting a treaty, of *“any relevant rules of international law.”* It is also common ground between the Parties that international custom is, alongside international treaties, a primary source of international law pursuant to Article 38 of the Statute of the International Court of Justice.²⁶⁷ The Tribunal therefore agrees that, in principle, international custom may be relevant for the purposes of interpreting a treaty pursuant to Article 31(3)(c) of the VCLT.

556. The Tribunal is not satisfied, however, that the two undisputed criteria for the establishment of international customary law, namely (i) established State practice and (ii) *opinio juris* (*i.e.* the acceptance that such practice is law),²⁶⁸ are met in the present case with respect to the principles of primacy and autonomy of EU law.

²⁶⁴ C-338, Note for Ambassador Rutten.

²⁶⁵ C-338, Note for Ambassador Rutten.

²⁶⁶ Resp. Rej., paras. 90 *et seq* ; Resp. PHB, paras. 8 *et seq*.

²⁶⁷ Cl. PHB, para. 124; Resp. Rej., para. 92.

²⁶⁸ Cl. PHB, para. 122; Resp. Rej., para. 94.

557. The Tribunal fully agrees that primacy and autonomy are key principles of EU law within the framework of the EU legal order, as recalled by the European Court of Justice in the landmark *Costa v. ENEL* case,²⁶⁹ in its role of ensuring that these principles are duly applied by the national courts of the Member States.
558. As rightly expressed by the *Eskosol* tribunal, however, EU law is a regional sub-system of international law, as opposed to general international law, and in particular general customary international law.²⁷⁰
559. Therefore, the Tribunal does not consider that the principles of primacy and autonomy of EU law may qualify as customary international law (or international custom), as they only pertain to a regional sub-system of international law. In this context, the Tribunal understands that “primacy” of EU law can only mean primacy over the national laws of EU Member States, not primacy over other international treaties, as there is no hierarchy between international treaties in the absence of a provision to that effect in general international law or in the applicable treaty. In the case of the ECT, the only rule establishing a hierarchy between the ECT and other treaties is Article 16, to be addressed later.
560. For the sake of completeness, while the Tribunal acknowledges that *regional* custom, *i.e.* a rule of customary international law of a regional scope, may qualify as a source of international law, the Tribunal finds that Spain has not proven the existence of such a *regional* custom in the present case having the legal consequences that it wants to establish.
561. Moreover, even assuming that Spain had done so (*quod non*), Spain has, in any event, failed to demonstrate why such custom would derogate from a multilateral treaty such as the ECT. Indeed, from the fact that a rule of customary international law (general or regional) exists, it does not follow that such a rule would automatically supersede a treaty. On the contrary, treaties, as *leges speciales*, normally supersede rules of customary international law, unless they state *ius cogens*, which is an extremely narrow category and is not in issue here.
562. In addition, the Tribunal has reviewed the conventions filed by Respondent as legal exhibits RL-136 to RL-143 in support of its argument that those conventions would show an established practice of implied disconnection clauses in intra-EU issues.²⁷¹
563. The Tribunal fails to identify implied disconnection clauses in those conventions, not least because the evidence on record does not clearly show which contracting States are party to each of them. Quite to the contrary, those conventions appear either to include (i) *express* disconnection clauses, as opposed to *implied* (see, for instance, Article 70(1) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial

²⁶⁹ **RL-65**, Judgment of EUCJ (Court of Justice of the European Union) Case 6/64, *Flaminio Costa v. ENEL*, 15 July 1964.

²⁷⁰ **CL-151**, *Eskosol*, para. 181.

²⁷¹ Resp. Rej., paras. 96 *et seq.*

matters)²⁷² or (ii) clauses expressly providing for the replacement of an earlier convention with a subsequent one or an instrument of EU law (see, for instance, Article 68 of Council Regulation No. 44/2001 (quoted above) with respect to the replacement of the 1968 Brussels Convention).²⁷³

564. For the above reasons, the Tribunal is unable to accept the Respondent's contention that the above principles of EU law would rise to the level of international custom, even of a regional scope. Even if the existence of such custom were assumed, the Tribunal would be equally unable to accept that such custom would require it to interpret Article 26 of the ECT as including an implied disconnection clause having the effect of excluding intra-EU disputes from the jurisdiction of the Tribunal. In the eyes of the Tribunal, such argument is plainly untenable.
565. In light of the foregoing, the Tribunal concludes that it has jurisdiction over the claims of the German Claimants on the basis of the consent of the Parties to arbitrate under Articles 26(2), 26(3) and 26(4) the ECT.

(b) Relevance and Scope of EU Law on the Tribunal's Jurisdiction

566. For the sake of completeness, the Tribunal deems it important to address the relevance and impact of EU law on its analysis of jurisdiction, a complex issue which the Parties have heavily debated and the Tribunal has carefully reviewed.
567. In short, assuming that Article 26(6) applied to the determination of this Tribunal's jurisdiction (which the Tribunal has found in the preceding section not to be so) and assuming that EU law formed part of the applicable law under such provision (a point analyzed below), the Tribunal would still conclude that it has jurisdiction over the claims of the German Claimants.
568. It is first necessary to recall the terms of Article 26(6):

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

569. Before entering into the substance of EU law itself, the Tribunal must address the question whether the "*applicable rules and principles of international law*" do

²⁷² **RL-137**, Council Regulation (EC) No 44/2001, 22 December 2000, Article 70(1): "1. *The Treaty and the Conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply. [...]*". See also **RL-139**, Convention on the civil aspects of. International Child Abduction. HCCH Hague, 25 October 1980, Article 34; **RL-140**, Council Regulation (EC) No 1347/2000, 29 May 2000, Articles 37 and 38.

²⁷³ **RL-137**, Council Regulation (EC) No 44/2001, 22 December 2000, Article 68(1): "1. *This Regulation shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty*"; see also **RL-138**, Convention concerning the powers of authorities and the law applicable in respect of the protection of infants. HCCH Hague, 5 October 1961, Article 18(1); **RL-141**, Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children. HCCH Hague, 19 October 1996, Article 51; **RL-142**, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or commercial matters. HCCH Hague, 15 November 1965, Article 22.

encompass EU law. This question remains open to debate and has given rise to conflicting arbitral decisions.

570. Indeed, the phrase “*applicable rules and principles of international law*” has been diversely interpreted by arbitral tribunals, notably:

- as excluding EU law on the ground that EU treaties, while being part of international law, are not encompassed by the narrower notion of “*rules and principles of international law*” (see, for instance, *Vattenfall*,²⁷⁴ *Eskosol*,²⁷⁵ *Cube*,²⁷⁶ and *Rockhopper*),²⁷⁷ or
- as including EU treaties (*Cavalum*),²⁷⁸ or even
- as including both primary and secondary norms of EU law (*Electrabel*,²⁷⁹ *InfraRed*).²⁸⁰

571. While the Tribunal agrees that EU treaties are, like any treaty, part of international law, a majority of the Tribunal nonetheless considers that, in line with the first trend of arbitral precedents cited above, the phrase “*applicable rules and principles of international law*” must be understood to refer, in the specific context of Article 26(6), to general international law as opposed to regional sub-systems of international law such as EU law.

572. In that regard, the Tribunal (by majority) shares the following reasoning of the tribunal in *Cube*:

“The reference is to “principles” of international law, not to every rule of international law that might be binding upon an ECT Contracting Party. The natural and ordinary meaning of the phrase is that it refers to the principles of public international law in general, as it applies to relations between any set of States, and not to principles that are peculiar to a sub-system of international law, such as EU law, to which some but by no means all ECT Contracting Parties are subject. Article 26(6) ECT sets out the applicable law for all disputes arising under the ECT, whether or not the dispute involves an EU Member State; and there is no evidence, and it cannot be supposed, that the intention was to apply principles of EU law to all disputes arising under Article 26 ECT. While the EU treaties are of

²⁷⁴ **CL-98**, *Vattenfall*, decision on *Achmea* Issue, paras. 132-133.

²⁷⁵ **CL-151**, *Eskosol*, paras. 114-121.

²⁷⁶ **CL-178**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019 (“*Cube*”), paras. 157-158.

²⁷⁷ **CL-154**, *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU jurisdictional objection, 26 June 2019 (“*Rockhopper*”), para. 174.

²⁷⁸ **CL-196**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum and Dissenting Opinion, 31 August 2020 (“*Cavalum*”), para. 370.

²⁷⁹ **RL-2**, *Electrabel*, para. 4.126.

²⁸⁰ **RL-144**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 Award, 2 August 2019 (“*InfraRed*”), paras. 257-260.

*course international agreements made within the framework of, and governed by, public international law, they do not thereby become “principles of international law”.*²⁸¹

573. In the eyes of the Tribunal (by majority), such interpretation is further warranted by the fact that Article 26(6) of the ECT, being part of a multilateral, “mixed” agreement, must be given a consistent interpretation that cannot be dependent on whether the parties to a given ECT-based dispute happen to be from the EU or not. The Tribunal (by majority) agrees in that regard with the statement of the *Vattenfall* tribunal that:

*“When States enter into international legal obligations under a multilateral treaty, pacta sunt servanda and good faith require that the terms of that treaty have a single consistent meaning. States parties to a multilateral treaty are entitled to assume that the treaty means what it says, and that all States parties will be bound by the same terms. It cannot be the case that the same words in the same treaty provision have a different meaning depending on the independent legal obligations entered into by one State or another, and depending on the parties to a particular dispute. The need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT”.*²⁸²

574. Therefore, to the extent that Article 26(6) of the ECT might apply to jurisdiction, the Tribunal (by majority), finds that the application of this provision would *not* entail the application of EU law.
575. In any event, even if EU law were encompassed in the phrase “*rules and principles of international law*” and considered “*applicable*” to the present case to the extent that the German Claimants are concerned, such finding would still not prevent the Tribunal from upholding its jurisdiction, whether or not a conflict may be seen to arise between EU law and the ECT, as further explained below.
576. It is worth recalling, at that stage, that the Parties have heavily debated the existence of a conflict between the application of Article 26 of the ECT in intra-EU disputes and EU law.
577. Before assessing, in that regard, the potential relevance and impact of the recent judgments of the CJEU in *Achmea* and *Komstroy*, the Tribunal deems it necessary to state that, on the basis of its own assessment of the evidence on record, it sees no objective conflict between the ECT and EU treaties.

²⁸¹ **CL-178**, *Cube*, paras. 157-158; see also **RL-153**, *Freif Eurowind Holdings LTD. (United Kingdom) v The Kingdom of Spain*, SCC Case V2017/060, Final Award, 8 March 2021 (“**Freif**”): “As submitted by FREIF, the ordinary meaning of “rules and principles of international law” refers to general principles of public international law which apply as between all Contracting States. There is no evidence that Article 26(6) intended to include EU law or domestic law as laws applicable to deciding issues in dispute under the ECT nor has FREIF made any claims on the basis of a breach of EU law. EU is therefore not a governing law of this dispute.”

²⁸² **CL-98**, *Vattenfall*, decision on *Achmea* Issue, para. 156.

578. Indeed, as the Claimants have rightly pointed out, there is no equivalent provision to Article 26 of the ECT in the EU treaties, and in particular the TFEU, allowing an investor to resort to courts of the EU seeking investment protection. In other words, the Tribunal agrees with the Claimants that Article 26 and the TFEU do not share the same subject matter and therefore cannot be considered as conflicting.
579. *A contrario* there is no provision in the TFEU that would prohibit an EU investor from benefitting from a dispute-settlement mechanism provided in an international agreement. Indeed, it is telling that, in its Opinion 1/17 of 30 April 2019 regarding the negotiation of the Comprehensive Economic Trade Agreement (**CETA**) between Canada and the EU, the CJEU held that:

*“It must be recalled, at the outset, that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law. Indeed, the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions [...]”*²⁸³

580. The Court further noted in that case:

“It follows from the foregoing that EU law does not preclude Section F of Chapter Eight of the CETA either from providing for the creation of a Tribunal, an Appellate Tribunal and, subsequently, a multilateral investment Tribunal or from conferring on those Tribunals the jurisdiction to interpret and apply the provisions of the agreement having regard to the rules and principles of international law applicable between the Parties. On the other hand, since those Tribunals stand outside the EU judicial system, they cannot have the power to interpret or apply provisions of EU law other than those of the CETA or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework”.²⁸⁴

581. In addition, the Tribunal fails to see how EU law on State aid would be relevant for the purposes of assessing the Tribunal’s jurisdiction. Indeed, the Tribunal is not called upon to make a decision as to whether certain measures taken by an EU Member State qualify as “*State aid*” or not according to EU law, which is for the relevant EU institutions to determine, but to decide whether such EU Member State has breached the international obligations it has freely entered as a Contracting Party under the ECT towards investors of another Contracting Party.

²⁸³ **C-350**, European Court of Justice, Opinion 1/17, 30 April 2019 (“**ECJ Opinion 1/17**”), para. 106.

²⁸⁴ *Id.*, para. 118.

582. That being said, the Tribunal must also consider the findings of the CJEU in *Achmea* and *Komstroy*.
583. In the *Achmea* case, the CJEU was called upon to issue a preliminary ruling requested by the German Federal Court of Justice in the context of annulment proceedings of an award issued in favor of a Dutch investor against Slovakia on the basis of the Netherlands-Slovakia bilateral investment treaty.²⁸⁵
584. In a judgment of 6 March 2018, the CJEU held that:
- “Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept”.*²⁸⁶
585. Contrary to the Respondent’s position, the Tribunal is not convinced that this decision should extend to an arbitration brought under Article 26 of the ECT.
586. Indeed, the CJEU drew an important distinction between arbitration clauses contained in bilateral investment agreements concluded between Member States (which it considered to be contrary to EU law) and similar provisions found in multilateral agreements in which the EU is itself a party (which it considered to be compatible with EU law),²⁸⁷ as later confirmed in Opinion 1/17 of 30 April 2019 cited *supra*.²⁸⁸
587. While it is not for the Tribunal to opine on the justifications underpinning such distinction, suffice it to note that the ECT, being a mixed agreement to which both the EU and EU member States are parties, should fall within the second category and be considered as compatible with EU law. The Tribunal notes, on this point, that the ICSID arbitral awards on record that have been issued after the release of the *Achmea* have consistently considered that this decision did not affect their jurisdiction on the basis of Article 26 of the ECT.²⁸⁹

²⁸⁵ **CL-155**, *Slowakische Republik v. Achmea B.V.*, ECJ Case C-284/16, Preliminary Ruling, 6 March 2018 (“*Achmea judgment*”).

²⁸⁶ **CL-155**, *Achmea judgment*, para. 62.

²⁸⁷ *Id.*, para. 57.

²⁸⁸ **C-350**, ECJ Opinion 1/17.

²⁸⁹ See for instance **CL-6**, *Masdar*; **CL-7**, *ST-AD GmbH v. The Republic of Bulgaria*, UNCITRAL Case PCA No. 2011-06 (ST-BG), Award on Jurisdiction (“*ST-AD GmbH*”); **CL-98**, *Vattenfall*, decision on *Achmea* Issue; **CL-142**, *Foresight Lux. Solar 1 S.à.r.l. et al. v. Kingdom of Spain*, SCC Arb. No. 2015/150, Final Award, 14 November 2018 (“*Foresight*”); **CL-143**, *RREEF Infra. (G.P.) Ltd. and RREEF Pan-European Infra. Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum and Partially Dissenting of Professor Robert Volterra, 30 November 2018; **CL-144**, *Greentech*; **CL-178**, *Cube*; **CL-187**, *Landesbank Baden-Württemberg v. Kingdom of Spain*, ICSID Case No. ARB/15/45,

588. Ultimately, this debate appears to have lost much of its relevance in light of the recent judgment of the CJEU issued on 2 September 2021 in *Republic of Moldova v. Komstroy*.²⁹⁰
589. In the *Komstroy* case, the CJEU was called upon to issue a preliminary ruling by reference from the Paris Court of Appeal in the context of annulment proceedings relating to an *ad hoc* UNCITRAL award made in Paris in favor of a Ukrainian investor against Moldavia on the basis of the ECT.
590. Although the dispute involved no EU Member States and the ruling requested was about the interpretation of the notion of “*investment*” under the ECT, it appears that the CJEU took this opportunity to clarify its position as to whether Article 26 of the ECT applied to intra-EU disputes.
591. Indeed, by way of an *obiter dictum*, the CJEU made several findings that are relevant to the present discussion:
- the CJEU held that “*the ECT itself is an act of EU law*”, and concluded that “*an arbitral tribunal such as that referred to in Article 26(6) ECT is required to interpret, and even apply, EU law*”;
 - the CJEU then considered that “*an ad hoc arbitral tribunal, such as that referred to in Article 26(6) ECT, does not constitute a component of the judicial system of a Member State*” with the consequence that “*it cannot, in any event, be classified as a court or tribunal ‘of a Member State’ within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling*”;
 - finally, the CJEU went on to state that “*if the provisions of Article 26 ECT allowing such a tribunal to be entrusted with the resolution of a dispute were to apply as between an investor of one Member State and another Member State, it would mean that, by concluding the ECT, the European Union and the Member States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the fact that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law.*”

Decision on the “*Intra-EU*” Jurisdictional Objection, 25 February 2019 (“*Landesbank*”); **CL-153**, *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 Quantum Principles, 12 March 2019 (“*NextEra*”); **CL-151**, *Eskosol*; **CL-150**, *9REN Holdings S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (“*9REN*”); **CL-154**, *Rockhopper*; **CL-182**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award 31 July 2019 (“*SolEs*”); **RL144**, *InfraRed*; **CL-184**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award and Partial Dissent on Liability and Quantum (“*OperaFund*”).

²⁹⁰ **RL-167**, *Komstroy* judgment.

592. In conclusion, the CJEU held that:

*“Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State”.*²⁹¹

593. It is not for this Tribunal to make a critical assessment of this decision but rather to decide whether this decision may have a bearing on its jurisdiction over the claims of the German Claimants in the present case.

594. In substance, the Tribunal finds that it does not and approves, in that regard, the reasoning held in the recent post-*Komstroy* ICSID award in *Matthias Kruck v. Spain*.²⁹²

595. As rightly pointed out by the CJEU, this Tribunal is not a judicial body of the EU and is therefore not bound by the decisions of the CJEU. As explained earlier, this Tribunal draws its mandate from the ECT. Whether the ECT is considered within the EU legal order as being part of EU law does not alter the fact that the ECT, as a multilateral treaty including EU member States and third-party States, primarily belongs to international law.

596. The Tribunal further agrees with the Claimants²⁹³ that it must assess its jurisdiction at the time the arbitration was initiated, regardless of subsequent events, so that even assuming *arguendo* that the *Komstroy* judgment bore any relevance to the present case (*quod non*), in any event such case could not have retroactively invalidated the Tribunal's jurisdiction.

597. In addition, the Tribunal is also not persuaded by the declarations of EU Member States in favor of an exclusion of investment arbitration in the context of intra-EU disputes, whether on the basis of BITs or the ECT.²⁹⁴

598. Aside from the fact that these declarations are not unanimous among Member States, the Tribunal cannot attribute any legal weight to such unilateral declarations, which directly contradict the international obligations which have been freely undertaken by these Member States in the ECT without any reservations. On this point, the Tribunal endorses the reasoning in *Rockhopper* where the ICSID tribunal held:

²⁹¹ **RL-167**, *Komstroy* judgment, para. 66.

²⁹² **CL-198**.

²⁹³ Cl. Comments on *Green Power* award, p. 3.

²⁹⁴ **RL-84**, Declaration of the Representatives of the Governments of the Member States on the legal consequences of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 15 January 2019; **RL-85** Declaration of the Representatives of the Governments of the Member States on the enforcement of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, 16 January 2019; **RL-86**, Declaration of the Representative of the Government of Hungary on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, 16 January 2019.

“First, it is noted that the Declaration is only one of the three declarations signed on 15 and 16 January 2019. Each of the three declarations are cast in slightly different terms, but none of the three are signed by the representatives of all the EU Member States. Thus, the Declaration cannot be even at an initial level of analysis considered as a common view (insofar as a view might be expressed in those documents) of all the EU Member States. That fact renders it conceptually and legally impossible that the Declaration can be considered within the EU legal order.

More particularly, the Tribunal cannot see how the Declaration can be said to have an interpretative effect on the scope and content of EU law regarding investment protection and treaties concluded, inter alia, between EU Member States. That is because the Declaration was not adopted within the EU legal order and is not an EU legal instrument. The Declaration is, at best, a general expression of certain views and intentions (as discussed below) by the representatives of governments of some EU Member States. [...]”²⁹⁵

599. Such view is further confirmed by the fact that the Member States have had to enter into formal agreements in order to terminate intra-EU BITs, which shows that their declarations were not sufficient to constitute a valid objection to jurisdiction to the application of such BITs. Similarly, it is up to the EU or to EU Member States to seek to amend or terminate the ECT if they wish to exclude intra-EU disputes from the scope of this instrument in the future.
600. Be that as it may, the Tribunal cannot ignore the regrettable reality that is now on record, namely that there appears to be today a conflict between EU law, as authoritatively interpreted by the CJEU, and the ECT.
601. Even in such a situation of conflict, however, the Tribunal concludes that the ECT must prevail.
602. On this point, the Parties differ as to which conflict rule should apply. The Respondent claims that such conflict must be resolved by reference to Articles 30 and 59 of the VCLT, while the Claimants submit that Article 16 of the ECT must apply.
603. In the Tribunal’s eyes, the proper conflict rule is Article 16 of the ECT as *lex specialis* in the context of a dispute based on the ECT.²⁹⁶ Pursuant to Article 16 (“*Relation to Other Agreements*”):

²⁹⁵ **CL-154**, *Rockhopper*, paras.179-180.

²⁹⁶ For the sake of completeness, the Tribunal further notes that neither Article 30 nor Article 59 VCLT appears relevant in the present situation. First, Article 30 VCLT deals with the “*application of successive treaties relating to the same subject matter.*” However, in line with the tribunal in *Vattenfall* (**CL-98**, paras. 216-218) the Tribunal is not persuaded that the Lisbon Treaty qualifies as a “*later treaty*” for the purposes of Article 30 VCLT, given that Articles 267 and 344 TFEU were already in existence prior to the conclusion of the ECT, or even that the Lisbon Treaty could be properly described as “*relating to the same subject matter*” as the ECT. Second, Article 59 VCLT appears equally inapplicable, since it would require the later treaty to have been

“Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,

*where any such provision is more favourable to the Investor or Investment”.*²⁹⁷

604. In the present case, despite alleging that “*EU law contains internal protection mechanisms superior to those of many instruments of international law, including the ECT,*”²⁹⁸ the Respondent has failed to identify another “*international agreement*”, notably among the EU treaties, which would include a dispute-resolution mechanism “*more favourable to the Investor or Investment*” for the purposes of Article 16. The fact remains that Article 26 of the ECT offers an investor the privilege of *choosing* among several *fora* in case of dispute, and notably the right to choose between litigation (in Spain in our case) and arbitration, such choice being left to the investor’s entire discretion. By contrast, the Respondent does not demonstrate that an investor would be offered a similar privilege by EU treaties. Ultimately, the Tribunal considers that Article 16 requires the Tribunal to resolve the conflict in favour of the treaty that offers the most favourable dispute-resolution mechanism in the eyes of the investor, which is in the best position to make such an assessment.
605. In the present case, the choice of the German Claimants to initiate ICSID arbitration proceedings on the basis of the ECT indicates that they viewed the ECT as offering the most favourable dispute settlement mechanism, as opposed to EU treaties.
606. The Tribunal therefore concludes that, in a case of conflict between the ECT and EU law as to the applicable dispute-resolution mechanism, the ECT would prevail pursuant to Article 16 thereof.
607. Finally, for the sake of completeness, the Tribunal deems it proper to clarify that the aforementioned findings remain unaltered by the reasoning of the *Green Power*

concluded by “*all the parties*” to the earlier one, while the Lisbon Treaty was only concluded by EU Member States, as opposed to all the ECT Contracting States.

²⁹⁷ CL-98, *Vattenfall*, decision on *Achmea* Issue, para. 192.

²⁹⁸ Resp. Rej., para. 81.

award – which the Parties have discussed at the end of this arbitration²⁹⁹ – for at least two reasons.

608. First, the Arbitral Tribunal recalls that it is not bound by earlier arbitral precedents and that the relevance of such precedents remains left to the Tribunal's wide discretion according to the circumstances of the case.
609. Second, and in any event, the Tribunal finds that the *Green Power* award is of little assistance in the case at hand for the very reason that it was not an award rendered under the aegis of the ICSID Convention, but an award rendered in Stockholm, *i.e.* within the European Union, in accordance with the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). This is a crucial difference in the eyes of this Tribunal, since the fact that the seat of the arbitration was in Sweden played an important role in the application of EU law in *Green Power*, precisely because EU law was indeed part of the *lex arbitri*, as correctly noted by the *Green Power* tribunal.³⁰⁰ In fact, the latter itself suggested that its reasoning might be different in the context of an ICSID arbitration which, by contrast, has no seat.³⁰¹

(c) Conclusion

610. For the above reasons, the Tribunal unanimously finds that it has jurisdiction over the claims brought by DCM 1, DCM 2 and HL Sun Invest against Spain on the basis of Articles 26(2), 26(3) and 26(4) of the ECT.

5.1.4.2 Does the Tribunal Have Jurisdiction Over the Claims of Edisun Power?

611. The Tribunal notes that the Respondent's position as to whether the Tribunal had jurisdiction *ratione personae* over Edisun Power has evolved in the course of this arbitration.
612. The Respondent initially submitted that its objection to jurisdiction was "*an Objection of totality*" which concerned "*the totality of Claimants*"³⁰² and requested the Tribunal to "*declare that it [had] no jurisdiction to hear the claims of the Claimants or, in as appropriate, the inadmissibility thereof*".³⁰³
613. At the Hearing, however, the Respondent nuanced its position by declaring that "*there is a lack of jurisdiction at least concerning the Claimant parties of the EU*,"³⁰⁴ and subsequently amended its prayers for relief in its PHB by requesting that the Tribunal declare "*its lack jurisdiction [sic] regarding two EU Claimants' claims due to the intra-EU jurisdictional objection*".³⁰⁵

²⁹⁹ Resp. Comments on *Green Power* award; Cl. Comments on *Green Power* award.

³⁰⁰ **RL-175**, *Green Power*, para. 439.

³⁰¹ *Ibid.*, para. 441.

³⁰² Resp. C-Mem., para. 7; see also Resp. Rej., paras. 5; 48 *et seq.*

³⁰³ Resp. C-Mem., para. 1190 a); see also Resp. Rej., para. 1219 a).

³⁰⁴ Tr. Day 1, 145:17-18 (emphasis added).

³⁰⁵ Resp. PHB, para. 264 a).

614. Therefore, the Tribunal understands that the Respondent no longer objects to the jurisdiction *ratione personae* of the Tribunal over the claims of Edisun Power, which is a Swiss entity, and therefore *not* an entity of an EU Member State.
615. For the sake of completeness, the Tribunal further deems it proper to recall that Spain and Switzerland are both Contracting States of the ICSID Convention and Contracting Parties of the ECT. The Tribunal further notes that neither the quality of “Investor” of Edisun Power, nor the fact that the claims brought by this Claimant constitute a “dispute” arising from an “Investment” in the sense of the ECT, has been disputed.
616. For these reasons, the Tribunal unanimously finds that it has jurisdiction over the claims brought by Edisun Power against Spain on the basis of Articles 26(2), 26(3) and 26(4) of the ECT.

5.2 Does the Arbitral Tribunal Have Jurisdiction *Ratione Materiae* Over the TVPEE of Act 15/2012?

5.2.1 The Respondent’s Position

617. According to the Respondent, the Tribunal lacks jurisdiction to determine the Claimants’ claim with respect to the alleged infringement by Spain of its obligations under Article 10(1) of the ECT through the introduction of the TVPEE. The grounds for the objection are that the TVPEE is a taxation measure exempt from the scope of the ECT by reason of the carve-out of Article 21(1) of the ECT.
618. The Respondent argues that it has not consented to arbitrate disputes deriving from tax measures such as the TVPEE.³⁰⁶ Under Article 26(3) of the ECT, Spain only consented to arbitrate disputes arising out of alleged breaches of Part III of the ECT. While Article 10(1) of the ECT is included in Part III, the TVPEE is a taxation measure of general application. Taxation measures are exempt from the scope of protection of Article 10(1) by virtue of Article 21(1) of the ECT, which provides that “*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties*”.³⁰⁷ Therefore, the Respondent alleges that the ECT excludes taxation measures from its scope of application, with the exceptions expressly stated in Sections (2) to (5) of the Article 21 of the ECT, none of which comprises Article 10(1).
619. The Respondent further contends that the TVPEE is a “*taxation measure*” for the purposes of Article 21 of the ECT pursuant to the definition provided in Article 21(7)(a)(i) (“*any provision relating to taxes of the domestic law of the Contracting Party*”).³⁰⁸ In accordance with this definition, the TVPEE is part of the domestic law of Spain, enacted by the Spanish Parliament and confirmed by Spanish Constitutional

³⁰⁶ Resp. C-Mem., paras. 196-202; Resp. Rej., para. 182.

³⁰⁷ Resp. C-Mem., paras. 203-210; Resp. Rej., paras. 204-206; Resp. PHB, paras. 86-89.

³⁰⁸ Resp. C-Mem., paras. 219-229; Resp. Rej., paras. 160-168; Resp. PHB, para. 87.

and domestic courts, as well as domestic bodies.³⁰⁹ TVPEE also falls under the concept of “tax” under international law, as used by international arbitral case law³¹⁰ and as confirmed by the European Commission, through its ratification of the tax nature of the TVPEE and its compliance with EU law (which, according to the Respondent, is international law).³¹¹

620. In response to the Claimants’ submission that the TVPEE is not a *bona fide* tax through an analysis of its economic effects, the Respondent contends that such an additional analysis is not appropriate in light of the findings of the *EnCana* tribunal.³¹²

621. In the event that the Tribunal should consider that an additional analysis of the TVPEE is necessary in order to determine that there is a taxation measure for purposes of the ECT, Spain further submits that the TVPEE is a *bona fide* taxation measure because:

- Contrary to the Claimants’ argument that the TVPEE was merely a measure intended to reduce the incentive remuneration guaranteed to the Claimants by Spain, the Respondent submits that the TVPEE is a source of public income of the Spanish State. The revenues from the TVPEE are accounted for in the annual General Budgets of the State in order to finance the costs of the electricity system destined to the promotion of renewable energy.³¹³ The Respondent notes that all other taxes included in Law 15/2012 (including taxes on nuclear producers) pursue the same purpose, in accordance with the State legislator’s legitimate exercise of power to set taxes.³¹⁴
- The Respondent contends that the TVPEE is a tax of general application as it applies to all energy producers, both renewable and conventional, to all of which Law 15/2012 grants exactly the same treatment.³¹⁵ Indeed, because of its very nature as a direct tax, the TPVEE levied the income derived from the production of electrical energy and its incorporation into the Spanish electrical system at a rate of 7%.³¹⁶ From the perspective of economic repercussion, the economic effects of the TVPEE on producers of renewable energy are neutralized. Spain notes that renewable producers are entitled to receive specific remuneration to recover the costs of the TVPEE because, under Order IET/1045/2014, the TPVEE is among the operating costs

³⁰⁹ Resp. C-Mem., paras. 203-210; Resp. Rej., paras. 204-206; Resp. PHB, paras. 86-89.

³⁰⁹ Resp. C-Mem., paras. 235-248; Resp. Rej., para. 162.; Resp. PHB, para. 88.

³¹⁰ Resp. C-Mem., paras. 249-272; Resp. Rej., paras. 165 and 167.

³¹¹ Resp. C-Mem., paras. 273-284; Resp. Rej., paras. 161 and 165.

³¹² Resp. Rej., para. 173; Resp. PHB, para. 89: **RL-23**, *EnCana Corporation v. Republic of Ecuador*, UNCITRAL Case No. UN 3481, Award, 3 February 2006 (“*EnCana*”) para. 142: “*The question whether something is a tax measure is primarily a question of its legal operation, not its economic effect... The economic impacts or effects of tax measures may be unclear and debatable; nonetheless a measure is a taxation measure if it is part of the regime for the imposition of a tax.*”

³¹³ Resp. C-Mem., paras. 261-272; Resp. Rej., para. 207; Resp. PHB, para. 92.

³¹⁴ Resp. PHB, para. 93.

³¹⁵ Resp. C-Mem., para. 260; Resp. Rej., paras. 178-188.

³¹⁶ Resp. Rej., paras. 194-197.

considered to calculate the specific remuneration that those producers receive.³¹⁷

622. Furthermore, the Respondent alleges that the Claimants have not provided evidence to support their unfounded claim that the TVPEE does not fall within the carve-out provision of Article 21.³¹⁸ The Respondent adds that the burden of proof lies with the Claimants regarding their arguments regarding both *bona fide* taxation measure and the alleged bad faith of the Respondent.³¹⁹
623. Finally, the Respondent also submits that the Claimants' arguments are the same that have been used by other claimants in other arbitrations against Spain, and which have been unanimously rejected in all the cases decided to date.³²⁰ The Respondent notably relies on the awards of the arbitral tribunals in *Isolux v. Spain*, *Eiser v. Spain*, *Novenergia v. Spain*, *Masdar v. Spain*, *Antin v. Spain*, *Foresight v. Spain*, *Greentech v. Spain*, *RREEF v. Spain* and *OperaFund v. Spain*. Those tribunals unanimously considered the provisions of Law 15/2012 on the TVPEE to be a taxation measure for the purposes of the ECT and declared that they lacked jurisdiction to decide the claim for an alleged breach of Article 10(1) of the ECT through the introduction of the TVPEE by Act 15/2012.³²¹

5.2.2 The Claimants' Position

624. The Claimants consider that the 7% so-called "tax" imposed by Law 15/2012 is not a taxation measure of general application in the sense of Article 21 of the ECT.³²²
625. The Claimants argue that the TVPEE does not fall within the carve-out for Taxation Measures in Article 21 of the ECT because its application to the subsidies paid to the Claimants' plants lacks the substantive characteristics of taxation, for three reasons. First, the application of the TVPEE to subsidy revenue lacks the "non-equivalence" characteristic of taxation. Second, the application of the TVPEE to subsidy revenue discriminates against renewable producers. Third, the revenue generated by the TVPEE is not used for general state purposes, but to reduce costs for consumers as it is recycled back into the electricity system. Regardless of the formal legal characterization of the TVPEE, it has the substantive characteristics of a reduction of subsidies rather than a Taxation Measure of general application.³²³
626. While acknowledging that the domestic characterization of a disputed measure may be helpful in determining its nature, the Claimants contend that domestic law is not determinative to define taxation measures under a BIT, as it would allow host States to "*legitimize what otherwise would qualify as an abusive legislative provision by*

³¹⁷ Resp. C-Mem., paras. 681-686; Resp. Rej., paras. 189-204; Resp. PHB, paras. 89 and 95.

³¹⁸ Resp. PHB, para. 96.

³¹⁹ Resp. Rej., para. 175; Resp. PHB, para. 96.

³²⁰ Resp. Rej., para. 214; Resp. PHB, para. 96.

³²¹ Resp. Rej., paras. 212-215; Resp. PHB, para. 96.

³²² Cl. Reply, Section II, E.; Cl. Rej., Section I, B.; Cl. PHB, Section I, 3.

³²³ Cl. PHB, para. 25.

*simply calling it a ‘tax’.*³²⁴ Instead, the Claimants submit that arbitral tribunals have adopted a legal test to determine whether a measure constitutes a “tax” falling within the scope of Article 21 of the ECT. The Claimants refer to the tribunal’s two-step approach in *Antaris v. The Czech Republic* explaining that even if a measure is formally considered a tax within domestic law, a tribunal nevertheless must assess whether the measure “falls within the meaning of a ‘Taxation Measure’ as contemplated by [ECT] Article 21 [which] imposes limits on those measures which may be invoked by a Contracting Party under the ECT”.³²⁵

627. Furthermore, the Claimants maintain that even the Spanish Supreme Court expressed doubts about the constitutionality of the tax and its stated environmental purpose because renewable energy producers are already subject to a trade tax on their economic capacity. The Claimants explain that the Spanish Constitutional Court rejected the Supreme Court’s question about the constitutionality of the TVPEE on the ground that the question should have been posed to the CJEU but did not rule on the substance of the question. The doubts of the Spanish Supreme Court bolster the inference that the TVPEE was introduced with an ulterior purpose.³²⁶
628. The Claimants also allege that the carve-out of Article 21(1) of the ECT only applies to taxation measures that are *bona fide* and not to actions disguised as a tax but aiming at achieving a different purpose. The Claimants view the TVPEE established by Law 15/2012 not as a *bona fide* tax but as a disguised requirement that renewable producers reimburse Spain for a portion of their pecuniary incentives.³²⁷ In support of this contention, the Claimants notably advance the two following arguments:
- *First*, the energy “tax” was not paid to the State for public purposes.³²⁸ Rather, the resulting funds were cycled through the State budget into the Spanish electricity system, thus avoiding the need to raise prices to electricity consumers in order to pay the incentives guaranteed to renewable producers like the Claimants. Its real purpose was neither to raise revenue for the State nor to promote renewables,³²⁹ but to reduce the incentives Spain had previously granted to renewable energy facilities rather than to raise charges to electricity consumers.³³⁰
 - *Second*, while Spain asserts that the measure was a tax “of general application” because it applied to energy production from renewable and conventional sources alike, the Claimants contend that it impacted renewable and conventional plants differently.³³¹ Indeed, renewable plants paid the “tax”

³²⁴ Cl. Reply, para. 190.

³²⁵ Cl. PHB, para. 26; **RL-118**, *Antaris v. The Czech Republic*, PCA Case n° 2014-01, Final Award, 2 May 2018.

³²⁶ Cl. Rej., paras. 76-79; **C-443**, Auto TS 2955/2014, 14 June 2016; **C-444**, Auto TS 2554/2014, 14 June 2016; **C-445**, Auto TS 2554/2014, 10 January 2018.

³²⁷ Cl. Reply, para. 189; Cl. Rej., para. 82; Cl. PHB, para. 37.

³²⁸ Cl. Reply, paras. 196-200; Cl. Rej., paras. 85-90; Cl. PHB, paras. 37-39.

³²⁹ Cl. Rej., para. 86; Cl. PHB, para. 39.

³³⁰ Cl. Reply, para. 197; Cl. Rej., para. 85.

³³¹ Cl. Reply, para. 201-203; Cl. Rej., paras. 91-95; Cl. PHB, paras. 32-36.

on a higher base than conventional plants, because of the fact that the TPVEE rates are applied to revenues (not income) including subsidies and that the total production costs are higher for renewable plants than for conventional plants. Also, while conventional producers are able to recover a substantial proportion of their 7% payment from consumers by raising wholesale prices, renewable producers cannot recoup the lost revenue, as their revenues come from fixed tariffs.³³² In reality, the imposed “tax” therefore targeted renewable producers rather than the broader class of all electricity producers. The Claimants thus argue that the so-called 7% “tax” is “*a less conspicuous way of revoking incentives that [Spain had previously] considered necessary*”.³³³

629. As a further demonstration that the measure was introduced in bad faith, the Claimants allege that Spain enacted this measure under false pretenses, and they submit that the true purpose of Law 15/2012 was simply to reduce the tariff deficit. In this regard, the TVPEE falls squarely within the reasoning of *Yukos v. Russia*, which opined that the carve-out of Article 21(1) can apply only to *bona fide* taxation actions, *i.e.* “*actions that are motivated by the purpose of raising general revenue for the state*”.³³⁴ The Claimants maintain its position that the TVPEE of Law 15/2012 was introduced with the purpose of reducing incentives to RE producers and was shaped as a tax to avoid liability under the ECT, which is a purpose entirely unrelated to that of raising revenue for Spain, as in *Yukos* as well as in *Isolux* and *Eiser*.³³⁵
630. Finally, the Claimants acknowledge that several tribunals have accepted Spain’s argument that the carve-out for taxation measures in Article 21 of the ECT applies to the TVPEE, but none of those awards engaged in any significant analysis of the characteristics of the TVPEE that cause it to function as an indirect reduction of tariffs rather than a true taxation measure.³³⁶

5.2.3 The Tribunal’s Analysis

631. The issue before the Tribunal is whether, in light of the carve-out provision of Article 21(1) of the ECT, it has jurisdiction *ratione materiae* over the Claimants’ claim in relation to the introduction of the “*tax on the value of production of electricity in Spain*” (“TVPEE”) imposed by Spain through Law 15/2012 of 27 December 2012.³³⁷ As the Parties have argued this issue, it resolves into two separate sub-issues: (i) whether in principle the TVPEE falls within the carve-out of Article 21 of the ECT and (ii) if it does, whether the TVPEE should be deemed not to be encompassed by such carve-

³³² Cl. Reply, paras. 202-203; Cl. Rej., paras. 83 and 91-95; Cl. PHB, paras. 34-35.

³³³ Cl. Rej., paras. 82-84; Cl. PHB, para. 35.

³³⁴ Cl. Reply, para. 194; **CL-72**, *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 (“*Yukos*”), para. 1407.

³³⁵ Cl. Reply, paras. 194-196. Cl. Rej., paras. 88-89; **CL-109**, *Isolux Infra. Netherlands B.V. v. Kingdom of Spain*, SCC V2013/153, Award, 12 July 2016; **CL-41**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 (“*Eiser*”).

³³⁶ Cl. Reply, para. 205; Cl. Rej., para. 96.

³³⁷ **C-327**, Law 15/2012.

out by reason of allegedly having been enacted in bad faith, in violation of Spain's obligation to perform the ECT in good faith.

632. The first question must be answered by reference to the terms of the ECT. Pursuant to the relevant sections of Article 21 of the ECT ("*Taxation*"):

"(1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency. [...]"

(7) For the purposes of this Article:

(a) The term "Taxation Measure" includes:

(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; [...]"

633. It follows from the preceding discussion that the jurisdiction of an arbitral tribunal established on the basis of Article 26 of the ECT only extends to disputes relating to Part III of the ECT, as distinguished from other Parts and notably Part IV, which contains Article 21 on taxation measures. Therefore, if the Tribunal finds that the TVPEE qualifies as a "*taxation measure*" for the purposes of Article 21, it must decline its jurisdiction over the claims made in relation thereto, unless such measure (i) were to amount to a case of expropriation pursuant to Articles 13 and 21(5)(a), a point which has not been raised in this arbitration or (ii) were enacted in bad faith, as further discussed below.

634. Pursuant to Article 21(7)(i) of the ECT, taxation measures include "*any provision relating to taxes of the domestic law of the Contracting Party*", *i.e.* Spain in the present case.

635. It is therefore necessary for the Tribunal first to assess whether the TVPEE qualifies as a tax under Spanish law. In the present case, the evidence on record indicates that it does.

636. Law 15/2012 introducing the TVPEE and two other taxes is worth quoting in relevant part:

"Law 15/2012, dated 27 December on tax measures for energy sustainability.

Preamble

I

The purpose of this law is to make our tax system more compatible with more efficient and environmentally respectful use and sustainability, values that inspire this tax reform, and bring it in line with the basic principles that govern the tax, energy, and environmental policies of the European Union.

In today's society, the growing importance of energy production and consumption on environmental sustainability requires a regulatory framework that guarantees all agents the proper functioning of the energy model that also contributes to preserving our rich environmental heritage.(...)

To this end, through this Law three new taxes are enacted: a tax on the value of electric power production; a tax on production of spent nuclear fuel and radioactive waste resulting from generation of nuclear electric energy; and a tax on storage of spent nuclear fuel and radioactive waste in centralized installations (...)

II

In this sense and in order to ensure a balanced budget, in Title I of this law a tax is levied on the value of the production of electric power which is direct and real in nature, and affects the production of electric power and its contribution to the electricity grid within Spain's electricity system.

This tax will be levied on the economic gains of the producers of electric power whose installations require significant investments in electric power transport and distribution grids in order to evacuate the power they contribute to those grids, and which generate, themselves or as a result of the existence and development of such grids, undeniable environmental effects, as well as the generation of substantial costs necessary to maintain a guaranteed supply. The tax will apply to production from all of generation installations. (...)

TITLE I

Tax on the value of electric power production

Article 1. Nature.

The tax on the value of electric power production is a direct and real tax on the activities that involve production and incorporation into the electric power system, measured at the power station busbars, from each of the installations indicated in Article 4 of this Law. (...)

Article 4. Taxable event

1. The taxable event is the production and incorporation of energy into the electricity system of electric power measured at the power station busbars, included in the electricity system of peninsular, island and extra-peninsular territories, in any of the installations referred to in Title IV of Law 54/1997, of 27 November, of the Electricity Sector. (...)

Article 5. Taxpayers

Those subject to the tax are individuals or legal entities referred to in Article 35.4 of Law 58/2003, dated 17 December, General Tax Law, who carry out the activities listed in Article 4.

Article 6. Taxable basis.

1. The taxable basis is the total amount that the taxpayer receives for the electric power production and its incorporation into the electricity system, measured at the power station busbars, for each installation, during the tax period.

For these purposes, calculation of the total amount will include income from all economic regimes derived from the provisions of Law 54/1997, dated 27 November on the Electric Sector, during the corresponding tax period, as well as income from the specific economic regime in the case of electric power production and incorporation into the electricity grid in island and extra-peninsular territories. (...)

Article 8. Tax rate.

The tax rate will be 7 percent. (...)

Second additional provision. Electricity system costs.

The State General Budget Laws for each year will include an amount to finance the electricity system costs included in Article 16 of Law 54/1997, dated 27 November on the Electric Sector, and this amount will be equivalent to the sum of the following:

a) The calculation of the State's annual revenue collection derived from taxes and assessments included in this Law.

b) The estimated revenue generated by auctions of greenhouse gas emission rights with a maximum of 500 million euros".³³⁸

637. The Tribunal first observes that the TVPEE has been expressly labelled as a tax and has been introduced by a law, *i.e.* by a piece of legislation enacted by the Spanish

³³⁸ **R-2**, Law 15/2012 on tax measures for energy sustainability, 27 December 2012 ("Law 15/2012").

Parliament.³³⁹ Moreover, the Tribunal notes that the fiscal nature of the TVPEE has been confirmed by several Spanish courts and authorities:

- On 2 June 2014, the Spanish High Court (*Audiencia Nacional*) upheld the legality of Ministerial Order HAP/703/201369 which regulates the tax form (Form 583) used for the self-assessment and payment of the TVPEE to the Spanish Treasury.³⁴⁰
- On 6 November 2014, the Spanish Constitutional Court found that the TVPEE was in compliance with the Spanish Constitution. In particular, this Court referred to the TVPEE as “*the tax in question*” and dismissed a claim that Articles 4, 5 and 8 of the TVPEE were unconstitutional, holding that “*the challenged provisions do not exceed the freedom of configuration of the legislator, who is in no way prevented from employing taxation as an economic policy instrument in particular sectors [...]*”.³⁴¹
- The Spanish Institute of Accounting and Accounts’ Auditing explained that the amounts paid pursuant to the TVPEE “[would] *not reduce the turnover and must be registered as an expense on the profit and loss account, within account item 631 Other taxes*”.³⁴²
- The Spanish General Directorate of Taxes, whose role includes the interpretation of tax norms, indicated that the TVPEE is a tax deductible in calculating the Corporations Tax.³⁴³

638. The Tribunal further notes that the TVPEE has also been considered as a (valid) tax from an EU point of view.³⁴⁴

639. The Tribunal also observes that, even if the ECT had not included a definition of “Taxation Measure” in Article 21(7)(a), the TVPEE would have to be regarded as a tax under an international concept of tax, as recognized by the jurisprudence of arbitral tribunals. For example, under cases such as *EnCana v. Ecuador*³⁴⁵ and

³³⁹ *Id.*; see also **R-166**, The processing and approval process of Act 15/2012 by the Spanish Congress of Deputies and Senate, 20 September 2012.

³⁴⁰ **R-170**, National High Court Judgment (Administrative Dispute App. 297/2013), 2 June 2014; **R-171**, National High Court Judgment (Administrative Dispute App. 298/2013), 2 June 2014; see also **R-172**, National High Court Judgment (Administrative Dispute App. 296/2013), 30 June 2014.

³⁴¹ **R-178**, Judgment 183/2014 of the plenary session of the Constitutional Court, 6 November 2014; see also **R-323**, Order of the Constitutional Court of 20 June 2018, dismissing the challenge of unconstitutionality submitted by the Supreme Court about the TVPEE, which notably stated that the “*Supreme Court is convinced that the tax on the value of the production of electrical energy complies with EU Law*”, para. 3.

³⁴² **R-174**, Query 1, number 94 of the Official Gazette of the Institute of Accounting and Accounts Auditing (BOICAC), June 2013.

³⁴³ **R-177**, Act 27/2014 on Corporations Tax, 23 December 2014.

³⁴⁴ **R-183**, File sheet from EU Pilot Procedure 5526/13/TAXU, 13 February 2015; **R-184**, Email from EC to MAEC informing that EU PILOT 5526/13/TAXU has been closed, 8 September 2014; **R-185**, EC Web page about “EU Pilot” procedures.

³⁴⁵ **RL-23**, *EnCana*; see also **RL-53**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case, No. ARB/04/19, Award, 18 August 2008 (“*Duke*”).

Burlington Resources v. Ecuador,³⁴⁶ a State-imposed fiscal measure may be considered as a tax from the standpoint of international law if: (i) it is imposed by law; (ii) upon a class of persons; and (iii) to pay money to the State for public purposes and without any benefit to the taxpayer.³⁴⁷ Subject to the discussion that follows, the Tribunal considers that these three conditions are met in the case of the TVPEE.

640. The second question is whether, in spite of the conclusions reached above, the TVPEE should be deemed not to be included in Article 21 of the ECT on the ground that it (allegedly) was enacted in bad faith. It would be contrary to the obligation established by Article 26 of the VCLT³⁴⁸ and the objectives of protection of the ECT to accept that any measure introduced by a Contracting Party qualifies as a “*taxation measure*” for the purposes of Article 21 and is therefore shielded from investment protection obligations simply because such measure has been labelled as a “*tax*” by the relevant Contracting Party. Indeed, as explained by the tribunal in *Yukos*,

“[T]he carve-out of Article 21(1) can apply only to bona fide taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the State. By contrast, actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent) cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1).”³⁴⁹

641. The question whether the TVPEE was enacted in good or bad faith is a question of fact. As bad faith is not to be presumed, it is up to the Party that alleges it, in this case the Claimants, to establish by proper evidence that the TVPEE was enacted in bad faith. In particular, it is for the Claimants to establish their contention that the true purpose of the TVPEE was not to raise revenue for the State but to diminish the amount of the incentives afforded the investors in renewable energy.
642. The Claimants have not adduced any direct evidence on the alleged true purpose of the TVPEE. Their argument is based on indirect evidence, from which the Claimants seek to infer such a purpose. The Tribunal must now consider the Claimants’ indirect evidence and the inferences they seek to draw.
643. The Claimants submit that, even though the TVPEE is addressed, on its face, to all electricity producers, “*in application, the measure was targeted at renewable producers rather than the broader class of all electricity producers*”.³⁵⁰ In support of this contention, the Claimants essentially advance two arguments.

³⁴⁶ **RL-54**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (“*Burlington, decision on jurisdiction*”), paras. 164-165.

³⁴⁷ **RL-23**, *EnCana*, para. 142.

³⁴⁸ **CL-11**, VCLT, Article 26, “*Pacta Sunt Servanda*”: “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*”

³⁴⁹ **CL-72**, *Yukos*, para. 1407.

³⁵⁰ *Cl. Rej.*, para. 83; see also paras. 91-95.

644. First, the Claimants consider that “*because the measure applied to all revenues, as opposed to profits (after deducting depreciation of investment costs), the measure had a profoundly disproportionate impact on renewable energy producers whose revenues included much higher incentive tariffs precisely so that they could recover extremely high investment costs*”.³⁵¹
645. Second, the Claimants affirm that “*unlike conventional producers (who could pass along the ‘taxes’ to consumers through higher wholesale prices), renewable producers like Claimants who received a fixed tariff had no means to recoup the lost revenue*”.³⁵²
646. In other words, the Claimants seek to infer bad faith in the enactment of the TVPEE from the (alleged) fact that the measure has a disparate economic impact and affects producers of renewable energy the hardest. The Tribunal is not persuaded, however, by this line of argument.
647. In the first place, the Tribunal is not convinced that disparate economic impact, by itself, is sufficient to infer therefrom that the TVPEE was enacted in bad faith or was in fact meant to discriminate against producers of renewable energy. Whether, in practice, the TVPEE ended up having a more negative impact on those producers is not sufficient, in the Tribunal’s view, to warrant a finding of discrimination or to justify an inference on the motives of the Spanish Legislature in enacting the TVPEE. The Tribunal observes that many taxes have a disparate economic impact on persons and entities subjected to them. In addition, the extent of such impact remains uncertain on the basis of the evidence on record, not least because the TVPEE was one of the costs taken into account in the setting of the remuneration of renewable producers.³⁵³
648. The Claimants also submit that “*the energy ‘tax’ was not paid to the State for public purposes. Rather, the resulting funds were cycled through the State budget into the Spanish electricity system, thus obviating the need to raise prices to electricity consumers in order to pay the incentives guaranteed to renewable producers like Claimants*.”³⁵⁴ In other words, from the cycling of the funds the Claimants seek to infer a lack of public purpose, and from the lack of public purpose they seek to infer bad faith in the enactment of the TVPEE.
649. The Tribunal cannot share this position.
650. The Respondent has submitted evidence that the TVPEE was paid into the State Treasury and recorded in the General Budgets of the Spanish State from 2013 onwards.³⁵⁵ The fact that an amount equivalent to the revenues generated by the

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ **R-58**, Order IET/1045/2014.

³⁵⁴ Cl. Rej., para. 82; see also paras. 85-90.

³⁵⁵ **R-180**, Excerpt from the Spanish General State Budget for 2013; **R-181**, Excerpt from the Spanish General State Budget for 2014; **R-5**, Excerpt from the Spanish General State Budget for 2015; **R-179**, Excerpt from the Spanish General State Budget for

TVPEE was subsequently assigned to the financing of the costs of the electricity system³⁵⁶ does not change the fact that the State Treasury was the primary beneficiary of this tax, no matter how the Government then chose to redistribute the amounts collected.

651. In addition, the Tribunal is satisfied that the TVPEE was introduced by Spain to achieve a public purpose. In that regard, the Tribunal agrees with the Claimants that the “*environmental*” purpose of the TVPEE, as alleged by Spain, appears rather at odds with the fact that the TVPEE entailed a decrease in the revenues offered to the renewable-energy producers. Be that as it may, the Tribunal finds, based on the evidence on record, that the true purpose of the TVPEE, along with the two other taxes that were simultaneously enacted, was to correct the tariff deficit that Spain had to deal with at the time. As a matter of fact, such purpose can be read into the Preamble of Law 15/2012, which notably states that the TVPEE is enacted “*in order to ensure a balanced budget*”.³⁵⁷
652. In the eyes of the Tribunal, correcting the tariff deficit qualifies as a public purpose insofar as it reflects one of the duties of a State to manage its resources in an efficient manner. Whether such measure was ultimately justified or efficient in the circumstances is not for the Tribunal to assess and not relevant for the purposes of assessing the good or bad faith of the Spanish Legislature in enacting the TVPEE.
653. The Tribunal therefore concludes that the TVPEE qualifies as a *bona fide* “*taxation measure*” for the purposes of Article 21(1) of the ECT. Such finding is supported by a considerable number of arbitral precedents which have consistently reached a similar conclusion with respect to this measure.³⁵⁸
654. In light of the foregoing, the Tribunal unanimously finds that it has no jurisdiction over the Claimants’ claims to the extent that they relate to the impact of this measure on their investments.

6. MERITS

655. The Tribunal’s analysis and decisions on the merits, damages, and costs are taken by majority. Professor Dupuy dissents from those parts of this Decision for the reasons stated in his accompanying Dissenting Opinion (the “**Dissent**”). The Tribunal responds to certain aspects of the Dissent in appropriate places in the text or in footnotes.
656. In its examination of the merits of the case, the Tribunal will first address the issue of the law applicable to the substance of the dispute (below, subsection **6.1**) and then it

2016; **R-187**, Excerpt from the Spanish General State Budget for 2017; **R-204**, Excerpt from the Spanish General State Budget for 2018.

³⁵⁶ **R-2**, Law 17/2012; **R-6**, Law 17/2012, Fifth Additional Provision, 27 December 2012.

³⁵⁷ **R-2**, Law 15/2012, Preamble II.

³⁵⁸ See, for instance, **CL-189**, *Watkins Holding S.à.r.l. et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020 (“*Watkins*”); **CL-196**, *Cavalum*; **RL-153**, *Freif*.

will analyze and rule on each of the Claimants' claims under Article 10(1) of the ECT, namely the claim for the breach of the fair and equitable treatment clause (6.2), the claim for the breach of the impairment clause (6.3), and the claim for the breach of the umbrella clause (6.4).

6.1 Applicable law

6.1.1 The Claimants' Position

6.1.1.1 Article 26(6) of the ECT Does Not Allow for the Application of EU law

657. According to the Claimants, the ICSID Convention requires the Tribunal to decide the merits of this dispute on the basis of the laws agreed by the parties. In consenting to resolve this dispute by arbitration under the ECT, the Parties agreed to apply the governing-law provision of the ECT, *i.e.* Article 26(6), pursuant to which: "*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.*"
658. In that regard, the Claimants allege that Spanish law is relevant to this dispute only as a matter of fact, to be considered by the Tribunal along with other facts of this case. Spanish law does not provide and cannot influence the legal standards that the Tribunal applies to determine whether Spain violated the ECT and international law. The Parties have not agreed to apply Spanish law to this dispute.³⁵⁹
659. The Claimants further submit that EU law does not apply to the merits of this case.³⁶⁰ Indeed, Article 26(6) does not allow for the application of EU law.³⁶¹ The specific authorities on which Spain relies to claim that EU law applies to the merits of this ECT arbitration are *Electrabel*, *Blusun*, and *Wirtgen*. The Claimants contend, however, that none of these cases supports Spain's position.
660. According to the Claimants, the *Wirtgen v. Czech Republic* case is not comparable to the present case for three reasons. First, the *Wirtgen* case was brought under the Germany-Czech Republic BIT and its governing law provision is not comparable to Article 26(6) of the ECT. Second, given the absence of a governing-law provision, the Terms of Appointment that the Parties agreed to govern that case provided that the issue of the applicable law would be "*subject to briefing by the Parties and determined by the Tribunal.*" Third, the case was seated in Geneva, and therefore the Swiss Federal Act on Private International Law Act applied. This Act provides that failing a choice of law the tribunal "*must apply the rules of law with the closest connection with the dispute in accordance with the so-called principle of proximity.*"³⁶²
661. The Claimants contend that Spain's reliance on the *Blusun* award is also misplaced. Not only did *Blusun* reject the intra-EU objection (without applying EU law to reach

³⁵⁹ Cl. Mem., Section V.

³⁶⁰ Cl. Reply, Section III.

³⁶¹ Cl. Reply, Section III, A).

³⁶² Cl. Reply, paras. 208-209.

that conclusion), but also the *Blusun* tribunal never considered whether EU law was applicable to the merits of the dispute.³⁶³

662. Spain similarly tries to rely on the *Electrabel* case for the proposition that the “*application of EU law as International Law [i]s prescribed under Article 26 of the ECT,*” which the Claimants dispute. First, the Claimants argue that the *Electrabel* tribunal acknowledged that EU law is “*part of a regional system of international law,*” which is different from the universally accepted principles of public international law referred to in Article 26(6). Second, the Claimants point out that the *Electrabel* tribunal ultimately did not apply EU law to the merits of the case and only took it into account as a fact, which is at most what Claimants contend the present tribunal can do. As the *Blusun* tribunal rightly noted, the discussion in *Electrabel* of the possible application of EU law was only “*hypothetical.*” Third, the Claimants submit that *Electrabel* actually rejected many of the same arguments put forward by Spain regarding the interplay between the ECT and EU law.³⁶⁴
663. According to the Claimants, the *obiter dicta* in the *Electrabel* decision has been rejected by other tribunals. For instance, the *Eskosol* tribunal addressed the specific question of whether Article 26(6) of the ECT incorporates EU law to the merits of a case and held that it clearly does not do so. The tribunal concluded that “*the phrase ‘rules and principles of international law’ cannot be interpreted as encompassing EU law, which is a regional and not a worldwide system of law.*” Notably, the *Eskosol* tribunal relied on the *Eiser* tribunal, which rejected Spain’s argument that EU treaties were “*applicable rules and principles of international law for purposes of Article 26(6).*” The *Eskosol* tribunal also noted that an interpretation of the plain terms of the ECT in accordance with Article 31(1) of the VCLT further confirmed the conclusion that ECT Article 26(6) did not include EU law. Significantly, the *Eskosol* tribunal endorsed the finding in *Vattenfall* that “*EU law does not constitute principles of international law which may be used to derive meaning from Article 26 ECT, since it is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty such as the ECT.*”³⁶⁵
664. The Claimants also cite the *Greentech* award, in which the tribunal noted that “[the] reference to ‘international law’ cannot be stretched to include EU law, absent doing violence to the text which would be impermissible under the [VCLT],” given that the ECT’s reference to principles of international law “*must in context refer to public international law, not EU law.*”³⁶⁶
665. The Claimants therefore argue that this Tribunal should follow the unanimous findings of the most recent ECT awards (including *Electrabel*), rejecting any suggestion that EU law can be applied to the merits under Article 26(6) and finding that an

³⁶³ Cl. Reply, para. 210.

³⁶⁴ Cl. Reply, para. 211.

³⁶⁵ Cl. Reply, paras. 212-216.

³⁶⁶ Cl. Reply, para. 217.

interpretation of the plain text of Article 26(6) demonstrates that the reference to “*rules and principles of international law*” does not include EU law.³⁶⁷

6.1.1.2 EU Law on State Aid Is Irrelevant to Determining Spain’s Liability Under the ECT

666. Furthermore, the Claimants submit that EU law on State Aid is irrelevant to determining Spain’s liability under the ECT.³⁶⁸

667. According to the Claimants, Spain’s heavy reliance on the European Commission’s Decision on State Aid of 10 November 2017 to conclude that the incentives regimes at issue in this case constitute State aid, and therefore EU law should apply, is wrong for the following reasons.³⁶⁹

668. First, the Claimants argue that the 2017 EC Decision did not assess or reach any conclusions regarding whether RD 661/2007 and RD 1578/2008 are State aid and if so, whether they were compatible with EU State aid law. Instead, the 2017 EC Decision was concerned exclusively with Spain’s New Regulatory Regime and concluded that that regime is compatible with State aid.³⁷⁰

669. Second, the Claimants submit that under EU State aid law, a Member State is obligated to notify State aid schemes to the Commission for approval, prior to enacting the regimes. Spain did not notify either RD 661/2007 or RD 1578/2008 to the EC for a State aid analysis prior to enacting them, which reflects that Spain did not consider those regimes to have constituted State aid.³⁷¹

670. Pursuant to Article 107(1) of the Treaty on the Functioning of the European Union (“**TFEU**”), four cumulative criteria must be met for a finding of “State aid.” According to the Claimants, at the time they invested from 2007-2009, the common understanding was that the original regulatory regime (RD 661/2207 or RD 1578/2008) did not fall within the scope of TFEU Article 107(1) and hence was not State aid as defined by EU law. This is because the incentives ultimately were funded by electricity consumers rather than the general State budget.

671. The Claimants cite a 2003 APPA report which examined EU law and concluded that a feed-in tariff scheme “*does not constitute State aid for the purposes of Article 87 (1) [current TFEU Article 107(1)] of the Treaty of the European Community, insofar as it does not imply any transfer of state funds... These statements are extended by analogy to the Spanish system of compensation to renewables*”³⁷²

³⁶⁷ Cl. Reply, para. 218.

³⁶⁸ Cl. Reply, Section III, B).

³⁶⁹ Cl. Reply, para. 219.

³⁷⁰ Cl. Reply, para. 220.

³⁷¹ Cl. Reply, paras. 221-225.

³⁷² Cl. Reply, paras. 223; **C-77**, APPA 2003 Report.

672. Third, the Claimants note that Spain has failed to provide a single example of a decision by the EC finding an incentive program for renewable energy to be incompatible with EU State aid law.³⁷³
673. Fourth, the Claimants contend that the obligation to comply with EU State aid law lies with EU Member States, not investors. Yet, Spain never notified the RD 661/2007 and RD 1578/2008 regimes to the EC, because it did not consider the regimes to constitute State aid.³⁷⁴
674. Fifth, the Claimants argue that Spain's arguments that (i) a potential award in favor of the Claimants would constitute State aid and would be subject to the EC's control, and (ii) rules on State aid constitute "*rules of public order*" and therefore a potential award against Spain would (somehow) be annulled, are unproven, without merit, and ultimately beside the point. Post-award matters are irrelevant to the arbitral tribunal's consideration of issues before it, as held by several tribunals.³⁷⁵
675. Finally, the Claimants submit that Spain's argument that EU State aid law required Spain to enact the disputed measures is equally wrong and irrelevant as its other arguments on State aid.³⁷⁶
676. Spain relies on the EC's 29 February 2016 communication in response to a petition submitted by Spanish PV investors asking the EC to open an investigation into Spain's retroactive modification of RD 661/2007. While the Claimants may or may not agree with the EC's view expressed in this communication, it is irrelevant to this proceeding because the Claimants do not assert here that the disputed measures violated Directive 2009/28/EC or any other provision of EU law; the Claimants contend that the disputed measures violated the ECT. Moreover, according to the Claimants, while the EC's communication expressed its view that Member States retain discretion under EU law to modify support schemes, it in no way suggested that Member States' discretion to do so cannot be limited by other law, such as domestic law or the ECT.³⁷⁷
677. According to the Claimants, the EC itself confirmed the limits of its decisions in its 2017 EC Decision on which Spain also seeks to rely: the EC expressly stated that its Decision is only binding on tribunals "*where they apply Union law.*" The *Novenergia* tribunal relied on that limiting language to determine that the EC decision was irrelevant to its task of analyzing Spain's liability under the ECT.³⁷⁸
678. Hence, the Claimants argue that the 2017 EC Decision cannot serve as a basis for Spain to argue that EU law should apply to the merits of the case on the putative ground that the FET standard of the ECT cannot have a broader scope than it has in

³⁷³ Cl. Reply, paras. 226-227.

³⁷⁴ Cl. Reply, para. 228.

³⁷⁵ Cl. Reply, para. 229.

³⁷⁶ Cl. Reply, para. 231.

³⁷⁷ Cl. Reply, para. 233.

³⁷⁸ Cl. Reply, para. 234.

EU law. The Claimants contend that EU law is entirely irrelevant and that the FET provision of the ECT therefore applies to this case regardless of how that standard may exist under EU law.³⁷⁹

679. The Claimants further argue that Spain's State aid argument has been rejected by all ECT tribunals. The Claimants quote the *Novenergia* tribunal, which held that a "foreign investor who initiates an ECT arbitration...invoking protection under the FET standard does not abuse its rights nor incorrectly bypasses EU law...because EU law does not recognize, nor prohibit a similar right," and concluded that the 2017 EC Decision was "entirely irrelevant." The Claimants also refer to the *Antin* and *Foresight* tribunals, which also rejected Spain's argument that EU law should apply; the majority in *Foresight* expressly noting that the 2017 EC Decision "has no bearing on the issue of Claimants' legitimate expectations of the regulatory stability at the time of their investment." The Claimants also cite the *9Ren* tribunal, which rejected Spain's State aid argument, noted that *9Ren* "is not asserting a right to State Aid under EU law," and therefore conclude that the "status of Spain's compliance with the EU law is, so far as the Claimant is concerned, res inter alios acta." The same applies to the Claimants in the present case, who are not asserting any claims under EU law.³⁸⁰
680. According to the Claimants, Spain tries to suggest that RD 661/2207 and RD 1578/2008 were incompatible State aid programs on which the Claimants could not have relied, but there is no evidence at all for that suggestion. As the Claimants explained at the Hearing and in their written submissions, aid schemes for renewable energy enjoy a presumption of permissibility under EU law generally, and neither Spain nor the Commission considered RD 661/2007 or RD 1578/2008 to be State aid. If they had, they would have been in violation of their EU obligations, because (i) Spain did not notify the programs for a State aid analysis and (ii) the Commission did not investigate the programs for compatibility with State aid law.³⁸¹

6.1.2 The Respondent's Position

681. The Respondent submits that the law applicable to the merits of the case is set forth by Article 26(6) of ECT and Article 42 of the ICSID Convention and that, according to these provisions, "the ECT and other International Law principles and standards must be applied on an equal footing."³⁸²
682. The Respondent further argues that these principles and standards of international law encompass EU law, which, according to the European Court of Justice, is both part of the internal law of the Member States under the principle of direct effect and international law,³⁸³ as recalled in *Achmea*.³⁸⁴ The Respondent also refers, in that

³⁷⁹ Cl. Reply, para. 235.

³⁸⁰ Cl. Reply, paras. 235-236.

³⁸¹ Cl. PHB, Section I, 2, spec. para. 21.

³⁸² Resp. C-Mem., para. 859.

³⁸³ **RL-79**, Judgment of the CJEU from 5 February 1963, Case C-26/62, *Van Gend & Loos v. Nederlandse administratie der belastingen*; **RL-65**, Judgment of the CJEU, 15 July 1964, Case C-6/64, *Costa v. ENEL*, p. 593.

³⁸⁴ **RL-5**, *Achmea* Judgment, paras. 33 and 41.

regard, to Article 38 of the Statute of the International Court of Justice as authority for the proposition that EU law – its Treaties – are international agreements and therefore a source of international law that the Tribunal must apply.

683. Therefore, EU law is not only a crucial fact for the resolution of this dispute, and in particular to assess the objective and reasonable legitimate expectations of any investor in the European Union, but it is also applicable to the resolution of the dispute, both regarding the jurisdiction of the Arbitral Tribunal and on the merits.
684. In support of its contention, Spain notably refers to the findings of the arbitral tribunal in *Electrabel* where the latter held that:

“EU law as a whole is part of the international legal order; [...]

The Tribunal further concludes that EU law (not limited to EU Treaties) forms part of the rules and principles of international law applicable to the Parties’ dispute under Article 26 (6) ECT. Moreover EU law, as part of the Respondent’s national law, is also to be taken into account as a fact relevant to the Parties’ dispute.”³⁸⁵

685. Spain also relies on the decisions in *Blusun*³⁸⁶ and *Wirtgen*,³⁸⁷ which it considers to be applicable to the present case, as opposed to the reasoning in *Eskosol* – on which the Claimants rely – which Spain considers to be erroneous.
686. The Respondent contends that the *ratione personae* applicability of the rules of EU law to this dispute does not allow for any doubt as it affects a Member State of the EU and a national from another Member State.³⁸⁸
687. According to the Respondent, the rules of EU Law are also applicable *ratione materiae* for the purpose of the dispute, which is nothing more than the claim for State aid in favor of the Claimants.³⁸⁹ The matter of investments affects the fundamental freedoms of movement, which are the basis of EU law. Particularly in this case, the application of rules from EU law regarding public aid is unquestionable as what is being demanded by the Claimants is the maintenance of a public subsidy (which falls within the exclusive competence of the EU) granted by the State concerning renewable energy.³⁹⁰
688. The Respondent submits that the Tribunal should apply not only EU law, but also rules regarding State Aid, which constitute rules of public order,³⁹¹ and that an award that does not respect the rules of EU law and particularly those which have the nature

³⁸⁵ **RL-31**, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras. 4.122 et 4.195.

³⁸⁶ **RL-59**, *Blusun*, para. 278.

³⁸⁷ **RL-66**, *Wirtgen v. Czech Republic*, PCA Case No. 2014-03, Award, 11 October 2017 (“*Wirtgen*”), paras. 175 and 177.

³⁸⁸ Resp. C-Mem., paras. 871-872, Resp. Rej., para. 867.

³⁸⁹ Resp. C-Mem., para. 870.

³⁹⁰ Resp. C-Mem., paras. 871-872, Resp. Rej., para. 867.

³⁹¹ Resp. C-Mem., paras. 880 *et seq.*

of public order like State Aid, will be annulled under the 1958 New York Convention and the procedural rules of the State where the annulment is requested.³⁹²

689. The support systems constitute State Aid and for that matter, no investor has the right to them; they must fulfil the principle of proportionality; their amount must be the necessary minimum in order to cover the CAPEX, the OPEX, and grant a reasonable rate of return which allows for a level playing field to be reached; their duration is limited to the period of depreciation of the facilities; and they are subject to constant reviews from the Commission and from the Member State paying them.³⁹³
690. In particular, the Respondent stresses that the European Commission, the sole institution with competence to decide on State Aid, has already stated that the incentives provided by RD 661/2007 and 1578/2008 are State Aid.³⁹⁴ The Respondent notably refers to the European Commission's Response of 29 February 2016, where it stated that "*support schemes need to be compatible with the Guidelines on State Aid for environmental protection and energy in as far as they constitute state aid.*" The Respondent also refers to the European Commission's Decision of 10 November 2017, in which the Commission examined the aid granted by RD 661/2007 and RD 1578/2008 for proportionality purposes, concluding that the aid scheme granted by Spain complies with the requirements of EU Law because the amount of subsidies received by existing renewable installations does not exceed the limits established by EU law. The Respondent contests the Claimants' assertion that the Commission did not analyze RD 661/2007 and RD 1578/2008 in its 2017 Decision: while the Commission did not pronounce itself on the compatibility of the old regime since it has been replaced by the new one, the Commission analyzed State Aid with respect to both regimes. The new scheme has been analyzed in section 2.1 of the Decision.³⁹⁵
691. In response to the Claimants' argument that the 2017 Decision would be subsequent to the original regime and that the regulation on State Aid imposes obligations on States instead of investors, Spain responds that the Commission's decision proves that the regime for promoting renewable energy is the subject of State Aid, and therefore that it is irrelevant whether this statement is made after the Claimants' investments.³⁹⁶ The Respondent also argues that an investor must be familiar with the applicable legal framework, which obviously includes EU Law and notably the system of State Aid control, which is directly applicable in all Member States. An operator in the EU has no reasonable basis for an expectation concerning subsidies which may potentially constitute State Aid.³⁹⁷

³⁹² Resp. C-Mem., para. 888.

³⁹³ Resp. C-Mem., para. 876.

³⁹⁴ Resp. Rej., paras. 106 *et seq*; Resp. PHB, para. 144.

³⁹⁵ Resp. Rej., paras. 106 *et seq*.

³⁹⁶ Resp. Rej., paras. 113 *et seq*.

³⁹⁷ Resp. PHB, para. 140.

692. According to Respondent, the Tribunal therefore can and in fact must apply EU law to the resolution of this dispute, and so the decision adopted cannot be contradictory to the standards of EU law that discipline the public aid for Member States.

6.1.3 The Tribunal's Analysis

693. As a starting point, the Tribunal notes that it is common ground between the Parties that the law applicable to the merits of the present dispute is governed by Article 42 of the ICSID Convention and Article 26(6) of the ECT.

694. Pursuant to Article 42(1) of the ICSID Convention,

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

695. In the present case, the Tribunal must then turn to Article 26(6) of the ECT, which contains the Contracting States' agreement on the law applicable to an ECT-based dispute:

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

696. This agreement of the Contracting States has been accepted also by the Claimants by filing claims under the ECT through the arbitration system contemplated in the same treaty. It follows from the foregoing that, to decide the issues in dispute, the Tribunal is bound to apply (i) the ECT and (ii) *“applicable rules and principles of international law.”*

697. Nevertheless, the Parties differ as to the meaning and scope of the phrase *“applicable rules and principles of international law”*, since the Claimants contend that it excludes the application of EU law, including EU State Aid rules, while the Respondent argues the contrary.

698. This disagreement has already been addressed *supra* at the jurisdictional stage and therefore the Tribunal's analysis need not be repeated here. The Tribunal considers that EU law does not qualify as *“applicable rules and principles of international law”* for the purposes of Article 26(6) for the reasons set out earlier.

699. In any event, even if EU law were to be considered to be part of applicable rules and principles of international law for the purposes of the law applicable to the merits, EU law could not be invoked in derogation of the provisions of Part III of the ECT. Under the conflict rule of Article 16 of the ECT, Part III of the ECT would prevail, because it has not been demonstrated in this proceeding that any provision of Part III is less favorable to the Claimants than the provisions of the ECT.

700. The Tribunal observes, however, that EU law is part of the domestic law of Spain, one of the Parties to this arbitration. Therefore, both EU law, including EU State Aid law, and Spanish law form part of the factual background of the present dispute, which the Tribunal may have to take into account and discuss, where appropriate, in the course of its decision-making process, and notably in the assessment of the Claimants' claims under Article 10(1) of the ECT addressed *infra*.
701. For the sake of completeness, the Tribunal (by majority) has taken due note of the Dissent which attributes to Spanish law a decisive role in the outcome of this case. In paragraph 21, after acknowledging that the law applicable to this case is "first" provided by the ECT, the Dissent adds: "*That said, in this case as in many others, the domestic law of the host State plays a decisive role, [footnote 'As stated by Art. 42 ICSID Convention.'] unless it is considered that it is in substance incompatible with the applicable rules of international law, a presumption which could hardly be sustained here.*"
702. The Tribunal regards this view as mistaken, for several reasons:
- First, Article 42 of the ICSID Convention cannot be invoked as a basis for the alleged "decisive" role of Spanish law in this case. Article 42(1) indeed calls for the application of the law of the Contracting State party to the dispute along with the applicable rules of international law, but it is a default provision that comes into play only in the absence of the parties' agreement on the applicable law. In this case, all the parties concerned have agreed on the choice-of-law provision of Article 26(6) of the ECT. The Contracting States to the ECT have done so on behalf of themselves and for the benefit of their respective nationals, and the Claimants have concurred in that agreement by asserting claims under the ECT. Hence the law applicable to this dispute is determined by Article 26(6) of the ECT, not by the subsidiary rule of Article 42(1) of the ICSID Convention.
 - Second, the role of Spanish law in this case cannot be characterized as "*decisive*" on any other basis. From the standpoint of international law and that of an international tribunal, "*it is common ground that [...] national laws are to be considered as facts*".³⁹⁸ As an exception, international rules sometimes require that national law be applied for specified purposes, such as establishing the nationality of a corporation,³⁹⁹ or the nature and scope of certain types of investment,⁴⁰⁰ but always subject to the control of international law, as a State's national law cannot be invoked in derogation of its international obligations.⁴⁰¹ In this case, the content of Spanish law is highly relevant for deciding whether Spain's conduct complied with its

³⁹⁸ **CL-10**, *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 ("**AES**"), para. 7.6.6.

³⁹⁹ See ECT, Article 1(7)(a)(ii).

⁴⁰⁰ See ECT, Article 1(5)(f).

⁴⁰¹ **CL-11**, VCLT, Article 27; **CL-12**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 3.

obligations under the ECT concerning the Claimants' treatment. For this purpose, this Decision has reviewed the Spanish law in detail, including *inter alia* the provisions that laid down the conditions on which each investment was made⁴⁰² and those that determined how the investments were subsequently treated.⁴⁰³ But nowhere does the ECT defer to Spanish law (or make it "*decisive*") on the content of the standards of treatment required by the treaty or the application thereof to a particular case. Indeed, the *raison d'être* of the ECT, and what it actually does, is to lay down a Contracting State's international obligations on the treatment of qualified foreign investors, framed in terms of international standards – not to defer to a treatment or standards applicable under that State's national law.

- Third, the question is not whether, in the abstract, Spanish law is or is not compatible with international law or whether there is a presumption on that point one way or the other. The question is whether Spain, by means of its own law or otherwise, has breached its obligations under the ECT concerning the treatment of the Claimants' investments. To say that Spanish law is presumed to be compatible with international law is to beg the question that this Tribunal must decide on the merits of the case.

6.2 Article 10(1) of the ECT: Fair and Equitable Treatment

6.2.1 The Claimants' Position

6.2.1.1 General Position

703. The Claimant's general position is that Spain violated the ECT and the applicable rules and principles of international law.⁴⁰⁴

704. In substance, the Claimants contend that Spain sought to induce significant investment in its renewable energy sector. To that end, Spain guaranteed that the Claimants' PV plants would receive incentive tariffs at fixed amounts for a fixed period of 25 years, and then (for RD 661/2007 plants) at 80% of those amounts for the remaining lives of those plants. Spain also guaranteed that the value of those incentives would not be altered once the plants were established and registered under the RD 661/2007 and RD 1578/2008 regimes. The Claimants invested in reliance on those guarantees and the value of the "*incentivized*" revenue streams that resulted from them. Spain reneged on its commitments, however, in violation of its guarantee of non-retroactivity, which severely harmed the Claimants' investments. Spain subsequently abolished the RD 661/2007 and RD 1578/2008 regimes in their entirety and replaced them with the much less favourable and much more arbitrary New Regulatory Regime.

⁴⁰² See notably paras. 216-245; 275-330 *supra*; and 843-887 *infra*.

⁴⁰³ See notably paras. 331-387 *supra*; and 940-990 *infra*.

⁴⁰⁴ Cl. Mem., paras. 424 *et seq.*

705. The Claimants further argue that Spain violated Article 1 (which provides that “[e]very internationally wrongful act of a State entails the international responsibility of that State”) and Article 2 of the ILC Articles (which states that “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State”). Spain agreed to abide by the international legal commitments contained therein, by signing and ratifying the Energy Charter Treaty. By doing so, it committed to afford several substantive protections to the Claimants’ investments, including (i) the right to fair and equitable treatment, (ii) protection against impairment of investments by unreasonable or discriminatory measures, and (iii) a guarantee that Spain would observe all obligations entered into with respect to the Claimants’ investments. Through the measures implemented between late 2010 and 2014, Spain violated the spirit and purpose of the ECT, as well as each of those key standards of protection contained in the Treaty.
706. In particular, the Claimants submit that Spain violated its obligation to afford a fair and equitable treatment in three different respects: (6.2.1.2) by violating the Claimants’ legitimate expectations of fixed feed-in tariffs for their photovoltaic facilities, (6.2.1.3) by making “fundamental changes” to the incentives regime offered to the Claimants and (6.2.1.4) by failing to treat the Claimant’s investments transparently and consistently. In addition, the Claimants argue that the Respondent has failed to provide any valid justification to the Disputed Measures (6.2.1.5).

6.2.1.2 Spain Breached the FET Standard by Violating the Claimants’ Legitimate Expectations of Fixed Feed-in Tariffs for Their Photovoltaic Facilities

707. In substance, the Claimants submit that Spain created legitimate expectations of stable feed-in tariffs in order to induce the Claimants’ investments, which it later breached.⁴⁰⁵
708. In support of this contention, the Claimants propose to rely on a three-step approach to determine whether a host State has breached the FET standard by frustrating an investor’s legitimate expectations: (a) the host State must have induced the investments by creating legitimate expectations on the part of the investor, (b) the investor must have reasonably relied on the host State’s representations when deciding to invest, and (c) the host State must have subsequently failed to honor the expectations it created.⁴⁰⁶

(a) Spain Created Legitimate Expectations of Stable Feed-in Tariffs in Order to Induce the Claimants’ Investments

709. According to the Claimants, Spain created legitimate expectations that the feed-in tariffs that Spain granted to eligible plants under RD 661/2007 and RD 1578/2008 would be paid as stated in those decrees (namely, that those facilities would receive

⁴⁰⁵ Cl. Mem., Section VI, A, (1).

⁴⁰⁶ Cl. Mem., para. 432.

fixed incentive tariffs on all the electricity they produced throughout their operating lives, or for 25 years, for those plants registered under RD 1578/2008) and no retroactive reductions would apply.

710. These regulations were enacted to establish an authorization procedure and “fix” the incentives created by Law 54/1997, which merely set a part of the criteria to be considered by the government when adopting said regulations.⁴⁰⁷
711. The Claimants submit that such expectations were legitimate and informed by the explicit terms of RD 661/2007 and RD 1578/2008 themselves, the *quid-pro-quo* required of PV producers for their plants to gain the right in RD 661/2007 and RD 1578/2008, numerous statements of Spanish representatives, the investment context in which Spain enacted the regulatory framework and the widely understood policy goals of the program, the legal advice from multiple law firms, and the willingness from international banks to provide non-recourse financing on favorable terms.⁴⁰⁸
712. First, the Claimants submit that Spain’s assurances of the stability of feed-in tariffs for existing plants were repeated and explicit. The royal decrees themselves confirmed the precise tariff rate and the precise period during which an eligible plant could receive the feed-in tariff on all the electricity the plant produced.⁴⁰⁹
713. According to the Claimants, Spain’s legal framework contained an express stabilization provision confirming that tariff revisions, despite being carried out periodically in the future, would not impact plants already in operation. Article 44.3 of RD 661/2007, which operated the same for plants under RD 1578/2008,⁴¹⁰ stated as follows:⁴¹¹

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

⁴⁰⁷ Cl. PHB, paras. 63 *et seq.*

⁴⁰⁸ Cl. Mem., Section VI, A, (1), a; Cl. Reply, para. 582.

⁴⁰⁹ Cl. Mem., paras. 439 *et seq.*; Cl. Reply, paras. 564 *et seq.*

⁴¹⁰ Cl. PHB, paras. 85-95.

⁴¹¹ Cl. Mem., para. 442.

The revisions to the regulated tariff and the upper and lower limits [under the premium option] indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed.⁴¹²

714. The Claimants argue that this provision was included precisely because Spain knew that investors needed the stability and non-retroactivity it guaranteed in order to invest.⁴¹³
715. The Claimants contend that the explicit terms of both RD 661/2007 and RD 1578/2008, as well as the way in which they each operated, are sufficient to find that Spain made specific commitments that it would not make retroactive changes to the specific tariffs for the guaranteed duration.⁴¹⁴
716. The Claimants also submit that numerous Spanish officials repeatedly confirmed to the investment market that changes to the feed-in tariffs would not apply retroactively to existing plants. The Claimants refer to representations from the Prime Minister, the Council of Ministers, the Minister of Energy and the Minister of Industry, Commerce and Tourism, presentations by the CNE, excerpts from government websites, press releases and interviews.⁴¹⁵
717. Relying on the findings of earlier tribunals (*Novenergia, Antin, 9REN, Foresight*), the Claimants argue that such explicit and repeated statements by Spanish officials were designed to generate expectations among investors such as the Claimants, as well as Europe's financial community in charge of financing the majority of the projects.⁴¹⁶
718. In addition to Spain's express representations, the Claimants submit that Spain's conduct and official policy goals also gave rise to the same legitimate expectations on the part of investors in the renewable energy sector. The Claimants refer to the *Micula v. Romania* decision, which confirmed that state conduct and policy goals that induce potential investors to make an investment can create legitimate expectations on the part of those investors. The Claimants point to Spain's advertised policy goal of promoting renewable energy investment (notably to meet its binding EU targets)⁴¹⁷ and its promise of long-term stability in regimes of RD 661/2007 and RD 1578/2008 as giving rise to legitimate expectations that Spain would act consistently with those policies.⁴¹⁸

⁴¹² C-106, RD 661/2007, Article 44 (emphasis added).

⁴¹³ Cl. PHB, paras. 80-84.

⁴¹⁴ Cl. Reply, Section V, B, (1), b.

⁴¹⁵ Cl. Mem., para. 444; Cl. Reply, para. 602; Cl. PHB, paras. 83-84.

⁴¹⁶ Cl. Mem., paras. 444-448; Cl. Reply, paras. 603-609.

⁴¹⁷ Cl. Mem., para. 451.

⁴¹⁸ Cl. Mem., paras. 455-456; Cl. Reply, paras. 609-611.

(b) The Claimants Invested in Reliance on Those Expectations

719. The Claimants submit that they invested in Spain's renewable energy sector in reliance on those expectations to their detriment. But for Spain's representations, the Claimants would not have made their investments.⁴¹⁹
720. The Claimants argue that they were not alone in their reliance: thousands of other investors and sophisticated lenders understood the regulatory framework exactly the same way, which speaks volumes about the reasonableness of the Claimants' reliance and the implausibility of Spain's arguments to the contrary.⁴²⁰
721. The Claimants reject Spain's argument according to which, had the Claimants performed an exhaustive analysis of the legal framework prior to investing, the Claimants would have learned that Spain had the right to amend the tariffs at any time in ways that would decrease the incentives granted to the Claimants' plants.⁴²¹
722. The Claimants submit that there is no absolute requirement for an investor to conduct thorough due diligence in order to have legitimate expectations that are entitled to protection under the FET clause of the ECT. In any event, the Claimants argue that they did conduct extensive due diligence and were advised by various law firms.⁴²²
723. In addition, the fact that the regime set out in RD 661/2007 guaranteed potential investors against future changes affecting existing PV plants is not at odds with the State's right to modify its regulatory framework on renewables.⁴²³ Indeed, "*Spain's sovereign regulatory power encompasses its power to relinquish its right to modify its regulatory framework in particular ways through the commitments it made not to decrease tariffs of PV plants once they were built and awarded certain tariffs, which Spain exercised in order to induce Claimants' investments in the present case*".⁴²⁴
724. Hence, while Spain remained free to modify or even abolish its incentives program prospectively, for future PV plants yet to be built, and to adopt regulatory changes affecting the Claimants' existing plants (such as environmental rules, safety rules, labor rules, etc.), Spain deliberately chose to relinquish its right to decrease the tariffs awarded to existing plants, like the Claimants' plants, precisely to induce the investments of the Claimants and many others in the PV sector. Had Spain not done so, it would not have attracted the massive investment in its PV sector that it needed.
725. The Claimants do not question a State's general right to regulate and recognize that it may be proper to balance the established expectations with the State's right to regulate in some cases of general concern, such as cases involving public health or

⁴¹⁹ Cl. Mem., paras. 460-461; Cl. Reply, paras. 610-611.

⁴²⁰ Cl. Reply, para. 611.

⁴²¹ Cl. Reply, paras. 632 *et seq.*

⁴²² Cl. Reply, paras. 632 *et seq.*

⁴²³ Cl. PHB, paras. 43-53.

⁴²⁴ Cl. PHB, para. 43.

environmental safety.⁴²⁵ However, the Claimants point out that an investor's legitimate expectation should not be balanced against a State's right to regulate "*when the precise claim is that a State regulated in specific ways that it promised it would not,*"⁴²⁶ as confirmed by investment treaty jurisprudence (*Cube v. Spain*, *9REN v. Spain*).

(c) Spain Breached the Claimants' Legitimate Expectations to Stable Feed-in Tariffs

726. The Claimants further argue that Spain subsequently failed to honor the expectations it had created.⁴²⁷
727. After the Claimants had relied on these representations in good faith and after Spain had benefitted from the investments its representations induced, the Government abruptly changed the legal framework applicable to the Claimants' investments, which frustrated the Claimants' legitimate expectations. According to the Claimants, Spain did so by "*implementing a series of measures, culminating in the New Regulatory Regime, that imposed unforeseen, drastic changes to the system and ultimately abolished the regulatory regime on which Claimants had relied when they made their investments*".⁴²⁸
728. According to the Claimants, in late 2010, Spain started to change the regulatory framework by limiting the duration during which RD 661/2007 plants could receive the fixed tariff from the lifetime of the plant to 30 years and by restricting the operating hours for which all plants could receive the RD 661/2007 and RD 1578/2008 tariffs. These changes thus reduced the value of marginal production, without any regard to the cost that investors may have incurred up-front to optimize production.
729. Spain then imposed the so-called 7% "tax," further undermining the Claimants' expectation of receiving defined tariff rates. In June 2013, Spain abolished RD 661/2007 and RD 1578/2008 in their entirety and replaced those regimes with its New Regulatory Regime a year later.⁴²⁹ The New Regulatory Regime reduced the target rate of return that Spain considered when establishing the RD 661/2007 and RD 1578/2008 incentive rates, changed returns from fixed to variable and changed the structure of the incentive payments in arbitrary and unfair ways.⁴³⁰
730. The Claimants contend that Spain changed the notion of "*reasonable rate of return*" itself from what that concept meant under Law 54/1997: while Article 30.4 of Law 54/1997 mentions that achieving reasonable rates of return was a criterion regulators were required to consider when establishing incentives and was never expressed as a cap, Spain inserted with RDL 9/2013 an express provision stating that the new

⁴²⁵ Cl. PHB, para. 53.

⁴²⁶ Cl. PHB, para. 44.

⁴²⁷ Cl. Mem., Section VI, A., 1); Cl. Reply, Section IV, C).

⁴²⁸ Cl. Mem., para. 462.

⁴²⁹ Cl. Mem., paras. 463-465; Cl. Reply, paras. 483-484.

⁴³⁰ Cl. Reply, Section IV, C, (5), a, b, and c.

“compensation regime will not surpass the minimum level necessary to cover the costs that will allow the installations to compete on an equal level with the rest of the technologies in the marketplace and that permit the possibility of obtaining a reasonable profit.” Thus, with the enactment of RDL 9/2013, Spain restricted for the first time the level of incentives its regulators could grant by transforming the criterion of reasonable profitability from a factor that regulators were to consider when setting incentives to a factor limiting the incentives that a plant could receive. There was no indication, in the Law, the Royal Decrees, or otherwise, that Spain could or would change the defined tariffs if its concept of *“reasonable rate of return”* changed in the future.⁴³¹

731. The New Regulatory Regime violates the Claimants’ expectations because the Claimants calculated for themselves the returns their plants were likely to generate and the Claimants concluded, based on their own criteria and judgment, whether those returns were sufficient to justify the risks of investment. Under the New Regulatory Regime, Spain has imposed a different, much lower, rate of return on the Claimants’ plants, which Spain derived using arbitrary, *ex post* formulas.
732. More fundamentally, the Claimants argue that the New Regulatory Regime violates Spain’s express guarantee against retroactive changes to tariff rates for existing plants, which was central to the inducement of the Claimants’ investments and the success of Spain’s incentive programs.⁴³²

6.2.1.3 Spain’s “Fundamental Changes” to the Incentives Regime Also Violate the FET Standard

733. According to the Claimants, Spain also violated the FET standard by abolishing the RD 661/2007 and RD 1578/2008 regimes and fundamentally changing the essential characteristics of the investment framework that formed the basis of the Claimants’ investments.⁴³³ ECT tribunals (*Eiser, Novenergia, Antin, Masdar*) have confirmed that a fundamental change in the incentives regime violates the FET standard of the ECT and have recently found Spain liable for breaching the FET standard by fundamentally changing its renewable incentive framework.
734. The Claimants’ expert Brattle identified six fundamental changes made by Spain:
- (i) the *“change in tariff structure from a stable incentive-based system per MWh produced, to a new, unprecedented and uncertain “rate base” system with financial incentives per MW installed”*;⁴³⁴

⁴³¹ Cl. PHB, paras. 68-74.

⁴³² Cl. Mem., para. 466.

⁴³³ Cl. Mem., paras. 469 *et seq.*

⁴³⁴ Brattle First Regulatory Report, para. 17 and Section V.C.

- (ii) the “*unilateral reduction of the allowed target return implicit under the Original Regulatory Regime*”,⁴³⁵
- (iii) the “*use of hindsight to set new stricter costs targets and appropriate efficiency rewards that existing investors expected to retain for beating the original cost targets implicit in the FITs under the Original Regulatory Regime*”,⁴³⁶
- (iv) the imposition of “*retroactive*” changes in two different senses: (i) by imposing the changes on existing plants and (ii) by penalizing “*existing installations that obtained gains under the Original Regulatory Regime above what Spain now deems reasonable by reducing the future financial support*”,⁴³⁷
- (v) a reallocation of interest rate risk, since “*the New Regulatory Regime updates FITs based on the evolution of interest rates exposing existing investors who have locked in the existing loans to default if interest rates fall*”,⁴³⁸
- (vi) creation of significantly “*greater risk facing investors under the New Regulatory Regime,*” given that Spain has violated previous commitments and stands ready to alter the regime regularly in the future, when the original regimes were backed by Spain’s express guarantee against changes for existing plants.⁴³⁹

735. As a consequence, the Claimants argue that the drastic and complete dismantling of the Original Regulatory Regime constituted a fundamental change in the regulatory framework which violated the ECT’s FET standard.⁴⁴⁰

6.2.1.4 Spain Breached the FET Standard by Failing to Treat the Claimants’ Investments Transparently and Consistently

736. The Claimants claim that Spain’s failure to treat the Claimants’ investments in a consistent and transparent manner constitutes in itself an additional breach of the FET standard by Spain. According to the Claimants, the New Regulatory Regime is the result of conduct by Spain that was neither consistent nor transparent.⁴⁴¹

737. In particular, the Claimants argue that Spain’s reliance on *AES Summit v. Hungary* is misplaced.⁴⁴² The Claimants contend that the facts of that case where the tribunal determined that Hungary’s price setting for electricity generators did not violate the ECT standards of transparency are vastly different from those of the present case. While Hungary had notified electricity generators several months before Hungary

⁴³⁵ *Id.*, para. 17 and Section VI.D.

⁴³⁶ *Id.*

⁴³⁷ *Id.*, para. 17 and Section V.C.

⁴³⁸ *Id.*, para. 17 and Section VII.C.

⁴³⁹ *Id.*, para. 17 and Section VII.C.

⁴⁴⁰ Cl. Mem., para. 473.

⁴⁴¹ Cl. Mem., paras. 484 *et seq.*; Cl. Reply, paras. 653 *et seq.*

⁴⁴² Cl. Reply, para. 654.

made a decision to reintroduce administrative price-setting for those facilities, Spain, in the present case, imposed cuts on the Claimants' remuneration retroactively, without giving them any opportunity to comment on the new regime. With the New Regulatory Regime, Spain also lowered the return that it had considered reasonable when it developed the RD 661/2007 and RD 1578/2008 tariffs and based the new system on arbitrary "*standardized*" costs, rather than the actual costs of the Claimants' facilities. Under the New Regulatory Regime, investors are not allowed to exceed the return that Spain has imposed on facilities. Instead, regular reviews in which Spain will amend the rate ceiling applicable to those facilities are imposed. Moreover, as explained in Mr. Margarit's First Expert Report, the "*standard installations*" used under the New Regulatory Regime in order to determine the "*reasonable return*" were based on opaque data.⁴⁴³

738. The Claimants further contend that Spain has no response to the Claimants' case on transparency and consistency, other than reusing its case on legitimate expectations. However, the Claimants submit that transparency and consistency are independent bases for the Tribunal to conclude that Spain treated Claimants' investments unfairly and inequitably.⁴⁴⁴
739. According to the Claimants, Spain knew that it could or would make fundamental changes to the RD 661/2007 and RD 1578/2008 regimes at a later date, after it had benefited from billions of euros of investment in its renewables sector. The Claimants submit that Spain therefore failed to afford the Claimants and their investments the transparency and consistency required by the fair and equitable treatment provision of the ECT.⁴⁴⁵

6.2.1.5 Spain Failed to Provide Valid Justifications to the Disputed Measures

740. The Claimants further contend that none of Spain's justifications of the Disputed Measures is convincing.⁴⁴⁶
741. With respect to the applicable legal standard, Spain offers no convincing response to the wealth of case law – including the cases on which Spain relies (*AES Summit*, *Electrabel*, *Palma*, *Charanne*, *Isolux* and *Blusun*) – that confirms that State conduct, policy goals, official statements, and specific entitlements to investors can all give rise to "*legitimate expectations*" on the part of investors.⁴⁴⁷
742. According to the Claimants, while Spain attempts to paint the New Regulatory Regime as fair and reasonable, its defenses are baseless. Spain asserts that the tariffs in RD 661/2007 resulted in "excess" or "windfall" compensation. Even assuming that this is a legally valid justification for reducing guaranteed remuneration

⁴⁴³ Cl. Reply, paras. 654-655.

⁴⁴⁴ Cl. Reply, para. 658.

⁴⁴⁵ Cl. Reply, para. 659.

⁴⁴⁶ Cl. Reply, paras. 612 *et seq.*

⁴⁴⁷ Cl. Reply, paras. 565 *et seq.*, paras. 612 *et seq.*

after an investment is made, the Claimants submit that it is wrong that the Claimants' PV facilities received excessive compensation by Spain's own standards.⁴⁴⁸

743. According to the Claimants, Spain seems to suggest that it set the tariff rates at the "correct" level in the first period, but that those rates were set to grow excessively due to an excessive inflation rate. However, Claimants contend that the tariffs were set by estimating what level of cash flows over the lifetime of a hypothetical facility would be necessary to generate the target return on investment. Spain could have performed that calculation with a lower inflation adjustment or none at all, but that would have required setting tariffs higher in the first year in order to generate the same target return on investment.⁴⁴⁹
744. The Claimants submit that it appears that Spain believes that RD 661/2007 resulted in excess compensation because interest rates have declined, the "reasonable" rate of return must be understood as dynamic rather than fixed. The Claimants contend, however, that that argument is factually and legally flawed: lower interest rates may reduce the return that would be reasonable to induce a new investment now, but such reductions are factually and legally irrelevant to what rate of return is reasonable in relation to an investment that was completed almost ten years ago.⁴⁵⁰
745. According to the Claimants, Spain also seems to imply (without ever expressly stating) that returns for PV plants under RD 661/2007 and RD 1578/2008 were excessive because investors built plants that were more efficient (*i.e.* they cost less, produced more electricity, or both) than Spain assumed when it set the tariff rates in the decree. The Claimants point out, however, that Spain produces no evidence in support of this argument.⁴⁵¹
746. The Claimants further contend that Spain's claim that the periodic review of the incentives is not harmful because the reviews cannot change the regulatory lifespan and the standard investment value is nonsensical, while also underscores the validity of the Claimants' case. Spain established the current regulatory lifespan and the standard investment value only in 2014, years after Claimants (and numerous others) made their investments. Yet, at the time of the Claimants' investment, there were no "*standard values of initial investment*" and the current regulatory life span was the entire operating life of a facility.⁴⁵²
747. The Claimants argue that Spain routinely implies (but never truly makes that claim) that RD 661/2007 and RD 1578/2008 were incompatible State aid that investors could not have expected to be maintained. Nevertheless, when Spain abolished RD 661/2007 and the Special Regime in 2013, it did not do so out of an obligation to comply with EU State aid law. The 2017 EC decision on which Spain relies does not

⁴⁴⁸ Cl. Reply, para. 539.

⁴⁴⁹ Cl. Reply, para. 540.

⁴⁵⁰ Cl. Reply, para. 541.

⁴⁵¹ Cl. Reply, para. 542.

⁴⁵² Cl. Reply, para. 544.

consider the original framework, as it had been abolished by the time of the decision. There has been no order from the Commission to recover unlawful aid paid under RD 661/2007 and RD 1578/2008 precisely because those funds were not State aid, much less incompatible State aid.⁴⁵³

748. Finally, the Claimants submit that Spain could have addressed its tariff deficit in many ways other than reneging on the commitments it made to existing renewable energy investors. According to the Claimants, Spain could have, for example, either raised or deregulated consumer electricity prices, it could have enacted a carbon dioxide tax or a fuel consumption levy, or it could have rescheduled the feed-in tariffs to reduce them temporarily to address the tariff deficit while increasing them subsequently in a way that would maintain the net present value of the plants. The Claimants point out that the European Commission also recommended all of those options.⁴⁵⁴

6.2.2 The Respondent's Position

6.2.2.1 General Position

749. In essence, Spain submits that it has met its international obligations under the ECT at all times.⁴⁵⁵

750. The Respondent notes that the burden of proof in relation to the violation of the FET standard by the Disputed Measures rests with the Claimants, as stated in the *Electrabel* case.

751. Moreover, there is a consensus between the Parties on the need to keep the purpose and the objectives of the ECT in mind. According to Spain, the protection of investors is not an absolute value under the ECT that would be placed above the needs of the general interest of the State and even above the people, whether these be consumers or national investors, as expressly stated in the final award of the *Electrabel* case.

752. Spain argues that it has been established that: (i) relevant Spanish laws were omitted by Claimants, (ii) relevant judgments from the Supreme Court from 2005 were kept hidden to the Tribunal by the Claimants in their Memorial on the Merits, (iii) relevant parts of CNE reports and statements also hidden by the Claimants, and (iv) relevant RE sector statements (APPA, AEE, ANPIER, ASIF, Protermosolar, APECYL) were omitted by the Claimants as well. These facts allow for the determination that the Respondent has not violated the FET standard contained in the ECT.

753. The Respondent also contends that the Claimants have avoided referring to relevant precedents that have applied the ECT standard, such as (i) the *AES Summit* award, (ii) the decision of the Annulment Committee of the *AES Summit* case, (ii) the *Electrabel* final award, (iv) the *Charanne v. Spain* award, or (v) the *Isolux v. Spain*

⁴⁵³ Cl. PHB, paras. 74-79.

⁴⁵⁴ Cl. PHB, paras. 54 *et seq.*

⁴⁵⁵ Resp. Rej., para. 863.

award. Instead, the Claimants have relied on less relevant precedents issued in the context of breaches of contracts or administrative concessions in States such as Mexico, Ecuador, Chile, or Argentina.

754. According to the Respondent, it is evident that precedents arising under the ECT are of greater significance in comparison to those unrelated to the ECT invoked by the Claimants, as precedents arising from the application of the ECT have taken the context, object, and purposes of the ECT into account. Moreover, the Respondent notes that it is surprising that while the Claimants state that these elements should be taken into consideration, they nevertheless omit the application of the precedents arising under the application of the ECT. On the contrary, the Claimants invoke arbitral awards that apply BITs that are unrelated to the object, context, and purposes of the ECT as well as being unrelated to the facts that are being examined in this arbitration.

6.2.2.2 Object and Purpose of the ECT

755. The Respondent submits that the objective of investor protection of the ECT is to provide foreign investors with non-discriminatory treatment, in accordance with the minimum standards set down in international law.⁴⁵⁶ The Respondent disagrees with the Claimants' analysis of Article 10(1) as an autonomous FET standard that exceeds the minimum standards under international law and submits that such an interpretation is contrary to the criteria of interpretation set out in the VCLT.
756. The objectives and principles are to be understood in the ECT context and through the referral of Article 2 ECT. The main objective of the ECT is to enable investment in energy-related activities without discrimination on the grounds of the investor's nationality and to achieve the introduction of a free market, with no unjustified distortions. According to the Respondent, what the Claimants are seeking in this arbitration (*i.e.* to receive a specific amount of state aid over thirty-five years, even if this might distort competition in the market) is at odds with the very purpose of the ECT.
757. In light of the highly strategic and regulated sector in which the ECT operates, the Respondent submits that Article 10(1) of the ECT does not oblige signatory States to maintain a specific regulatory framework throughout the lifetime of the investment, but merely to ensure "*stable conditions*." In any event, the ECT allows States to adopt macroeconomic control measures on the grounds of public interest.

6.2.2.3 Spain Did Not Create Any Legitimate Expectations of Stable Feed-in Tariffs

758. In substance, Spain submits that the Claimants could not legitimately expect that feed-in tariffs would remain frozen and that such expectations are not objective.⁴⁵⁷

⁴⁵⁶ Resp. C-Mem., paras. 891 *et seq*; Resp. Rej., paras. 868 *et seq*.

⁴⁵⁷ Resp. C-Mem., paras. 969 *et seq*; Resp. Rej., paras. 941 *et seq*.

759. According to the Respondent, the Claimants' approach forgets the following facts that necessarily define the objective component of any expectation so that it can be considered worthy of international protection:
- The Spanish regulatory framework is governed by the principle of regulatory hierarchy and is the result of legally stipulated norm creation procedures.
 - The applicable regulatory framework is not limited to RD 661/1997 and RD 1578/2008, but is established on the basis of Law 54/1997, the regulations for which were implemented through various Royal Decrees that over time have served to adapt the principles of the Law to changing macroeconomic circumstances, and the urgent Royal Decrees adopted to guarantee the sustainability of the Spanish Electrical System ("**SES**") and the Renewable Energy Plans, as the basis for the objectives and remuneration regimes.
 - Special Regime subsidies are an SES cost subordinate to the principle of its economic sustainability.
 - The Special Regime remuneration has always consisted of the market price for the energy produced plus a subsidy, with the aim of providing RE generation facilities with a reasonable return.
 - That same principle of reasonable profitability makes the RE remuneration system a dynamic, balanced system, as confirmed in Supreme Court case law prior to, during and subsequent to Claimants making their investment.
 - The determination of the premiums was established based on the evolution of demand and other basic economic data, as set down in the Renewable Energy Plans.
 - The motivation behind the regulatory changes to the remuneration regime for the special regime, including those that occurred prior to Claimants' successive investments, was either: (i) to correct situations of over-remuneration; or (ii) due to major changes to the economic data that served as a basis for the initial calculation of the premiums.
 - The subsidies for the production of energy from renewable sources are considered as State aid in accordance with EU law, and there is no existing right to receive State aid.
760. The Respondent contends that the characteristics of the Spanish regulatory framework which define the objective expectations of any investor and underline the fact that RD 436/2004, RD 661/2007, and RD 1578/2008 contain no clauses that impede the Government from adapting the remuneration regime for renewable

energy to changing macroeconomic circumstances.⁴⁵⁸ The Respondent submits that these characteristics of the Spanish regulatory framework have already been addressed by the arbitral tribunal in the *Charanne* case: “Spanish law left wide open the possibility of modifying the remuneration scheme applicable to photovoltaic energy”.⁴⁵⁹

761. The Respondent further explains what it considers to be the true subjective expectations of the Claimants.⁴⁶⁰
762. According to the Respondent, the standard of legitimate expectations requires taking into account the specific knowledge that the investor had of the regulatory framework in which it made its investment in order to determine if it has the right to rely on the protection of the ECT. In that regard, Spain submits that the expectation of immutability of the remuneration regime of RD 661/2007 is neither objective nor reasonable.⁴⁶¹
763. The Respondent contends that the Claimants have not proven that they made their investment based on the unreasonable and non-objective expectations to which they refer. There is no evidence that the Claimants expected a freezing of the regime of RD 661/2007 for 35 years; on the contrary, the evidence is that the regulatory framework known to the Claimants when they made their investment was immersed in an important process of adjustment and modification. The Respondent refers to the *Plama* case, which held that a diligent investor should have been aware of the debates in parliament regarding possible changes to the relevant environmental law.⁴⁶²
764. The Respondent therefore argue that the Claimants cannot rely on the standard of fair and equitable treatment set out in the ECT because their expectations are not legitimate: they knew or should have known the imminence of the regulatory changes that were coming when making their investment.
765. The Respondent further argues that it has not created, with its conduct, the expectations referred to by the Claimants.⁴⁶³ The Respondent submits that the documents cited by the Claimants do not allow to conclude the existence of a commitment that no review of the remunerations would affect operational facilities.⁴⁶⁴
766. Referring to the *Blusun* case, the Respondent adds that international law cannot attribute the character of commitment or guarantee to a declaration that could never be of such a type because that expectation is not legitimate and therefore cannot be

⁴⁵⁸ Resp. Rej., para. 944 *et seq.*, Resp. PHB, paras. 97 *et seq.*

⁴⁵⁹ **RL-33**, *Charanne BV and Construction Investment S.A.R.L. v. the Kingdom of Spain*, SCC Arbitration Case No. V 062/2012, Final Award, 21 January 2016, para. 505.

⁴⁶⁰ Resp. Rej., paras. 951 *et seq.*

⁴⁶¹ Resp. Rej., para. 951.

⁴⁶² Resp. Rej., para. 953-954.

⁴⁶³ Resp. Rej., paras. 958 *et seq.*

⁴⁶⁴ Resp. Rej., paras. 606 *et seq.*

protected under international law. Neither PowerPoint presentations, press releases, nor declarations of authorities have the value or content that the Claimants wish to attribute to them. Also, the Claimants were not recipients of any of these declarations, and therefore it is uncertain as to whether they shaped their expectations when investing.⁴⁶⁵

767. Spain submits that because RD 661/2007 does not guarantee potential investors that there will be no future changes affecting existing PV plants, there cannot be a contradiction between RD 661/2007 and the right of Spain to modify its regulatory framework on renewables.⁴⁶⁶
768. In the present case, what the Spanish regulatory framework has guaranteed its investors by law is only a reasonable return.⁴⁶⁷ RD 1578/2008 was enacted in order to provide a “reasonable return” and such remuneration had to be reduced for the facilities under this regulation, in accordance with the dynamic criterion of the system and to prevent a significant impact on the costs of the electricity system as the Claimants recognize.⁴⁶⁸

6.2.2.4 Spain Did Not Violate the Claimants’ Legitimate Expectations

769. In any event, the Respondent submits that it did not violate the Claimants’ legitimate expectations.⁴⁶⁹
770. According to the Respondent, the Claimants’ claim would ultimately imply that their regime would remain petrified since it would only be modified for future facilities; and that they would have an acquired right to all future fees, during all of the useful life of the Plants, and for all of the energy produced from these.⁴⁷⁰ The Respondent denies such allegations.

(a) Lack of Evidence of an Exhaustive Analysis of the Legal Framework by the Claimants

771. The Respondent submits that the Claimants have failed to carry out an exhaustive analysis of the applicable legal framework at the time of their investments. As part of the assessment of the reasonable and objective expectations of the Claimants, the Respondent contends that the knowledge of the investor should be analyzed with regards to the general regulatory framework.⁴⁷¹

⁴⁶⁵ Resp. Rej., para. 965; Resp. PHB, paras. 126-131.

⁴⁶⁶ Resp. PHB, para. 132 *et seq.*

⁴⁶⁷ Resp. Rej., para. 965; Resp. PHB, paras. 126-131.

⁴⁶⁸ Resp. PHB, para. 168.

⁴⁶⁹ Resp. C-Mem., paras. 931 *et seq.*

⁴⁷⁰ Resp. C-Mem., paras. 931-932.

⁴⁷¹ Resp. C-Mem., paras. 933 *et seq.*

The DCM 1 Investment

772. The Respondent submits that the reports labelled “due diligence” provided by the Claimants do not carry out an exhaustive analysis of the Spanish regulatory framework and that the Linklaters “Reg Flag” reports were carried out for financing, do not examine the regulatory framework and were not addressed to the Claimants.⁴⁷²
773. The Respondent notes that, in relation to the *Bovera* Project, the Claimants provide two reports of alleged “due diligence” from Rödl & Partner: the first report is merely a Data Room Index that displays a list of documents, without containing any mention of the regulatory framework and the second one is a concise report with the simple object of analyzing whether the project can use the tariff regime in place at that time.⁴⁷³
774. In relation to the *Bovera* Project, the Claimants provide a report from Herbert Smith, which is directed exclusively at Deutsche Bank and not to the Claimants, as well as reports from Linklaters, addressed to Deutsche Bank with a purely financial perspective. The Respondent contends that the reports provide no information to the Claimants regarding the Spanish regulatory framework.⁴⁷⁴
775. Regarding the *Cam Mestre* project, the Claimants claim that their knowledge of the Spanish regulatory framework was furnished by a report from the Rödl & Partner firm. Again, the Respondent highlights that this is a report lacking in any kind of minimally rigorous analysis of the Spanish energy sector.⁴⁷⁵

The DCM 2 Investment

776. In the case of the DCM 2 investment in the *Huéscar and Granada* Projects, the Claimants state that the Freshfields Bruckhaus Deringer report dated December 2008 confirms that the regime under RD 661/2007 would not be legally revoked.⁴⁷⁶
777. The Respondent submits, however, that the report on which the Claimants presumptively based their investment states that a retroactive application of RD 1578/2008 may not be ruled out and, ultimately, accepts the possibility of regulatory changes of a retroactive character in the SES.
778. Annex 7 (page 78) of the same report analyzes the applicable regulatory framework and, in the description, contained in section 1 regarding the regime under RD 661/2007 – it is never stated in any way that it shall never be modified or that it is guaranteed *sine die*.

⁴⁷² Resp. C-Mem., para. 940.

⁴⁷³ Resp. C-Mem., para. 942.

⁴⁷⁴ Resp. C-Mem., para. 943.

⁴⁷⁵ Resp. C-Mem., para. 944.

⁴⁷⁶ Resp. C-Mem., paras. 945-948.

The Hannover Leasing Investment

779. In the case of the *Cervia II, Alamus and Borges Blanques 2* Project, the Claimants again state that the report produced for this investment issued by Freshfield Bruckhaus Deringer in 2009 did not suggest the possibility of retroactive regulatory changes. It is a report that is extremely similar to that created for the DCM 2 investment and therefore the Respondent reiterates the same comments concerning this Project.⁴⁷⁷

The Edisun Investment

780. The Claimants allude to a sole report as the basis of their “due diligence” which was presumably carried out for their investment. Although the Marimón report effectively explains the Spanish regulatory framework, it does not state in any way, with regards to RD 661/2007, that the said regime is guaranteed or petrified *sine die*.

Conclusion on Claimants’ Due Diligence

781. According to the Respondent, the burden of proof for claimed commitments and due diligence falls upon the Claimants. The lack of due diligence prevents the expectations invoked by the Claimants from being considered as real and objective. Therefore, the Claimants’ alleged violation of legitimate expectations by Spain should be rejected. The Claimants have not proven the supposed legitimate expectation they invoke, with the aforementioned having no base whatsoever in the internal documentation provided.⁴⁷⁸

(b) In the Alternative, Even if They Had Properly Carried Out Their Due Diligence, the Contested Measures Do Not Violate the Claimants’ Legitimate Objective Expectations

782. The Respondent contends that it did not provide any specific commitments under the Spanish regulatory framework regarding the future immutability of the fee regime, in favor of the renewable energy facilities.⁴⁷⁹
783. The Respondent argues that the regulatory framework only ensured that renewable energy facility projects might achieve reasonable profitability during their useful life, *i.e.* the guarantee was a “*level playing field*” with installations of ordinary production. No diligently informed investor might expect that all of these regimes would be petrified in their favor due to their compliance with a statutory requirement for obtaining subsidies, such as registration in a mandatory administrative register, nor could one expect such conditions to be maintained indefinitely, in the absence of any commitment in this regard. It is evident that a regulatory risk existed for the Claimants and that they knew or ought to have known it, since it was clearly known by the

⁴⁷⁷ Resp. C-Mem., paras. 949-951.

⁴⁷⁸ Resp. C-Mem., para. 955.

⁴⁷⁹ Resp. C-Mem., paras. 956 *et seq.*

relevant actors of the renewable energy sector that examined the Spanish regulatory framework.⁴⁸⁰

784. Spain further submits that the expectations of the Claimants would not be reasonable in light of the evolution of the regulatory framework.⁴⁸¹
785. According to the Respondent, it has been proven that under the applicable regulatory framework for that part where the Claimants have made their investments, there were successive regulatory changes regarding existing facilities, in order ever to maintain the principle of reasonable profit under the framework of a sustainable SES.⁴⁸²
786. In addition, the Respondent submits that the expectations of the Claimants were also unreasonable regarding a supposed active campaign of recruitment for foreign investors.⁴⁸³ The Respondent denies the existence of such a campaign and argues that in no case has there been a campaign to attract foreign investors, nor have rules been specifically issued with the purpose of convincing foreign investors to grant specific guarantees in their favor.
787. The Claimants refer to a series of supposed presentations but cannot demonstrate that they knew them during the time when they made the investment, and the content and value of these presentations cannot even remotely allow to affirm the expectations as alleged.

6.2.2.5 Spain Has Respected the Obligation to Create Stable Conditions According to the ECT

788. The Respondent further submits that it has respected the obligation to create stable conditions according to Article 10(1) of the ECT.⁴⁸⁴
789. The Respondent first analyzes the standard invoked by the Claimants under the framework of the FET, in compliance with the objective and purposes of the ECT. The Respondent argues that in no event does the ECT make it impossible for a State to adopt non-abusive macroeconomic control measures and that the international standard cannot be a freezing standard.⁴⁸⁵
790. The Respondent contends that there has been no violation of the creation of stable conditions as stated in the ECT because the Disputed Measures (a) have maintained the subsidies for renewables as a SES cost linked to their sustainability; (b) have retained priority of access and delivery; (c) have confirmed the principle that the remuneration of renewable energy producers consists of a subsidy that, when added to the market price, will allow the facilities to obtain a reasonable return during their

⁴⁸⁰ Resp. C-Mem., paras. 964.

⁴⁸¹ Resp. C-Mem., paras. 969 *et seq.*

⁴⁸² Resp. C-Mem., para. 973.

⁴⁸³ Resp. C-Mem., paras. 983 *et seq.*

⁴⁸⁴ Resp. C-Mem., paras. 994 *et seq.*; Resp. Rej., paras. 970 *et seq.*

⁴⁸⁵ *Id.*

useful life according to the capital market which has a dynamic and balanced character within the SES; (d) have maintained a methodology consisting in the determination of subsidies that are fixed, based on the evolution of demand and various economic data, regarding the costs of investments and operation of the facilities; and; (e) have corrected a situation of imbalance of the economic sustainability of the SES in a rational and balanced way.⁴⁸⁶

791. The Respondent further contends that, contrary to the Claimants' allegation, the Disputed Measures are not retroactive⁴⁸⁷ and note that the Claimants do not provide any arbitral precedent to support the supposed retroactivity of the measures, nor in regard to the fact that this "*retroactivity*" violates the standard of stable conditions.⁴⁸⁸
792. Referring to earlier arbitral awards, the Respondent submits that what the Claimants name as "*retroactivity*" is nothing more than the consequence of the time-bound application of the rules.⁴⁸⁹
793. In addition, the Respondent refers to national case law: the Supreme Court and the Council of State ratified the legality of legislative changes that do not affect acquired rights, since they are to be applied in the future. The Spanish Constitutional Court has tried the measures adopted since RDL 9/2013 and has ruled that they are not retroactive, since they show their effectiveness towards the future, without affecting the acquired rights.
794. The Respondent contends that the Claimants have never had an "*acquired right*" to any remuneration by means of a fixed and unchanged FIT and the reform applies only in the future with no possible claims on subsidies paid previously.⁴⁹⁰

6.2.2.6 The Conduct of Spain Has Been Transparent

795. The Respondent submits that the obligation to guarantee transparent conditions has not been violated.⁴⁹¹
796. The Respondent contends that the ECT does not guarantee the predictability of the regulatory framework of the Contracting States if there is no specific promise by the State.⁴⁹² According to the Respondent, the standard of transparency in international law does not require the investor to have to be a partner in the procedure of elaboration of the norms that affect it. It also does not mean that an investor has to have access to absolutely all the information that a host State manages when preparing its regulations. Spain relies on the *AES Summit* award which, it says, concluded that Hungary did not violate the transparency conditions under the ECT,

⁴⁸⁶ Resp. C-Mem., para. 1004; Resp. Rej., para. 981.

⁴⁸⁷ Resp. Rej., paras. 819-837.

⁴⁸⁸ Resp. C-Mem., para. 1007; Resp. Rej., paras. 987 *et seq.*

⁴⁸⁹ Resp. C-Mem., para. 1009.

⁴⁹⁰ Resp. Rej., para. 989.

⁴⁹¹ Resp. C-Mem., paras. 1020 *et seq.*; Resp. Rej., paras. 802-818; paras. 993 *et seq.*

⁴⁹² Resp. C-Mem., para. 1021.

since it had acted within the acceptable range of legislative and regulatory behavior. Spain also submits that, while it did not decide on the standard of transparency, the *Charanne* award did insist on the foreseeability of the measures adopted by Spain.⁴⁹³

797. Spain further contends that (i) from 2006, it warned the operators of the energy sector that it would take action in situations of over-compensation or unsustainability of the SES and (ii) that, from 2008, it alerted on the need for introducing modifications to eliminate the tariff deficit. The announcements on the inadmissibility of over-compensation and the necessary sustainability of the SES were transparent, constant and consistent with commitments undertaken at the international level to adopt macroeconomic control measures.⁴⁹⁴
798. In addition, Spain argues that, in addition to announcing the Disputed measures, it also held several hearings in the context of their preparation during which all stakeholders could submit arguments. The Claimants could have submitted arguments to the CNE before it issued its 2012 report, but they did not do so. The Claimants also could have submitted arguments in the various processes that were granted for this purpose during the preparation of RD 413/2014 and Ministerial Order 1045/2014. They did not submit arguments either. The processing of RD 413/2014 and MO 1045/2014 complied with the processes required by Spanish legislation for the preparation, processing, and approval thereof. Additionally, a report was requested from the consultant bodies, from the Council of State and from the regulators.⁴⁹⁵

6.2.2.7 The Disputed Measures Were Reasonable and Proportionate

799. In substance, the gist of the Respondent's argument is that the adoption of the Disputed Measures was prompted by the need to correct the economic unsustainability of the Spanish electricity sector resulting from (i) the existence of an international and unprecedented economic crisis that caused an exceptional drop in electricity demand; (ii) the increase of consumers' tariffs; (iii) the existence of an over-compensation in the renewable energy sector and; (iv) the growth of the tariff deficit.⁴⁹⁶
800. Spain further submits that the Disputed Measures have been recognized as necessary and reasonable macroeconomic measures to stabilize the Spanish economy,⁴⁹⁷ although it does not invoke the state of necessity.⁴⁹⁸

⁴⁹³ Resp. C-Mem., para. 1023; Resp. Rej., paras. 995-1002.

⁴⁹⁴ Resp. Rej., paras. 1003-1004.

⁴⁹⁵ Resp. Rej., paras. 1005-1020.

⁴⁹⁶ Resp. Rej., para. 1032, and more generally, Resp. Rej., paras. 1025-1042.

⁴⁹⁷ Resp. C-Mem., paras. 816-856, 1040-1042; Resp. Rej., paras. 838-862, 1021-1036, 1064-1070.

⁴⁹⁸ Resp. Rej., paras. 1064-1070, in part. 1065: "First, it should be stated that *Spain is not invoking a defence of necessity. It's that simple*" (underlined in the original text).

801. In particular, Spain stresses that the Disputed Measures have been appraised and approved by the Spanish domestic courts, by international organizations, and by the markets.⁴⁹⁹
802. Spain explains that the High Courts of Spain, the Supreme Court and the Constitutional Court, have ruled that the Disputed Measures do not breach the principles of legal certainty or legitimate expectations, nor do they violate the principle of non-retroactivity. Both the Spanish Supreme Court and the Constitutional Court have ratified that the regulatory drafting procedure was conducted pursuant to law, guaranteeing the right to a hearing to all interested parties, and guaranteeing a reasonable return on investments under the new system.⁵⁰⁰
803. Spain also recalls that the new remuneration model has been analyzed by the European Commission, which has issued various reports on the evolution of the macroeconomic measures taken by Spain. These reports acknowledge that Spain is in compliance with the agreements made with the EU to introduce measures of macroeconomic control since March 2012. The European Commission held, in its Decision of November 2017, that the aid scheme subject to this arbitration is fully compliant with the EU State Aid Directives and declares that, from the point of view of EU law, the principles of legitimate expectations and legal certainty have not been infringed. The measures have also been judged positively by other international organizations, such as the IMF and the AIA.⁵⁰¹
804. Spain also contends that experts, rating agencies and businesses in the RE sector have positively assessed the cause-effect relationship of the entry into force of the new regulation and the reduction of the tariff deficit, which in turn underpins the sustainability of the SES. Spain describes very positive assessment by (1) the main rating agencies; (2) the specialist economic press; (3) the main players in the Energy Sector; and (4) the markets, with the boost in the number of transactions in the RE Sector.⁵⁰²
805. More generally, according to Spain, the Claimants ignore the fact that the activity of electricity generation in the Special Regime is an integrated activity of the SES, regulated and subject to its sustainability. Although Law 54/1997 introduced competition in the electricity sector by a mandate of the EU, that does not mean that electricity production in the Special Regime ceased to be an activity subject to the regulatory power of the State. In fact, Article 30 of Law 54/1997 introduced a list of rights and obligations to producers in the Special Regime, proof of the interventionism they were subjected to.⁵⁰³

⁴⁹⁹ Resp. Rej., paras. 838 *et seq.*

⁵⁰⁰ Resp. Rej., para. 840.

⁵⁰¹ Resp. Rej., paras. 848-852.

⁵⁰² Resp. Rej., paras. 853-862.

⁵⁰³ Resp. Rej., paras. 237 *et seq.*

806. The activity of power production from renewable sources is an integrated activity of the SES. This activity is subject to its purposes and principles. These principles include the principle of economic sustainability of the SES. Spain argues that ensuring the economic sustainability of the SES justifies the intervention of the Regulator in the various income and expense items of the SES, including the cost of subsidies for renewable energy. The regulatory measures, although covered in the economic sustainability of the SES, have a limit, which is established in Law 54/1997: to ensure that the renewable plants make a reasonable return in accordance with the cost of the money on the equity market.⁵⁰⁴
807. The Respondent further argues that the linkage of the costs of the SES to the Average Reference Electricity Tariff (“TMR”) caused an increase in the tariff deficit.⁵⁰⁵
808. The risk to the economic sustainability of the SES caused by the tariff deficit drew an instant reaction from the regulator. Therefore, any investor who invested in the renewables sector between 2007 and 2009 should have known that if the tariff deficit put the economic sustainability of the SES into question, the regulator would adopt the measures required to ensure its sustainability. They also knew that the effects of these measures would be proportional to the problem the measures were seeking to address, but that the investor would be guaranteed a reasonable rate of return on their investments in the event of these potential regulatory changes.⁵⁰⁶
809. In conclusion, Spain is not arguing that the Disputed Measures were the only means available to tackle the tariff deficit; what Spain is arguing is that they were the most reasonable and proportionate.⁵⁰⁷

6.2.3 The Tribunal’s Analysis

6.2.3.1 The Standard of Fair and Equitable Treatment

810. The issue before the Tribunal is whether, by enacting the Disputed Measures, Spain violated its obligation to accord a fair and equitable treatment (“FET”) to the Claimants’ investments under Article 10(1) of the ECT.
811. To resolve this issue, the Tribunal must start with the terms of Article 10(1) of the ECT, which reads:

“Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most

⁵⁰⁴ Resp. Rej., paras. 243-246.

⁵⁰⁵ Resp. Rej., para. 440.

⁵⁰⁶ Resp. Rej., paras. 440-441.

⁵⁰⁷ Resp. PHB, para. 113.

constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party (emphasis added).

812. This provision, as well as all other provisions of the ECT at issue in this case, must be interpreted under the rules of interpretation prescribed in the VCLT. First and foremost, the provision must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the treaty.⁵⁰⁸
813. For the sake of clarity, it is common ground in this case that the Claimants all qualify as “*Investors*” for the purposes of the ECT and that their claims relate to “*Investments*” for that same purpose. The Tribunal is also satisfied that the investments in dispute have been made in the “*Area*” of Spain for the purposes of this provision.
814. The first sentence of Article 10(1) concerns the conditions that the Respondent was required to create for the Claimants to make new investments, and requires that those original conditions be stable, equitable, favourable, and transparent. As this sentence is framed in prescriptive language (“*shall*”), it must be recognized as imposing legal obligations on the host state. In the circumstances of this case, those legal obligations concern the “*original*” conditions, that is, the conditions that the Respondent had created and that existed at the time the Claimants made each of their respective investments.
815. In this case, the Claimants have not articulated their claims by reference to the first sentence of Article 10(1) but by reference to the second one. However, the obligation imposed by the first sentence of Article 10(1) remains relevant to the interpretation of the conditions under which each one of the Claimants’ investments was made.
816. The second sentence of Article 10(1) of the ECT provides that “[s]uch conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.” The Tribunal will refer to this clause as the “**Fair and Equitable Treatment Clause.**”
817. “Fair and equitable treatment” is a legal concept which, by the time the ECT was drafted and opened for signature in 1994, had been used for decades in numerous investment-protection treaties and had been interpreted and applied in multiple arbitral awards. Those awards have frequently linked the term “*fair and equitable treatment*” to various concepts, including consistency, transparency, stability, and respect for objectively reasonable expectations derived from antecedent state action.

⁵⁰⁸ CL-11, VCLT, Arts. 31 and 32, especially Art. 31.1.

Nevertheless, neither Party to this arbitration has argued that “*fair and equitable treatment*” should be given a special meaning, in the sense of Article 31.4 of the VCLT, nor has either Party attempted to establish that the Contracting States Parties to the ECT intended to adopt any particular exegesis of “*fair and equitable treatment*” made by any pre-December 1994 decision or set of decisions. “*Fair and equitable treatment*” must therefore be regarded as a term having an objective meaning, to be established in good faith under the rules of the VCLT.

818. The rules of the VCLT require that the interpreter take into account the context in which “*fair and equitable treatment*” is used. The Tribunal notes that the second sentence of Article 10(1) (the Fair and Equitable Treatment Clause) immediately follows the first sentence and explicitly refers to a term contained therein. Accordingly, the first sentence forms the immediate context of the second, and this context must especially be considered in the interpretation of the latter. It indeed appears that the drafters of the ECT intended to link the commitment to accord fair and equitable treatment to the “*stable, equitable, favourable, and transparent conditions*” referred to in the first sentence.
819. This observation suggests that the drafters understood “*fair and equitable treatment*” to belong to a larger class of “*stable, equitable, favourable, and transparent conditions*.” This close contextual relationship does indicate that the degrees to which a state measure is stable, favourable, and transparent are among the relevant factors or circumstances that should be taken into account in determining whether a given instance of treatment is “*fair and equitable*.”
820. In ascertaining the meaning of “fair and equitable treatment,” the Tribunal must also look at the object and purpose of the ECT. In that regard, the Tribunal recalls that the purpose of this Treaty is to establish “*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter*”.⁵⁰⁹ One of these “*objectives and principles*” in relation to the protection of foreign investment is to provide a “*high level of legal security*” to such investments.⁵¹⁰
821. The Tribunal concludes that whether a given form of treatment is “*fair and equitable*,” as these terms are ordinarily used, ultimately depends on all the relevant surrounding circumstances, a conclusion also supported by cases such as *Waste Management, Inc. v. United Mexican States*⁵¹¹ and academic literature.⁵¹²
822. With these preliminary remarks in mind, the Tribunal now turns to the examination of the Claimants’ claims.

⁵⁰⁹ **RL-11**, ECT, Article 2.

⁵¹⁰ **RL-11**, European Energy Charter, Title II, point 4.

⁵¹¹ **CL-20**, *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 99: “*Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.*”

⁵¹² See notably **RL-39**, “*Fair and Equitable Treatment in Arbitral Practice*”, Ch. Schreuer, *Journal of World Investment & Trade*, 2005, pp. 364-365 (and the cited decisions).

823. According to the Claimants, Spain has breached the FET standard in three different ways: (i) by violating the Claimants' legitimate expectations of fixed feed-in tariffs for their photovoltaic facilities; (ii) by making "*fundamental changes*" to the incentives regimes offered to the Claimants; and (iii) by failing to treat the Claimants' investments transparently and consistently.
824. As noted, the Tribunal considers that whether a given State measure constitutes fair and equitable treatment must be determined in light of all the relevant circumstances of the case. Accordingly, the Tribunal will examine the Claimants' contentions on the ways in which the Respondent has allegedly breached the FET as relevant sets of circumstances to be considered in a comprehensive FET analysis, along with the circumstances invoked by the Respondent in its discharge.⁵¹³
825. For expository purposes, the Tribunal will address separately the following sets of circumstances: those related to the Claimants' legitimate expectations (*infra*, subsection 6.2.3.2); those related to the stability of the regime under which the Claimants made each of their investments and the changes made thereto (6.2.3.3); and those related to transparency and consistency (6.2.3.4). Each of these subsections will end with preliminary conclusions. The Tribunal will further evaluate those preliminary conclusions and assess their relative weight in a final, comprehensive analysis on the application of the FET standard to the facts of the case (6.2.3.5).

6.2.3.2 Circumstances Related to the Claimants' Legitimate Expectations

826. The investor's legitimate expectations have long been regarded as a relevant factor in the application of the FET standard. For example, the tribunal in the *Tecmed* case stated as follows:

*"The Arbitral Tribunal considers that this provision of the Agreement [fair and equitable treatment], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment".*⁵¹⁴

⁵¹³ The Dissent states at para. 5 that (i) a tribunal must attempt to establish a balancing of interests on the merits of the case and (ii) the Decision has not taken sufficient account of the constraints on Spain resulting from the economic crisis of 2007-2008 and the fact that the Claimants have been able profitably to maintain their investments in Spain under the new regulatory regime. On the first point, the Tribunal observes that its duty and function are to apply the ECT and the applicable rules of international law (ECT, Art. 26(6)). The ECT embodies the agreement of the Contracting Parties on the balancing of interests between themselves and investors of other Contracting Parties, and that is the balancing of interests the Tribunal must respect. The Tribunal is not aware of any legal basis for doing its own balancing of interests and imposing it over and above that established in the ECT by the Contracting Parties. On the second point, the Tribunal has considered expressly and at length the impact of the economic crisis, along with all the other relevant circumstances that must be assessed in the FET analysis (see notably *infra* paras. 1026-1030, 1070-1078). The relevance of the continued profitability of the investments is addressed below, in footnote 667 to para. 1058.

⁵¹⁴ **CL-19**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154.

827. The underlying rationale of this view is that it would be unfair for the host State to deceive the expectations of an investor where such expectations were, in the circumstances, “legitimate.”
828. The question is, then, what set of circumstances amount to the creation and frustration of an investor’s legitimate expectations. Without attempting to exhaust the scope of this concept, the Tribunal notes that, at the very least, “legitimate expectations” refers to a complex set of facts in which (a) the State behaves in such a way as to give rise to expectations that it will treat an investment or class of investments in a certain way; (b) the prospective investor actually derives expectations from such State conduct and relies on it in making the investment; (c) the investor’s expectations and reliance are “legitimate” in the sense that they are objectively reasonable (reasonable from the standpoint of a reasonable investor in the same position), and (d) the State takes measures that frustrate the investor’s expectations.
829. The Tribunal will address each of these elements in turn.
- (a) The Respondent’s Conduct: Did the Respondent’s Conduct Create Expectations Regarding the Treatment of the Investment?
830. There is a long-standing debate as to whether the State conduct must consist of a *specific commitment* towards the investor and/or the investment to be able to generate a legitimate expectation. The Tribunal (by majority) is not persuaded that requiring such a specific commitment is consistent with the overarching notions of fairness and equity that must inform the assessment of the relevant circumstances of the FET analysis. The Tribunal (by majority) is of the view that an investor’s expectation may very well be legitimate even in the absence of such a specific commitment as long as the State, explicitly or impliedly, behaved in a way that made it objectively reasonable for a prospective investor to rely upon such behavior or declarations.
831. As correctly stated by the tribunal in *Micula v. Romania*:

“There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability.

It is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance. The element of reasonableness cannot be separated from the promise, assurance or representation, in particular if the promise is not contained in a contract or is otherwise stated explicitly. Whether a state has created a legitimate expectation in an investor is thus

*a factual assessment which must be undertaken in consideration of all the surrounding circumstances”.*⁵¹⁵

832. Therefore, in this subsection the Tribunal will consider whether Spain’s conduct was capable of giving rise to expectations among potential investors in the position of the Claimants concerning the way in which their potential investments would be treated.

833. In substance, the Claimants submit that Spain created legitimate expectations on their part to receive the feed-in tariffs granted to eligible photovoltaic plants under RD 661/2007 and RD 1578/2008 for the period designated in each regime. By contrast, Spain considers that the Claimants could not expect more than to receive a “reasonable rate of return” on the investments, as provided in the Spanish Electric Power Act.

834. To determine whether Spain’s conduct was capable of giving rise to expectations on the part of potential investors and what those expectations were, the Tribunal will look at all the relevant enactments and the State’s conduct related thereto.

(i) Analysis of Law 54/1997

835. The Tribunal recalls that in Section 3.1 of this Decision it summarized the main steps of the evolution of the Spanish legal and regulatory framework applicable to renewable energies from the late 1990s to the time the Claimants chose to invest in the photovoltaic industry in Spain. At this stage, suffice it to recall that Spain took steps to liberalize the electricity generation sector and to develop its production of electricity through renewable energies from 1997 onwards in order to comply with the requirements set by EU Directive 96/92/EC of 1996.⁵¹⁶

836. In this regard, the Parties agree that the Spanish Electric Power Act, enacted through Law 54/1997 of 28 November 1997, was the main component of the legal regimes under which the Claimants invested.⁵¹⁷

837. While the main provisions of Law 54/1997 have been discussed earlier, two articles – Article 16(7) and Article 30(4) – deserve to be recalled, as they are crucial to the present discussion.

⁵¹⁵ **CL-29**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 669; see also **CL-165**, UNCTAD, *Fair and Equitable Treatment, Series on Issues in International Investment Agreements II a sequel*, p. 69. The tribunal in *Parkerings v. Lithuania* also referred to various ways in which legitimate expectations may be created: “*The Fair and Equitable Treatment standard is violated when the investor is deprived of its legitimate expectation that the conditions existing at the time of the [investment] would remain unchanged. The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment.*” **CL-28**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, paras. 330-331.

⁵¹⁶ **C-73**, Directive 96/92/EC of the European Parliament and of the Council of concerning common rules for the internal market in electricity, 12 December 1996.

⁵¹⁷ **C-33.1**, Law 54/1997.

838. Article 16(7) of Law 54/1997 reads as follows:

“7. The remuneration for surplus energy defined in Section 30.2, transferred by special regime producers, shall be the same as the remuneration for electricity production, in accordance with subsection 1, plus, as the case may be, a premium to be determined by the Government, upon a consultation with the Autonomous Communities, under Section 30.4” (emphasis added).

839. Article 30(4), which defines the obligations and rights of electricity producers under the special regime, provides in pertinent part:

“To determine the premiums, voltage levels delivered to the grid shall be considered, as well as the actual contribution to environmental improvement, primary energy savings and energy efficiency, and the investment costs incurred [,] to obtain reasonable rates of return with regard to the cost of money in the capital markets.”

“Para la determinación de las primas se tendrá en cuenta el nivel de tensión de entrega de la energía a la red, la contribución efectiva a la mejora del medio ambiente, al ahorro de energía primaria y a la eficiencia energética, y los costes de inversión en que se haya incurrido, al efecto de conseguir unas tasas de rentabilidad razonables con referencia al coste del dinero en el mercado de capitales” (emphasis added).

840. The Tribunal (by majority) is of the view that the purpose of Law 54/1997 was to establish a special regime for renewable energy producers, which included photovoltaic facilities, and to grant such producers the right to a specific remuneration in the form of a premium. It is clear that the provisions of Law 54/1997 were not sufficiently precise to allow for the determination of such remuneration and were, in fact, not intended to do so, since this Law expressly delegated to the Spanish Government the task of setting, by means of regulations, the remuneration for the plants eligible to the special regime.

841. In such a context, the Tribunal (by majority) considers that the reference to a “*reasonable rate of return*” did not set either a cap or a floor on the remuneration of the renewable energy producers. Rather, it set an objective at which the Government was to aim in exercising its delegated function of establishing by regulation, within a significant degree of discretion, the specific parameters of such remuneration. In other words, Law 54/1997 left to the Government the task of devising, subject to the general goal of allowing for a “*reasonable rate of return*,” the specific form and quantum of the remuneration offered to producers of energy from renewable sources.

842. Within that statutory framework, the Spanish executive adopted the two key regulations which are at the core of the Claimants’ claims in this arbitration, namely Royal Decree 661/2007 of 25 May 2007 and Royal Decree 1578/2008 of 27 September 2008, to which the Tribunal now turns.

(ii) Analysis of RD 661/2007

843. The key provisions of RD 661/2007 having been transcribed in Section 3.1.8 *supra*, the Tribunal will focus on those provisions on which the Claimants have relied in the context of their claim for breach of their legitimate expectations.

844. As recorded in the Explanatory Statement of RD 661/2007,

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

845. Article 1 of RD 661/2007 states the purpose of the Royal Decree as follows:

“a) To establish a legal and financial framework for the business of the production of electrical energy under the special regime in replacement of Royal Decree 436/2004, of 12 March, establishing the methodology for updating and systematisation of the legal and economic framework of the activity of the production of electrical energy under the special regime by a new regulation for the activity of the production of electrical energy under the special regime.”

846. Article 17 develops these principles by setting out the rights of producers under the special regime. It notably provides:

“Without prejudice to the provisions of Article 30.2 of Law 54/1997, of 27 November, the proprietors of production facilities under the special regime shall enjoy the following rights:

c) Receive, for the total or partial sale of their net electrical energy generated under any of the options appearing in Article 24.1, the compensation provided in the economic regime set out by this Royal Decree. The right to receive the regulated tariff, or if appropriate the premium, shall be subject to final registration of the facility in the Register of production facilities under the special regime of the General Directorate of Energy Policy and Mines, prior to the final date set out in Article 22.”

847. Article 17 must be read in conjunction with the other provisions of RD 661/2007, which together define the conditions and the level of remuneration offered to investors enrolled under the special regime. In particular, Articles 24, 25 and 44 are worth quoting for the purposes of the present analysis.

848. Article 24 “*Mechanisms for the compensation of the electrical energy produced under the special regime*” states:

“1. In order to sell their net production of electrical energy in full or in part, the proprietors of facilities to which this Royal Decree is applicable should elect one of the following options:

a) Sell the electricity to the system through the transport or distribution grid, receiving for it a regulated tariff, which shall be the same for all scheduling periods expressed In Euro cents per kilowatt/hour.”

849. Article 25 “*Regulated tariff*” provides:

“The regulated tariff indicated in Article 24.1.a) comprises a fixed sum which shall be the same for all scheduling periods and shall be determined as a function of the Category, Group, of Sub-Group to which the facility belongs, and the installed power, and where applicable the length of time since the date of commissioning under Article 35 to 42 of the present Royal Decree.”

850. As explained earlier, such “*regulated tariff*” was precisely defined in Article 36 of RD 661/2007, according to which PV plants belonging to the category b.1.1 with a power comprised between 100 kW and 10 MW were entitled to a regulated tariff (i) of € 41,7500 cents per kWh for the first 25 years of operation as from their date of commissioning and (ii) of € 33,4000 cents per kWh thereafter.

851. Finally, Article 44 “*Updating and review of tariffs, premiums, and supplements*” provides as follows:

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

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

852. Based on these provisions, read in conjunction, the Tribunal (by majority) considers that the purpose and effect of RD 661/2007 was to provide qualifying electricity producers with clear and precise rules on the remuneration they would receive for the electricity produced during the entire life of their plants. As already explained, in the specific case of photovoltaic facilities with a power comprised between 100 kW and 10 MW, those rules provided that the producers of electricity through PV plants were entitled to receive a regulated tariff (i) of € 41,7500 cents per kWh for the first 25 years of operation as from their date of commissioning and (ii) of € 33,4000 cents per kWh thereafter, *i.e.* for the remaining duration of the life of the plant, such tariff to be updated annually according to a defined inflation index.
853. The Tribunal (by majority) further finds that the provisions of RD 661/2007 were not only compatible with Law 54/1997 and its objective to offer a “*reasonable rate of return*” to renewable energy producers but, in fact, reflected the attainment of this objective by means of a specific, transparent, precise, and enforceable set of rules applicable to such producers, *i.e.* the Special Regime, as long as such producers satisfied the requirements for enrolment under the regime set out by this Royal Decree, and in particular the requirements for registration (“**RAIPRE**”) set out in Article 9 *et seq.* The Tribunal (by majority) also notes that the Respondent has not alleged that in setting the remuneration of renewable energy producers the government overshot what was considered at the time a reasonable rate of return, nor has it alleged that RD 661/2007 was otherwise illegal for exceeding the boundaries set by Law 54/1997.
854. It also finds that Article 44(3) of RD 661/2007 provides electricity producers enrolled under the Special Regime with a guarantee against *future* changes regarding their remuneration.⁵¹⁸
855. In summary, the Tribunal (by majority), finds that the plain wording of the aforementioned provisions of RD 661/2007, taken together, constitute an express commitment of Spain to offer a stable remuneration to any renewable energy producer that was properly enrolled in the Specific Regime for the whole duration of the life of its plant.⁵¹⁹
856. Such finding is strongly supported by the context surrounding the adoption of RD 661/2007, and notably the statements made at the time by Spain, directly or through State-related entities, in relation to RD 661/2007.

⁵¹⁸ The Dissent states the view, at para. 15, that Article 44(3) of RD 661/2007 cannot have the effect of stabilizing the remuneration regime of that royal decree because it refers only to the revisions to be made in 2010 and does not lay down a general rule barring other changes. This argument overlooks that, under international law, treaty obligations, including the obligation under the ECT to treat qualified investors fairly and equitably, must be performed in good faith (VCLT, Art. 26). Hence, for the purposes of compliance with the FET obligation, a commitment made by a State to potential investors must be read in good faith and, in this case, also in light of the State’s transparency obligation (ECT, Art. 10(1), 1st sentence). A *bona fide* reading of Article 44(3) indicates that Spain was making a commitment to forego future changes to the remuneration regime of RD 661/2007, not just those that might be made in the revisions programmed for 2010. In fact, that understanding is implicit in the statements made at the time by Spanish officials that the remuneration regime would be stable, thus ensuring “juridical security” (see *infra* paras. 857 *et seq.*); Margarit Regulatory Report, pp. 32-33.

857. In particular, the press release of the Ministry of Industry issued on 25 May 2007 confirms the Tribunal's interpretation:

"The Government Prioritizes Profitability and Stability in the New Royal Decree of Renewable Energy and Cogeneration

This Royal Decree sets out to improve the remuneration for less mature technologies such as biomass and solar thermal, thereby being able to achieve the targets of the Renewable Energies Plan 2005-2010 as well as the targets assumed by Spain at the EU level. With the development of these new technologies, renewable energy in Spain will cover 12% of energy consumption in 2010. [...]

Every 4 years the tariffs will be revised, bearing in mind compliance with the targets set. This will allow an adjustment to the tariffs in line with the new costs and the degree of compliance with the targets. The tariff revisions carried out in the future will not affect those installations already operating. This guarantee affords legal safety to the producer, providing stability to the sector and promoting its development. [...]

The new text, which replaces Royal Decree 436/2004, fits into the energy policy commitment to drive forward the use of clean, native and efficient energies in Spain. The Government commitment to these energy technologies was the reason why the new regulations sought stability over time, which allows businessmen to carry out medium and long-term scheduling as well as a sufficient, fair return that, combined with stability, makes the investment and dedication to this activity attractive".⁵²⁰

858. The theme of legal certainty was later reaffirmed by the Spanish Minister of Industry, Tourism and Trade, Joan Clos i Matheu, before the Spanish Senate in October 2007, who repeated several times that "there [was] no lack of legal security, not at all" in the renewable sector".⁵²¹
859. Similarly, it is noteworthy that the *Comisión Nacional de la Energía* (or CNE), the Spanish energy regulator, affirmed in June 2007 (and again in December 2008)⁵²² through the voice of its Director of Electricity, Carlos Solé, that, pursuant to Article 44

⁵²⁰ **C-108**, Ministry of Industry, Tourism and Trade, Press Release, The Government Prioritizes Profitability and Stability in the New Royal Decree of Renewable Energy and Cogeneration, 25 May 2007 ("**Press Release of 25 May 2007**"). (emphasis added).

⁵²¹ **C-110**, Joan Clos i Matheu, Appearance before the Congress of Deputies, Journal of Sessions of the Congress of Deputies, VIII Legislature, No. 822, Plenary Session No. 48, 9 October 2007; see also Joan Clos i Matheu public statements made before the Spanish Congress of Deputies: **C-121**, Commission of Industry, Trade and Tourism, Session No. 56, 17 October 2007.

⁵²² **C-134**, Carlos Solé Martín (CNE), Presentation, International Renewable Energy Regulation. The Spanish Case (Eilat, Israel) (see, in particular, slide 33, again referring to the non-retroactivity of future revisions to the tariffs and the fact that the economic support of the State was granted for the life of the installation).

of RD 661/2007, future revisions to the tariffs would not retroactively apply to existing facilities, the words “*sin retroactividad*” being underlined in his 2007 presentation.⁵²³

860. The Tribunal (by majority) also finds it revealing that, before making those statements, the CNE had initially criticized an early draft of the RD 661/2007 in its Report 3/2007 precisely because the draft of what later became Article 44 left the door open to the potential retroactivity of the future changes to the tariffs without providing for appropriate transitional provisions and adequate compensation.⁵²⁴ The draft of Article 44 was ultimately amended to address those criticisms and explicitly to indicate that future changes would *not* affect existing facilities. This change further demonstrates Spain’s intent to reassure electricity producers enrolled in the Special Regime that their remuneration would not be significantly altered by subsequent changes.
861. In addition to those unequivocal public statements, the Tribunal observes that Spain actively promoted the Special Regime to potential investors both domestically and abroad in various presentations around the globe (Spain, Germany, China, Israel, Peru, Luxemburg, etc.) and again placed great emphasis on the legal certainty and stability that the Royal Decree was to guarantee as part of that promotion process.⁵²⁵
862. The Tribunal (by majority) views such statements and such conduct as express and implied representations towards potential investors intended to induce the investments that Spain needed to reach its commitments on the production of electricity through renewable sources.
863. Such aggressive promotion of RD 661/2007 was all the more necessary as the evidence on record shows that the previous attempts at attracting investments in the sector of renewable energies in Spain had not yielded the expected results, notably because the previous regimes did not contain sufficient guarantees of stability.⁵²⁶
864. It therefore appears that the new regime set out by RD 661/2007 was designed to improve past flaws in the previous legislation and to reassure potential investors as to the certainty and stability of the legal regime applicable to their investments.

⁵²³ **C-82**, Carlos Solé Martín (CNE), Presentation, The New Regulatory Framework for Renewable Energy in Spain, presented at the XI Latin American Meeting of Energy Regulators, 18 June 2007.

⁵²⁴ **C-69**, CNE Report 3/2007, at 4.d) 10.

⁵²⁵ See, for instance: **C-114**, IDAE Presentation, The Sun Can Be Yours, Answers to All Key Questions of 6 June 2007 (“IDAE Presentation”); **C-115**, IDAE Presentation of 24 May 2005; **C-117**, IDAE Presentation of November 2007; **C-127**, Invest In Spain, Press Release, *Interes Invest in Spain Organizes a Seminar on Investment in Luxembourg*, 18 April 2007; **C-129**, Invest in Spain, Press Release, *Major Spanish Presence at CIFIT, 7 September 2007* to **C-135**, Begoña Cristeto, Invest in Spain, Presentation, *Andalucía, an Attractive Marketplace for Investments, 13 June 2007*; **C-148**, Luis Jesús Sánchez de Tembleque (CNE), Presentation, *The Regulation of Renewable Energy, February 2009*; **C-176**, Miguel Sebastián, Speech at the inaugural conference of IRENA, 26 January 2009; **C-400.1-C-400.3** and **C-400.14.**, Presentations Spain produced during document production; see also Margarit Regulatory Report, pp. 35-40.

⁵²⁶ See Brattle First Regulatory Report, para. 111; see also **R-62**, Plan for Renewable Energies in Spain 2005-2010, p. 10, acknowledging in August 2005 that “*the development in areas such as biomass and solar energy is substantially slower than would be necessary to reach the final targets*” (emphasis added); **R-119**, APPA Info Journal No. 22, “Energy Dictat”, May -July 2001; **C-101**, Diario Vasco, Press Article, *The Wind Industry Calls on the Government for “Stability” in the New Regulation of Renewable Energy*.

865. In light of the foregoing, the Tribunal (by majority) finds that the Respondent's conduct regarding RD 661/2007 is sufficient to generate expectations in potential investors that the treatment that their investments would receive if they invested under that legal regime would not be significantly altered.

866. Before addressing the remaining elements of the "legitimate expectations" analysis in respect of RD 661/2007, the Tribunal will turn to the other set of regulations invoked by the Claimants.

(iii) Analysis of RD 1578/2008

867. Two of the investments in dispute, the "*Valle Hermoso II*" Project and the "*Salinas*" Project, owned by Claimant Edisun, were registered under RD 1578/2008. The Tribunal must then analyze the relevant provisions of this Royal Decree and the context in which it was adopted.

868. In September 2007, only a few months after the entry into force of RD 661/2007, the Spanish government observed that 85% of the target capacity for new PV facilities had been reached. Accordingly, and as contemplated by Article 22 of RD 661/2007, the government decided that new production facilities that were not finally registered under RAIPRE by 29 September 2008 would no longer be entitled to benefit from the tariffs provided in RD 661/2007. In the wake of that decision, Spain adopted another Royal Decree, RD 1578/2008, of 26 September 2008, establishing a new regime for electricity producers using renewable energy.

869. In substance, and as reflected in its explanatory statement, RD 1578/2008 was aimed at preserving a special regime for electricity producers using renewable energies while offering lower tariffs in light of the decrease of the costs of technology.⁵²⁷

870. For the purposes of the present analysis, the Tribunal will recall the most relevant provisions of RD 1578/2008.

871. The Preamble states:

"To guarantee a minimum market for the development of the photovoltaic sector and, at the same time, to ensure the continuity of the support system, a mechanism is established for assigning compensation by registration in a compensation assignment registry, at the beginning of the development of a project, which will provide the necessary legal security to promoters with respect to the return that the facility will earn once it is put into operation [...]"(emphasis added).⁵²⁸

872. Article 1 "*Object*" reads as follows:

⁵²⁷ C-159, RD 1578/2008; see also R-47, RD 1578/2008.

⁵²⁸ R-47, RD 1578/2008.

“This Royal Decree’s objective is to establish an economic regime for facilities generating electric power with photovoltaic technology, to which the regulated tariff rates provided in Article 36 of Royal Decree 661/2007, of 25 May, on the activity of electricity power generation under the special regime, are not applicable because of their date of final registration in the second section of the Administrative Registry of Electricity Power Generation Facilities of the General Directorate of Energy Policy and Mines, hereinafter “Administrative Registry for Generation Facilities Included in the Special Regime” pursuant to 9.1 of Royal Decree 661/2007 of May, 25.”

873. Article 2 “Applicability” states:

“This royal decree will apply to facilities of the group b.1.1 [solar PV facilities] of Article 2 of Royal Decree 661/2007 of May 25, 2008, [that is to those] photovoltaic facilities that obtained definitive registration after September 29, 2008 in the Administrative Registry of Electricity Power Generation Facilities of the Energy Policy and Mines General Department.”

874. Article 11 concerns “Tariffs”:

“1. The rates of regulated tariffs for the sub-group b.1.1 facilities of Article 2 of Royal Decree 661/2007, of May 25, 2007, that are registered in the Pre-Allocation Registry, associated with the first notice, are fixed as follows:

Type		Regulated Tariff (c€/kWh)
Type I	Subtype I.1	34.00
	Subtype I.2	32.00
Type II		32.00

[...]

5. The applicable regulated tariff to a facility, in accordance with this royal decree, shall be maintained for a maximum duration of twenty-five years, as from the latest of the two following dates: the date of commissioning, or the date of the registration of the facility in the Compensation Pre-Allocation Registry, such [compensation shall never be applicable prior to the date of such registration. [...]]”

875. Article 12 “*Update of tariffs*” provides:

“The rates provided in Article 11 shall be updated as provided in Article 44.1 of Royal Decree 661/2007, of May 25 [ICP] for sub-group b.1.1 facilities, as from January 1, of the second year subsequent to the notice in which they are fixed.”

876. Finally, the Fifth Additional Provision of RD 1578/2008 reads as follows:

“In the course of 2012, in the light of technological developments in the sector and in the market, and of performance of the remunerative framework, the compensation for electricity power generation with solar photovoltaic technology, may be amended.”

877. In light of the foregoing, it appears that RD 1578/2008 was meant to offer an amended special regime to qualifying electricity production facilities enrolled after 29 September 2008 whereby the owners of such facilities were entitled to a fixed feed-in tariff, albeit lower than those provided in RD 661/2007, for a maximum duration of 25 years (with no guaranteed tariff thereafter, as distinguished from RD 661/2007). In order closely to monitor the development of new PV facilities, RD 1578/2008 also created a “*pre-allocation registry*” where any new facility had to be registered in one of the successive quarterly calls that were put in place. The date of registration would determine the regulated tariff applicable to such facility, subject to final registration.⁵²⁹

878. The Tribunal understands from the evidence that, in fact, RD 1578 did not affect the application of RD 661/2007 to the production facilities enrolled thereunder.⁵³⁰

879. The Tribunal also notes from the evidence on record that around the same period:

- The CNE produced Report 30/2008 of 29 July 2008 on the drafting of what became RD 1578/2008. In that Report, and in line with its recommendations for the drafting of RD 661/2007, the CNE focused again on the need to minimize regulatory uncertainty.⁵³¹
- The Energy Policy Directorate of the Ministry of Industry, Tourism and Trade issued a report (“*Memoria Justificativa*”) on the draft RD 1578/2008 confirming that a possible revision of the tariffs might occur in 2012 while also stating that “[t]he tariff applicable to a facility will be maintained for a maximum period of 25 years from its commissioning, as with the facilities that receive the remuneration envisaged in Royal Decree 661/2007”.⁵³²

⁵²⁹ C-159, RD 1578/2008, Article 4.

⁵³⁰ This is confirmed by the Minister’s declarations before the Spanish Senate on 25 September 2008: “*Thus, a new tariff will be established with reduction according to the actual costs and which will only apply to new plants, in other words, it will not have retroactive effects*” (C-161).

⁵³¹ C-163, CNE Report 30/2008, section 5.2.

⁵³² C-368, Memoria Justificativa of RD 1578/2008, Article 5.1 (Translation).

- In its official press release of 26 September 2008 accompanying the publication of RD 1578, the Ministry of Industry, Energy and Commerce notably stated that:

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

*The remuneration period for each facility is 25 years and the annual updating of the remuneration [is] in line with the IPC-0.25 or 0.50, in both cases the same as in the previous Royal Decree”.*⁵³³

- In its address to the Congress of Deputies on 25 September 2008, the General Secretary of Energy, recalling the need to ensure the legal stability of the regulatory framework, notably stated:

*“I do not know whether we can call that regulatory instability. Instability is retroactivity, which is not introduced in the draft proposal [of RD 1578/2008] and has never been introduced in any. Instability would be if I revise premiums regarding what you installed in August, or if I changed the regulation every month”.*⁵³⁴

880. It is also noteworthy that, in the subsequent months, and in the context of the success of the regime set up by RD 1578/2008, which continued to attract significant flows of investors, the Ministry of Industry issued another press release reaffirming the attractiveness and the stability of this regime and recalling that “[a]s of now, the owners of the facilities have twelve months to complete their facility and commission it in order to be entitled to this remuneration for a period of 25 years”.⁵³⁵
881. Moreover, on 10 October 2009, the CNE issued a relevant opinion in response to a particular query with respect to the interpretation of the Fifth Additional Provision of RD 1578/2008 anticipating possible revisions to the tariffs as of 2012, stating:

“Since section 11.5 [of RD 1578/2008] specifies a maximum duration of 25 years for the economic remuneration allocated to facilities registered under the scope of application of Spanish Royal Decree 1578/2008, this commission believes that the modification of the remuneration regime referred to in additional provision 5 would apply to new facilities that are registered from 2012 onwards. This is noted to be without prejudice to the

⁵³³ C-160, Press Release on RD 1578/2008.

⁵³⁴ C-143, Pedro Luis Marín Uribe, 25 September 2008, pp. 19-20.

⁵³⁵ C-165, Ministry of Industry, Trade and Tourism, Press release: Minister of Industry incorporates 731 PV facilities onto the register, 23 April 2009 (emphasis added).

government's power to determine the application of additional provision five of Spanish Royal Decree 1578/2008.

This regulation is consistent with Article 44.3 of Spanish Royal Decree 661/2007, which also provides for a revision of the economic remuneration in 2010, that would apply to facilities that start operating from 01 January 2012 onwards".⁵³⁶

882. The Tribunal also notes that the Fifth Additional Provision of RD 1578/2008 expressly contemplated the possibility that in the course of 2012 *"the compensation for electricity power generation with solar photovoltaic technology, may be amended,"* and, in contrast with RD 661/2007, did not contain a clause expressly stating that future revisions to the tariffs would *not* affect existing plants.
883. Two opposing theories of lines of argument can conceivably be developed on the basis of the antecedents discussed above. The first theory, which roughly coincides with the Claimants' position, holds that RD 1578/2008 should be interpreted in the sense that any changes to the remuneration system that might be adopted in the course of 2012 would not affect plants already registered. The second theory, which roughly agrees with the Respondent's position, takes the opposite view.
884. The first theory is supported by the following considerations:
- Under the first sentence of Article 10(1) ECT, the Respondent had a duty of transparency in the setting of conditions for the investment. Hence, if the government had intended to reserve the right to change the remuneration of registered plants, it had a duty to make that clear.
 - The Preamble to RD 1578/2008 states that the regime being established *"will provide the necessary legal security to promoters with respect to the return that the facility will earn once it is put into operation,"*⁵³⁷ a statement that is inconsistent with a potential change in such a return and consequent loss of legal security in as little as four years.
 - The same can be said of the official press release of 26 September 2008 accompanying the publication of RD 1578, which touted the new regulation as *"affording the predictability of future remunerations."*
 - The General Secretary of Energy told the Congress of Deputies, in support of legal stability, that *"[i]n stability would be if I revise premiums regarding what you installed in August,"* which suggests that the revision of premiums for registered installations would be inconsistent with stability.

⁵³⁶ **C-369**, CNE Report on the interpretation of the Fifth Additional Provision of RD 1578/2008 ("CNE Report on interpretation of 5th Additional Provision in RD 1578/2008"), 22 October 2009 (emphasis added).

⁵³⁷ **R-47**, RD 1578/2008.

- While Article 11.5 of RD 1578/2008 refers to “a *maximum duration of twenty-five years*,” the term “*maximum*” only reflects the possibility that the life of the facility might not reach 25 years, in which case the remuneration should naturally stop.
- The report of the Energy Policy Directorate of the Ministry of Industry, Tourism and Trade also mentioned that [t]he *tariff applicable to a facility will be maintained for a maximum period of 25 years from its commissioning*,” but notably added “*as with the facilities that receive the remuneration envisaged in Royal Decree 661/2007*,” which suggests that the “maximum duration” was intended to work in the same way as the regime of RD 661/2007.
- Before RD 1578/2008 was adopted, the CNE advised against regulatory uncertainty and later issued an opinion interpreting the Fifth Additional Provision as applying only to facilities registered from 2012 onwards. Even though the CNE’s opinion was issued “*without prejudice to the government’s power to determine the application of additional provision five*,” it reveals, at least, that a government agency reached an interpretation at odds with that which the Respondent now advocates.

885. The second theory is supported by the following considerations:

- First and foremost, the Fifth Additional Provision of RD 1578/2008 expressly states that in the course of 2012 “*the compensation for electricity power generation with solar photovoltaic technology, may be amended*,” without making any distinction between the compensation owed to plants already registered under RD 1578/2008 and plants to be registered in the future.
- The omission of a provision comparable to the second paragraph of Article 44(3) of RD 661/2007 cannot be considered an oversight, especially because the earlier Royal Decree was expressly referred to in various provisions of RD 1578/2008. On the contrary, it should be regarded as a deliberate choice by the government in designing the new regime.
- Article 11(5) of RD 1578/2008 expressly mentioned that such remuneration “*shall be maintained for a maximum duration of twenty-five years*” (emphasis added), thus reflecting that it could last for a shorter period.
- The Fifth Additional Provision of RD 1578/2008 contemplated the possibility of future amendments to such remuneration “*in the course of 2012*” not only in light of “*technological developments*” but also of “*the performance of the remunerative framework*,” without specifically stating whether changes based on such performance would be limited to new facilities.

- The CNE's interpretation of the Fifth Additional Provision on which the Claimants rely is expressly made "*without prejudice to the Government's competence to determine the application [thereof]*".⁵³⁸

886. The above elements lead the Tribunal (by majority) to conclude that the Respondent's conduct regarding the Special Regime of RD 1578/2008 is sufficient to generate expectations in potential investors that the treatment offered by such legislation would not be significantly altered. However, in light of the Fifth Additional Provision of RD 1578/2008 and of the absence of a provision equivalent to Article 44(3) of RD 661/2007, the Tribunal (by majority) considers that such expectations could not be of the same level as those generated under RD 661/2007. This means that a subsequent measure of the Spanish State could possibly rise to the level of a significant change with respect to an investor enrolled under RD 661/2007 but not necessarily so for an investor enrolled under RD 1578/2008. This nuance will be taken into account in assessing the relative weight of Claimant Edisun's legitimate expectations in respect of its investments made under RD 1578/2008 in the overall FET analysis.

887. Before turning to the question whether the Claimants actually formed expectations based on RD 661/2007 or RD 1578/2008 (as the case may be), the Tribunal will address the Respondent's argument that neither of these regulations could have given rise to legitimate expectations because they were unlawful under EU law.

(iv) Relevance of EU State Aid Law on the Claimants' Legitimate Expectations in Relation to RD 661/2007 and RD 1578/2008

888. The Respondent argues that, under EU law, RD 661/2007 and RD 1578/2008 constituted illegal State Aid and, because of that illegality, the Claimants could not have had any legitimate expectations based on those regulations. The Respondent notably relies, in that regard, on the EU Commission State Aid decision of 13 November 2017, which held that "[a] *recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission*".⁵³⁹

889. The Tribunal has found (*supra* at Section 6.1.3) that EU law could be relevant as a fact, as part of the domestic law of Spain where the investments in dispute were made.

890. For the reasons stated below, the Tribunal considers that the Respondent's objection fails on the evidence on the record, so that it is unnecessary for the Tribunal to interpret or apply EU law, even regarded as a fact. Indeed, the record shows:

- That Spain never considered the remuneration schemes provided in RD 661/2007 and RD 1578/2008 to be "*state aid measures*";

⁵³⁸ C-369, CNE Report on interpretation of 5th Additional Provision in RD 1578/2008.

⁵³⁹ RL-3, State Aid S.A. 40348 (2015/NN), para. 158.

- That, in any event, Spain never notified such measures to the European Commission, so that Spain cannot, in all fairness, have expected investors to second-guess it on whether it did or did not comply with EU law, and
- That, despite being aware of the regimes of RD 661/2007 and RD 1578/2008, the European Commission never investigated such regimes to determine whether they constituted unlawful state aid, and more generally, did not suggest that those measures even qualified as “*State aid*” from an EU law standpoint.⁵⁴⁰

891. The Tribunal has carefully examined the *amicus curiae* brief submitted by the European Commission on 13 June 2019.

892. In its brief, the Commission notably contends that the Claimants could not legitimately expect to receive tariffs that were illegal State aid according to EU law, while also acknowledging *inter alia* that it “*is not in possession of any information as to whether the claimant carried out an independent due diligence assessment on whether the State aid it was expecting had been notified in accordance with the procedures required by Union law*”.⁵⁴¹

893. The Tribunal therefore understands the Commission’s analysis to be based on the premise that RD 661/2007 and RD 1578/2008 qualified as illegal State aid from an EU point of view.⁵⁴² As noted above, however, there is no evidence on the record that those measures were ever considered as State aid, or *a fortiori* illegal, including by the Commission itself, until the latter’s intervention in the present arbitration.

894. In particular, the Commission’s Decision of 13 November 2017, upon which both Spain and the European Commission heavily rely, limited its scope to the New Regulatory Regime put in place by Spain and applicable as of 11 July 2014, which it found to be compatible State aid.⁵⁴³ By contrast, it expressly excluded from its scope any assessment of the previous regime, and notably RD 661/2007 and RD 1578/2008:

*“As Spain has decided to replace the premium economic scheme with the notified aid measure it is not relevant for the scope of this decision to assess whether the originally foreseen payments under the previous schemes would have been compatible or not”.*⁵⁴⁴

⁵⁴⁰ **C-345**, European Commission, Factsheet on *Competition: State aid procedures*; **C-352**, European Commission Staff Working Document, *The Support of Electricity from Renewable Energy Sources*; **C-68**, European Commission, Communication – The support of electricity from renewable energy sources.

⁵⁴¹ EC *amicus curiae* Brief of 13 June 2019, para. 36.

⁵⁴² See notably EC’s Second Application for Leave to Intervene, 5 April 2019, para. 10: “*The fact that the initial support scheme, on which Claimants claim to have relied, has been put in place in violation of the mandatory rules of Article 108(3) TFEU, and the case-law of the Court of Justice, have the effect that the continuation of the measure concerned would have been illegal under EU law and Spanish law, and can under no circumstances give rise to legitimate expectations.*”

⁵⁴³ **RL-3**, State Aid S.A. 40348 (2015/NN).

⁵⁴⁴ **RL-3**, State Aid S.A. 40348 (2015/NN), para. 156 (emphasis added).

895. In light of the foregoing, absent any demonstration that RD 661/2007 or RD 1578/2008 would qualify as EU State aid, the Respondent's objection must be dismissed. It follows that EU State aid law cannot have had any impact on the legitimacy of the Claimants' expectations based on those legal regimes.

(b) The Claimants' Conduct: Did the Claimants Actually Form Expectations Regarding the Treatment of the Investment and Rely on Those Expectations in Making Their Investments?

896. The Tribunal notes that it is up to the Claimants to prove that, as a matter of fact, (i) they formed expectations based on the legal regimes discussed above and (ii) relied on those expectations in making their respective investments. This issue is different from the objective reasonableness of any such expectations, a matter to be addressed separately. In this subsection the Tribunal will analyze the evidence on the record on the Claimants' expectations and reliance and the Respondent's arguments to the contrary.

897. The Claimants may prove their expectations and reliance by any competent form of evidence, as no restriction is found in the ECT or implied by any notion of fairness or equity. In this respect, the Tribunal agrees with the tribunal in *SolEs* that "*a formal due diligence process is not a precondition to a successful claim of legitimate expectations*".⁵⁴⁵ Particularly in a case like this, in which the alleged expectations and reliance are based on published laws and regulations and published statements by public officials, all that in fairness can be required of a potential investor is a reasonable understanding of those materials and their role in the legal system.

898. The Tribunal observes, however, that due-diligence investigations and reports of varying scope are routinely conducted in large and medium-sized investment transactions, either at the investor's own initiative or at the behest of lenders or others. In such cases, those reports may serve as evidence to prove or disprove the investor's expectations and reliance.

899. In addition, the Tribunal must also assess the Claimants' respective conduct when making their respective investments, in particular in light of Spain's contention that the Claimants failed to carry out an adequate due diligence before investing and that they should have been put on notice that, in accordance with the jurisprudence of the Spanish Supreme Court, they could not legitimately expect to benefit from an immutable right to remuneration. While this contention appears to be directed both to the factual reality of the Claimants' expectations and to their objective reasonableness, the Tribunal considers it more practical, for expository reasons, to discuss it in the present subsection.

⁵⁴⁵ CL-182, *SolEs*.

900. It is generally accepted that an investor's expectations and their objective reasonableness must be assessed at the time of the investment.⁵⁴⁶ Identifying the time of the investment may be a simple matter when the investment is made in a single act, as in the case of the acquisition of an existing investment, but it may require further analysis when the making of the investment comprises a series of acts taking place over a certain period. In such cases, it should be remembered that a prospective investor's expectations and reliance are particularly related to the decision to invest.
901. In the present case, it is worth recalling that the different dates on which the Claimants' investments were made have not been contested. Moreover, it is common ground that the Claimants did not invest under the same regime, since DCM 1, DCM 2 and HL Sun Invest made their investments under the Special Regime of RD 661/2007, while Edison invested both under the regimes of RD 661/2007 and RD 1578/2008.
902. Accordingly, the Tribunal will separately address the expectations and reliance of each Claimant.
- **DCM 1 and DCM 2**
903. DCM 1 invested in four PV projects ("Sevilla", "Alicante", "Bovera," and "Cam Mestre") under the regime of RD 661/2007. The evidence shows that the RAIPRE registrations for these four projects were obtained between 31 July 2008 and 26 September 2008,⁵⁴⁷ while the corresponding investments were completed between 29 November 2008 and 7 October 2009.⁵⁴⁸
904. DCM 2 invested in two PV projects ("Huéscar" and "Granada") under the regime of RD 661/2007. The RAIPRE registrations for these two projects were obtained on 8 September 2008,⁵⁴⁹ while the corresponding investments were made two days later, on 10 September 2008.⁵⁵⁰
905. The evidence on record establishes that DCM carried out a great deal of due diligence before deciding to invest in Spain.

⁵⁴⁶ **CL-23**, M. Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of Controversial Concept*, ICSID Review, No. 28 (1), 2013, pp. 110-111; **CL-32**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2007 ("**LG&E**"), para. 130.

⁵⁴⁷ **C-185**, Sevilla RAIPRE Registration; **C-191**, Alicante RAIPRE Registration; **C-197**, Bovera RAIPRE Registration; **C-214**, Cam Mestre RAIPRE Registrations.

⁵⁴⁸ **C-186**, Purchase Agreement Between DCM & Co. Solar with Mr. Holger Pohlen; **C-194**, Change of Limited Partner of Solarpark Alicante GmbH & Co. KG, 8 September 2009; **C-206**, Purchase Agreement Between DCM Energy Solar 1 Bovera S.L. (Purchaser) and Wirsol Deutschland GmbH, Wirsol Energia S.L.U., and Wirsol Solar AG (Sellers) for Solar Park Bovera, 13 August 2009; **C-217**, Deed of Purchase Agreement between DCM Energy GmbH & Co. Solar 1 KG Sucursal en España (Purchaser) and Conort Ingeniería y Montajes Eléctricos S.A. et al. (Sellers) for Solar Park Cam Mestre, 28 January 2010.

⁵⁴⁹ **C-226**, Huescar Energía RAIPRE Registrations; **C-227**, Granada Energía RAIPRE Registrations.

⁵⁵⁰ **C-229**, Share Purchase Agreement Between DCM Energy GmbH & Co. Solar 2 KG Sucursal en España (Buyer) and Enterprise Granada Energía Solar S.L. et al. (Sellers), 10 September 2008.

906. It appears that, before investing in the Spanish PV sector, DCM's managers received legal advice from the law firm HHKL, in the person of Mr. Raster, a lawyer who testified in this arbitration that he had personally taken steps to understand and assess the legal framework applicable to the investments, and that he had notably reviewed RD 661/2007 and conducted research about it.⁵⁵¹ Mr. Raster was notably in contact with the Spanish law firm Frübeck Abogados which confirmed his understanding of RD 661/2007 and in particular the stability of the FIT provided therein.⁵⁵² Furthermore, it is not contested that DCM obtained financing from five different banks, all of which received legal advice before approving such financing from different reputable law firms, including Freshfields, Rödl & Partner, Herbert Smith and Monereo.⁵⁵³
907. The examination of these various legal analyses reveals that no red flag was raised in relation to a possible regulatory risk arising from RD 661/2007 and that the focus rather turned on whether the DCM investors had adequately complied with the requirements for registration under the Special Regime. Whether these legal advisors specifically addressed the issue of the stability of the Special Regime or not, the Tribunal (by majority) is satisfied that if any of these advisers had identified a risk that the remuneration offered to Special Regime electricity producers were open to significant changes, such risk would have been clearly stated to the DCM investors or their banks. Yet, that was not the case.
908. Spain argues, however, that any prudent investor should and would have known the jurisprudence of the Spanish Supreme Court in existence at the time of the investments, which indicated, according to Spain, that the investor's right to a fixed feed-in tariff was not immutable and hence the Special Regime of RD 661/2007 could lawfully be modified in the future. This contention, and a similar one made in respect of the Special Regime of RD 1578/2008, will be examined in the next subsection, dealing with the legitimacy of the Claimant's expectations and reliance.
909. The Tribunal (by majority) also finds that DCM 1 and DCM 2 relied on the Special Regime of RD 661/2007 in making their investments. The testimony of Mr. Hermuth, the chairman of DCM's board of directors at the time, explained that the guaranteed tariffs offered by RD 661 were key in DCM's decision to invest in Spain:

“Just as the German government had not changed its EEG tariff from what was foreseen in the law, DCM did not expect that Spain would retroactively amend or revoke the rights it granted renewable energy plants under RD 661/2007 once a facility had qualified under that regime.

⁵⁵¹ First Raster WS, paras. 11; see also Witness Statement of Mr. Claus Hermuth, 2 November 2018 (“**Hermuth WS**”), notably paras. 9;13;14, confirming that DCM sought legal advice on RD 661/2007 and obtained assurances about the stability of this regime which was modelled on the German's feed-in tariff system (EEG).

⁵⁵² First Raster WS, paras. 14-15.

⁵⁵³ **C-204**, Rödl & Partner Due Diligence Report, Project Bovera, 26 October 2009; **C-205**, Herbert Smith Due Diligence on Project Bovera; **C-213**, Monereo, Meyer, Marinell-lo Abogados, Capacity Opinion, 2 March 2010; **C-223**, Rödl & Partner Due Diligence Report, Project Cam Mestre, 3 February 2010; **C-236**, Freshfields, Legal Due Diligence Review, 1 December 2008; **C-405**, Monereo, Meyer, Marinell-lo Abogados Publication, The modification of the remuneration system for renewable energies was agreed upon, 1 June 2007.

*Indeed, had we considered this to be a risk, DCM never would have invested in the Spanish PV sector”.*⁵⁵⁴

910. The Tribunal (by majority) concludes that DCM 1 and DCM 2 have demonstrated that they formed expectations based on the Special Regime of RD 661/2007 that their remuneration would not be significantly altered with respect to their investments and relied on that regime in making their investments.

- **HL Sun Invest**

911. HL Sun Invest invested in three PV projects (“Cervia 2”, “Alamus,” and “Borges Blanques 2”) under the regime of RD 661/2007. According to the evidence, the RAIPRE registrations for these three projects were obtained between 29 August 2008 and 3 September 2008,⁵⁵⁵ and the corresponding investments were completed on 7 May 2009.⁵⁵⁶

912. The Tribunal (by majority) observes that Hannover Leasing did take several steps to inform itself about the applicable legal and regulatory framework before investing in Spain. Mr. Roeder, a project manager at Hannover Leasing in charge of advising on the fund’s investments in the renewable energy sector, rendered uncontested testimony on these facts. He testified that he had “*personally read and studied Royal Decree 661/2007*”⁵⁵⁷ which was “*rather straightforward*”.⁵⁵⁸ He further stated that Hannover Leasing sought legal advice from the law firm Freshfields which, in its legal opinion dated 18 March 2009, analyzed the strict requirements imposed by RD 661/2007 and the inspections carried out by the CNE but did not identify as a “*regulatory risk*” the potential revocation of the tariffs set out in this regulation.⁵⁵⁹

913. As for reliance, Mr. Roeder, Project Manager at Hannover, made the following assertion in his first witness statement, which appears credible:

*“It is not an exaggeration to say that the tariff rate that would be paid for the electricity produced was the single most important factor in the decision to invest”.*⁵⁶⁰

914. The Tribunal (by majority) concludes that HL Sun Invest has demonstrated that it formed expectations based on the Special Regime of RD 661/2007 that its

⁵⁵⁴Hermuth WS, para. 13.

⁵⁵⁵ **C-238**, Cervia II RAIPRE Registration, 29 August 2008; **C-243** Cervia II RAIPRE Registration, 29 August 2008; **C-248**, Cervia II RAIPRE Registration, 1 September 2008.

⁵⁵⁶ **C-265**, Deed of Share Sale Between HANNOVER LEASING Sun Invest 2 Spanien Beteiligungs GmbH (Purchaser) and Promociones Solares Sunergy S.L.U. (Seller) for the Shares in Parsosy Alamus S.L.U., Parsosy Borges Blanques 2 S.L.U., and Parsosy Cervia II S.L.U, 7 May 2009.

⁵⁵⁷ First Witness Statement of Mr. Klaus Roeder, 9 November 2018 (“**First Roeder WS**”), para. 5.

⁵⁵⁸ *Id.*, para. 6.

⁵⁵⁹ **C-261**, Freshfields Legal Due Diligence Review for Hannover Leasing & Co, in particular at p. 41 *et seq.*, section 2 “*Regulatory risk*”; First Roeder WS, para. 11; Second Roeder WS, paras. 14 *et seq.*; see also Tr. Day 2, 76:1 to 80:2.

⁵⁶⁰ First Roeder WS, para. 9; Second Witness Statement of Mr. Klaus Roeder, 9 July 2019 (“**Second Roeder WS**”), para. 14; see also Tr. Day 2, 80:3 to 80:13; 91:22 to 92:8.

remuneration would not be significantly altered with respect to its investments and relied on that regime in making its investments.

- **Edisun**

915. Edisun invested in two PV projects, “El Tesoro” and “El Trujillo,” under the regime of RD 661/2007. According to the evidence, the RAIPRE registrations for these two projects were obtained between 16 July 2008 and 11 August 2008,⁵⁶¹ while the corresponding investments had already been made on 16 January 2007 (El Tesoro)⁵⁶² and on 8 September 2007 (El Trujillo).⁵⁶³
916. The Tribunal (by majority) is satisfied that Edisun carried out a proper and sufficient due diligence in respect of those projects. Indeed, Mr. Toggweiler, a founder of Edisun, testified that he had “*personally reviewed [RD 661/2007] and discussed it with many actors in the market*” and that “*there was a common understanding of how it operated,*” including his understanding that “*changes to tariff rates would only apply for future plants in light of the evolution of the market*”.⁵⁶⁴ More generally, he indicated at the Hearing that he was more focused on the technical and financial due diligence.⁵⁶⁵ Mr. Toggweiler’s testimony was credible.
917. Moreover, Edisun received legal advice on the Spanish regulatory framework, first in 2006 from Mr. Carlos Llobel, a Spanish lawyer,⁵⁶⁶ and then from the Spanish law firm Marimón Abogados which issued a Due Diligence Report in July 2008, confirming the Claimants’ understanding that future revisions to the tariffs set out in RD 661/2007 would not affect existing facilities.⁵⁶⁷ It is also relevant to note that Edisun was in close contact, in the context of its investment, with Energés, a local plant developer which, according to Mr. Toggweiler, had the same understanding of the operation of RD 661/2007 as Edisun did.⁵⁶⁸
918. On the question of reliance, Mr. Toggweiler testified that:

“The tariff rate that would be paid on the electricity a plant produced, coupled with the expected productivity of a plant, would determine the financial success of a given project. Therefore, our decision of whether to acquire a project and what price to pay for that project depended entirely

⁵⁶¹ **C-185**, Sevilla RAIPRE Registration; **C-191**, Alicante RAIPRE Registration; **C-197**, Bovera RAIPRE Registration; **C-214**, Cam Mestre RAIPRE Registrations.

⁵⁶² **C-288**, Contract for Work and Labor Between Edisun Power Iberia Beta S.A. (Purchaser) and Energés Gestión Medioambiental S.L. (Contractor), 16 January 2007 to **C-292**, Contract for Work and Labor Between Edisun Power Iberia S.A. (Purchaser) and Energés Gestión Medioambiental S.L. (Contractor), 16 January 2007.

⁵⁶³ **C-296**, Contract for Work and Labor Between Edisun Power Europe A.G. (Buyer) and Energés Gestión Medioambiental S.L., 8 September 2007.

⁵⁶⁴ First Toggweiler WS, paras. 9-11; see also Second Toggweiler WS, para. 12; Tr, Day 2, 51:7 to 53:1.

⁵⁶⁵ Tr, Day 2, 71:16 to 72:25.

⁵⁶⁶ First Toggweiler WS, para. 6; Second Toggweiler WS, para. 11.

⁵⁶⁷ **C-302**, Marimón Abogados, Due Diligence Report for Edisun Power Europe AG, 25 July 2008; at p. 11; see also First Toggweiler WS, para. 13; Second Toggweiler WS, para. 11.

⁵⁶⁸ Second Toggweiler WS, para. 11.

on the tariff rate that we expected to apply. For this reason, it was critical to ensure that projects we wished to enroll under Royal Decree 661 were completed and obtained their RAIPRE registrations by the stated deadline”.⁵⁶⁹

919. For these reasons, the Tribunal (by majority) concludes that Edisun formed expectations based on the Special Regime of RD 661/2007 that its remuneration would not be significantly altered with respect to its investments and relied on that regime in investing in the El Tesoro and El Trujillo projects.
920. Edisun also invested in two projects registered under RD 1578/2008, namely a 200 kW project called Valle Hermoso II and a 658 kW project named Salinas. In the case of the Valle Hermoso II project, on 4 March 2009, Edisun entered into a turn-key purchase agreement for the development of the project,⁵⁷⁰ on 5 May 2009 it obtained a pre-allocation registration under RD 1578/2008; and on 12 July 2010 it obtained the final RAIPRE registration. In the case of the Salinas project, on 12 January 2009, Edisun entered into an EPC contract for the development and purchase of the project.⁵⁷¹ Further to a pre-allocation registration,⁵⁷² the RAIPRE registrations were obtained between 6 July and 5 August 2009.⁵⁷³
921. With respect to those two Projects, Mr. Toggweiler rendered credible testimony to the effect that he had reviewed RD 1578/2008.⁵⁷⁴ It is not clear from the evidence whether Edisun received legal advice specifically addressing these two Projects. It does appear that Oppenheim, the bank advising Edisun, issued a research report on 1 September 2008 in the context of Edisun’s planned initial public offering. That report, which was not issued by a legal professional, identifies the “*drastic reduction or discontinuation of government subsidies*” as a “*future risk for investment*”.⁵⁷⁵
922. The Tribunal (by majority) concludes that Edisun formed expectations based on RD 1578/2008 that its remuneration would not be significantly altered with respect to its investments and relied thereon in making its investments in the Valle Hermoso II and Salinas projects. Such expectations can be inferred from the fact of the investments and the provisions of RD 1578/2008. The Tribunal (by majority) notes however, that the weight of these conclusions in an overall FET analysis are affected by the uncertainties concerning the interpretation of RD 1578/2008 and the paucity of the evidence on Edisun’s expectations and reliance with respect to these two projects.
923. The Tribunal (by majority) concludes that the Claimants formed expectations that their remuneration would not be significantly altered with respect to their investments

⁵⁶⁹ First Toggweiler WS, para. 10; see also Tr. Day 2, 68:14 to 68:20; 69:14 to 70:6.

⁵⁷⁰ **C-303**, EPC Contract Between Edisun Power Iberia S.A. (Purchaser) and Energes Gestión Medioambiental S.L. (Contractor).

⁵⁷¹ **C-305**, Contract for Work and Labor Between Edisun Power Iberia S.A. (Purchaser) and Zela Capital S.L. (Contractor), 12 January 2009.

⁵⁷² **C-312**, Salinas Registration in the Pre-Allocation Registry, 4 December 2007.

⁵⁷³ **C-306.1 – C-306.9**, Salinas RAIPRE Registrations, 21 July 2008 to 6 July 2009.

⁵⁷⁴ First Toggweiler WS, paras. 14-15.

⁵⁷⁵ **C-15**, Selection of data on Spain’s geography, demography and economy, excerpted from World Databank, 4 April 2018, p. 9.

based on the terms of RD 661/2007 or RD 1578/2008, as the case may be, and relied upon those terms in making their investments under those regimes.

(c) Legitimacy: Were the Claimants' Expectations and Reliance Objectively Reasonable?

924. While the existence of the Claimants' expectations and reliance is a matter of evidence, the Tribunal must determine the objective reasonableness of those expectations and reliance by assessing whether a reasonable investor would have held such expectations and reliance in the circumstances.

925. The Tribunal (by majority) considers that the Claimants' expectations and reliance based on the terms of Special Regime of RD 661/2007 were objectively reasonable. The Tribunal (by majority) reaches the same conclusion in respect of the expectations and reliance of Claimant Edisun based on the Special Regime of RD 1578/2008, subject to the caveat already discussed *supra* (see para. 886), that Edisun could not legitimately expect the same level of stability under such Special Regime as that applicable to its investments made under RD 661/2007.

926. The Tribunal's assessment (by majority) that the Claimants' expectations and reliance were objectively reasonable is strengthened by the fact that many other investors and reputable banks shared a common understanding of the Spanish legal regime and viewed it as secure and predictable, to the point that they invested in Spanish PV facilities or financed such investments at or around the same time. It considers Mr. Raster's testimony especially relevant concerning the major banks that financed DCM's investments. Mr. Raster explained that:

*"To my knowledge, none of these banks ever expressed any doubt that Spain would not fulfill its obligations under the RD 661/2007 incentive regime. Indeed, if these banks had any doubts about the incentive regime upon which the projects relied for a steady cash flow, I cannot imagine that they would ever have considered financing projects in Spain at such high leverage".*⁵⁷⁶

927. The Respondent alleges, however, that a reasonable investor could not have had legitimate expectations based on the Special Regimes of RD 661/2007 or RD 1578/2008 because such an investor should have been aware of a series of decisions by the Spanish Supreme Court, which held that an investor could not have acquired rights based on a legal regime which was subject to amendment or repeal by a later norm of equal or higher rank.

928. The Tribunal (by majority) is of the view that the question before the Tribunal is not whether the Supreme Court decisions invoked by Spain were correct or not as a matter of Spanish law or, more generally, whether it would have been lawful under Spanish law for RD 661/2007 or RD 1578/2008 to be amended or repealed by a later

⁵⁷⁶ First Raster WS, para. 20; see also Hermuth WS, para. 14; First Roeder WS, para. 15.

norm of equal or higher rank, as these are matters that exceed the Tribunal's jurisdiction. The question to be addressed is, rather, whether under the ECT and international law those Supreme Court decisions were sufficient, as a matter of fact, to render objectively unreasonable the Claimants' expectations based on the Special Regimes of RD 661/2007 and RD 1578/2008.

929. After thoroughly examining the decisions put forward by Spain, the Tribunal (by majority) finds itself unable to conclude that such decisions should have been treated by the Claimants as erasing their expectations based on the commitments contained in RD 661/2207 and RD 1578/2008.

930. The Tribunal first addresses the Supreme Court decisions of 15 December 2005, 25 October 2006, 20 March 2007, and 9 October 2007, all of which predated the investments of each Claimant and were publicly available at the times of those investments. The Tribunal (by majority) observes that each of those decisions relates to different sectors and different legal regimes and (ii) none of them relates to Article 44(3) of RD 661/2007, or even to the preceding stability clause found in Article 40(3) of RD 436/2004.

931. In particular,

- The judgment of the Supreme Court of 15 December 2005 dismissed a challenge brought against RD 431/2004 by electricity producers enrolled under the special regimes of RD 2366/1994 and RD 2818/1998, none of which contained a stability clause comparable to Article 44(3) of RD 661/2007.⁵⁷⁷
- The judgment of the Supreme Court of 25 October 2006 dismissed a challenge brought against RD 2351/2004 by electricity producers using "cogeneration" (as distinguished from PV plants). The producers' plants were enrolled under RD 2818/1998, which contained no stability clause comparable to Article 44(3) of RD 661/2007. Those producers complained that RD 2351/2004 decreased the premiums which they received under RD 2818/1998 and which they continued to receive pursuant to a transitory provision of RD 436/2004. In other words, this judgment did not address the special regime of RD 436/2004 or the stability clause of Article 40(3).⁵⁷⁸
- The judgment of the Supreme Court of 20 March 2007 dismissed a challenge against Annex IV of RD 2392/2004 which set out electricity rates for 2005 brought by co-generation electricity producers also enrolled under the special regime of RD 2818/1998, which did not include a stability clause comparable to Article 44(3) of RD 661/2007.⁵⁷⁹

⁵⁷⁷ **R-79**, Judgment from the Third Chamber of the Supreme Court (App. 73/2004), 15 December 2005.

⁵⁷⁸ **R-80**, Judgment of Chamber Three of the Supreme Court (App. 12/2005). Reference El Derecho EDJ 2006/282164, 25 October 2006.

⁵⁷⁹ **R-81**, Judgment from the Third Chamber of the Supreme Court (App. 11/2005). Reference El Derecho EDJ 2007/18059, 20 March 2007.

- The judgment of the Supreme Court of 9 October 2007 dismissed a challenge against RD 1454/2005 brought by co-generation electricity producers which were not enrolled under any special regime and not entitled to any incentive, *a fortiori* any unmodifiable incentive.⁵⁸⁰

932. that none of the decisions mentioned above (which pre-dated all the Claimants' investments) could reasonably qualify as a "warning" that the Special Regime of RD 661/2007 could be subsequently altered despite the express wording of Article 44(3). The Tribunal (by majority) notes, in that regard, that this was also the conclusion reached by several tribunals in earlier ICSID cases dealing with a similar fact pattern. For example, in *RWE v. Spain*, a decision largely favourable to Spain, the tribunal held that those Supreme Court cases neither related to the operation of Article 44(3) of RD 661/2007, nor even of Article 40(3) of RD 436/2004, and therefore "*were not made in a sufficiently analogous context*" to constitute a relevant warning to a diligent investor.⁵⁸¹ The same conclusion can be reached in respect of the Special Regime of RD 1578/2008, because none of those decisions concerned that regime, allowing for the uncertainties already noted which flow from the textual differences between RD 1578/2008 and RD 661/2007.
933. The Tribunal now turns to the Supreme Court decisions of 3 December 2009 and 9 December 2009, also invoked by the Respondent. The Tribunal (by majority) is of the view that none of those decisions could have affected the expectations of Claimants DCM and HL Sun Invest, because they were issued after their investments were made.⁵⁸² Nor could they have affected the expectations of Claimant Edisun, because both of them post-dated the times of Edisun's first concrete acts to begin the investment process in respect of each of its investments, and even post-dated, in all cases except that of Valle Hermoso II, the dates of the last step that completed such process.⁵⁸³
934. In any event, in the judgment of 3 December 2009, the Supreme Court dismissed a challenge brought against Transitory Provision 1 of RD 661/2007 by the owners of electrical energy production facilities enrolled under the special regime of RD 436/2004. It is correct that the Supreme Court said that electricity producers enrolled under the special regime of RD 436/2004 did not have an immutable right that the economic system that regulates the receipt of the premiums would remain unchanged. Yet, the Supreme Court notably based its decision on the fact that the

⁵⁸⁰ **R-82**, Judgment from the Third Chamber of the Supreme Court (App. 13/2006). Reference El Derecho EDJ 2007/175313, 9 October 2007.

⁵⁸¹ **RL-135**, *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v. The Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability y Certain Issues of Quantum, dated 30 December 2019; see also **CL-5**, *Novenergia II – Energy & Environment (SCA), SICAR v. The Kingdom of Spain*, SCC Arb. 2015/063, Final Award, 15 February 2018; **CL-142**, *Foresight*; **CL-184**, *OperaFund*.

⁵⁸² See *supra* paras. 275 to 311.

⁵⁸³ See *supra* paras. 313 to 330. In the case of Valle Hermoso II, Edisun made its decision to invest on 4 March 2009 (**C-303**), when it signed the turnkey purchase agreement but, in any event, not later than 5 May 2009 (**C-285**), when it obtained the pre-allocation registration. The final RAIPRE registration was obtained on 12 July 2010 (**C-304**).

electricity producers would continue to receive a remuneration *equivalent* to what they received under RD 436/2004 and therefore suffered no detriment.⁵⁸⁴

935. The Supreme Court judgment of 9 December 2009 follows the same pattern of stating a narrow ground for the decision coupled with a reiteration of its broad statement that electricity producers enrolled under the special regime of RD 436/2004 did not have an immutable right that the regime would remain unchanged. The Supreme Court dismissed an appeal brought against certain provisions of RD 661/2007 by an investor who claimed rights under RD 436/2004. The Court held, notably, that the petitioner had made its investment before RD 436/2004 was even adopted and consequently could not claim having any expectations thereunder.⁵⁸⁵
936. In addition, the Tribunal (by majority) is not persuaded by Spain's contention that the Report issued on 29 March 2007 by the *Abogacía del Estado* regarding RD 661/2007 could have served as another warning that a diligent investor could not reasonably expect the regulated tariffs granted by RD 661/2007 to remain unchanged.⁵⁸⁶ In substance, the purpose of this Report –which, according to the evidence, was publicly available – was to address the legal effects of the First Transitional Provision of RD 661/2007 on renewable energy producers enrolled under the prior regime of RD 436/2004. This Report considered the issue of whether, and to what extent, the new regime set up under RD 661/2007 retroactively affected the remuneration of producers enrolled under the prior regime of RD 436/2004, despite the wording of Article 40.3 thereof. It is important to note, however, that this Report drew a clear distinction between RD 436/2004 producers who received a regulated tariff and those who received a premium on top of the market price. Indeed, it is only with respect to the latter, and more precisely wind investors who enjoyed windfall profits as a result of the significant increase of the premiums, that the question of retroactivity arose, insofar as RD 661/2007 set a cap and a floor to those premiums in order to maintain a “*reasonable rate of return*” as required by Law 54/1997.
937. By contrast, the Report makes it crystal clear that there was no issue of retroactivity at all with respect to those producers who received a *regulated tariff* under RD 436/2004, as distinguished from a premium, since those producers could either elect to switch to the new tariffs set out in RD 661/2007 or to remain subject to the “old” tariffs of RD 436/2004.⁵⁸⁷ Therefore, the Tribunal (by majority) is of the view that a diligent investor taking all steps to enrol under RD 661/2007 to receive the regulated

⁵⁸⁴ **R-83**, Judgment of the Third Chamber of the Supreme Court (Appeal 151/2007), Reference El Derecho EDJ 2009/307349, 3 December 2009.

⁵⁸⁵ **C-422**, Spanish Supreme Court, Judgment No. 2009/307357, Appeal No. 152/2007, 9 December 2009.

⁵⁸⁶ **R-248**, Spain State Legal Service Report on Industry and Energy, 29 March 2007; Resp. Closing Presentation, slide 13; Resp. PHB, paras. 41-56.

⁵⁸⁷ **R-248**, Spain State Legal Service Report on Industry and Energy, 29 March 2007, p. 11 (in the Spanish version): “*Es fácil ver del régimen esquematizado con anterioridad, que ningún problema de retroactividad se ha de plantear en el caso de Instalaciones antiguas a Tarifa (supuesto A 1 y 2), pues voluntariamente el productor puede acogerse al nuevo régimen (siendo la retribución mayor), o si lo prefiere puede mantener la tarifa actual (que le es garantizada).*”

tariff it provided could not have reasonably expected, on the basis of that Report, that such tariff could be significantly lowered at a later time.

938. The Respondent cites the Supreme Court decisions and the Report of the Abogacía del Estado for the broader proposition that, under Spanish law, a legal regime like those of RD 661/2007 and RD 1578/2008 can be lawfully amended or repealed by a norm of the same or higher rank and investors under those regimes do not have acquired rights to the continuation thereof. Without reaching the question whether this proposition correctly describes Spanish law, the Tribunal (by majority) observes that, as a matter of fact and under international law, that proposition would not prevent investors such as the Claimants from having objectively reasonable expectations based on the terms of those regimes, nor would it prevent those expectations from being protected by the FET standard of the ECT.⁵⁸⁸
939. It remains to consider whether and to what extent the Claimants' (objectively reasonable) expectations and reliance were frustrated by the Disputed Measures.

⁵⁸⁸ In the preceding paragraphs the Decision explains in detail why the Supreme Court decisions and the Report of the Abogacía del Estado do not stand as a bar to the objective reasonableness of the Claimants' expectations based on RD 661/2007 and RD 1578/2008. The Dissent (at paras. 20-31) criticizes the Tribunal's analysis on several grounds, none of which the Tribunal finds convincing. Three of those grounds require a reply: The Dissent argues that Spanish law plays a "decisive role" on the question whether the Claimants have received fair and equitable treatment. This argument has been addressed *supra* (para. 702) in connection with the discussion on the applicable law. The Tribunal perceives no basis for attributing any such role to Spanish law.

- The Dissent relies on certain general pronouncements of the Spanish Supreme Court (made before and after the Claimants' investments) to the effect that as a matter of Spanish law regulatory frameworks for electricity production are not immutable. As noted in paras. 929 *et seq.*, the Spanish Supreme Court decisions that predate the Claimants' investments do not relate to the legal regime at stake in the present dispute, while the decisions that do relate to such regime postdate those investments and therefore could not have been taken into account by the Claimants at the time such investments were made. In any event, the argument constructed on this basis is premised on the assumption that, for the purposes of the FET obligation, the State's commitment must be immutable (or non-revocable) under domestic law, otherwise it cannot count as a commitment on which an investor can reasonably rely. That premise has no basis: it is not a requirement of the ECT, it does not follow from the ordinary meaning of "*fair and equitable treatment*," and it is not a necessary component of the fact-pattern known as the frustration of legitimate expectations. If a Contracting State of the ECT makes a commitment to the duration and stability of a specific remuneration regime for the purpose of attracting investments, with the intent and expectation that potential investors will rely on such commitment, that action, understood in good faith, implies (absent a warning to the contrary) the State's intent to forego exercising any right under its own law to revoke that commitment. Otherwise, the commitment and the attendant incentives would be an illusion, designed to obtain the desired investments under false pretenses. In such circumstances, the subsequent revocation of the commitment, however lawful such revocation might be under domestic law, can hardly be characterized as fair and equitable treatment under the ECT.
- The Dissent invokes the "*respect due by the arbitrators to the constitution of a State governed by the rule of law, which is member of the European Union*." This ground of criticism is invalid for several reasons. First, nothing in the Decision shows lack of due respect (whatever that may mean) for the Spanish Constitution. The Decision is based on the ECT and international law; it does not apply the Spanish Constitution, nor could it apply that constitution (if that is what "*respect*" means) in derogation of Spain's obligations under the ECT and general international law. Second, there is nothing in the ECT authorizing a tribunal to discriminate, in the application of the ECT standards of conduct, in favor or against a State that is generally governed by the rule of law or is a member of the European Union. Whether or not Spain is generally governed by the rule of law (a question that the Tribunal is not called upon to decide), the Tribunal still must determine whether, in this particular case, it breached its obligations under the ECT.

(d) Frustration: Did Spain Fail to Honor the Claimants' Expectations it Had Created?

940. The Disputed Measures are: (i) RD 1565/2010, (ii) RDL 14/2010, (iii) Law 15/2012, (iv) RDL 2/2013, and (v) the New Regulatory Regime comprised of RDL 9/2013, Law 24/2013, RD 413/2014 and Ministerial Order IET/1045/2014. These measures will be addressed in turn.

(i) RD 1565/2010

941. As already explained (*supra*, Section 3.3.1), Spain issued Royal Decree 1565/2010 ("**RD 1565/2010**") on 19 November 2010 to regulate and modify certain aspects relating to the electricity production under the special regime.⁵⁸⁹

942. Of particular relevance to the present discussion, RD 1565/2010 suppressed the right of electricity producers registered under the Special Regime of RD 661/2007 to receive the feed-in tariffs provided in that Royal Decree after twenty-five years. It should be recalled that under RD 661/2007 such producers were entitled to 100% of the feed-in tariffs for twenty-five years and 80% thereof for the remainder of the life of the plant.⁵⁹⁰ The change made by RD 1565/2010 was short lived. One month later, RDL 14/2010 extended the period of entitlement to the feed-in tariffs period to twenty-eight years⁵⁹¹ and four months later Law 2/2011 further extended that period to thirty years.⁵⁹²

943. Therefore, for the short period in which it was in effect, RD 1565/2010 curtailed the period during which electricity producers enrolled under the Special Regime of RD 661/2007 could benefit from the fixed feed-in tariffs guaranteed by the latter.

(ii) RDL 14/2010

944. On 23 December 2010, Spain promulgated Royal Decree-Law 14/2010 ("**RDL 14/2010**"), which introduced two changes to the legal regimes governing PV plants.

945. The first change was to limit the number of hours of operation for which PV facilities could receive feed-in tariffs each year,⁵⁹³ with the result that any electricity generated in excess of that limit would be sold at the market price. The limits on operating hours introduced by RDL 14/2010 were of two kinds: (i) a permanent limitation on operating hours applicable to all PV facilities, and (ii) a more stringent, temporary limitation until 31 December 2013 on operating hours of PV facilities registered under RD 661/2007.

946. The First Additional Provision of RDL 14/2010 limited the equivalent working hours for photovoltaic facilities:

⁵⁸⁹ C-316, RD 1565/2010.

⁵⁹⁰ C-316, RD 1565/2010.

⁵⁹¹ C-319, RDL 14/2010, First Final Provision.

⁵⁹² C-320, Law 2/2011, 44th Final Provision.

⁵⁹³ C-319, RDL 14/2010.

“1. Solar and photovoltaic technology facilities will have the right, where appropriate, to settle each year under the primary economic system acknowledged to them, until they reach the equivalent amount of hours, considering 00:00 hours of January 1 of every year as the starting point.

2. The equivalent reference hours for these facilities, in relation to the solar climate zone where the facilities are located, according to the climate zones classification, based on the average solar radiation in Spain, determined by Royal Decree 314/2016 of March 17, which approves the Technical Code for Building, will be the following:

Technology	Equivalent reference hours per year				
	Zone I	Zone II	Zone III	Zone IV	Zone V
Fixed installation	1,232	1,362	1,492	1,632	1,753
Installation with a single-axis tracking system	1,602	1,770	1,940	2,122	2,279
Installation with a double-axis tracking system	1,664	1,838	2,015	2,204	2,367

For this purpose, the amount of equivalent working hours of an electric power plant is defined as the ratio between the annual net production, expressed in kWh, and the nominal power of the facility, expressed in kW. [...].”⁵⁹⁴

947. In addition to the aforementioned permanent limitation, the Second Transitory Provision of RDL 14/2010 introduced a temporary, more stringent limitation until 31 December 2013 on the equivalent working hours for PV facilities enrolled under RD 661/2007:

“Notwithstanding the provisions of the first additional disposition, until December 31, 2013, the equivalent reference hours for solar and photovoltaic technology facilities that are subject to the economic system established by Royal Decree 661/2017 of May 25, which regulates the electricity production activity under a special regime, shall be the following:

Technology	Equivalent reference hours per year
Fixed installation	1,250
Installation with a single-axis tracking system	1,644
Installation with a double-axis tracking system	1,707

⁵⁹⁴ C-319, RDL 14/2010.

948. The second change introduced by RDL 14/2010 has already been mentioned. This Royal Decree Law re-extended the duration of the entitlement of Special Regime energy producers enrolled under RD 661/2007 to receive feed-in tariffs from 25 years to 28 years,⁵⁹⁵ “as a form of compensation for imposing the more stringent limitation on the number of hours of operation receiving financial support.”⁵⁹⁶ Shortly thereafter, as noted, Law 2/2011 extended such duration to 30 years.⁵⁹⁷
949. RDL 14/2010 also introduced a temporary access toll of € 0.5 per MWh for transmission and distribution networks to be paid by electric energy producers,⁵⁹⁸ a measure that is not contested in the present arbitration.⁵⁹⁹
950. The twin limits on the annual production of electricity eligible to feed-in tariffs imposed by RDL 14/2010 had the intended effect of lowering the remuneration of eligible producers by eliminating all subsidies after production hit the respective caps. These measures were in force only in 2011 and 2012, as RDL 14/2010 was replaced by the New Regulatory Regime in 2013 (see *infra*).

(iii) Law 15/2012

951. On 27 December 2012, Spain enacted Law 15/2012 on fiscal measures for energy sustainability. This piece of legislation entered into force on 1 January 2013 and imposed a 7% tax on all revenues from the generation of electricity (“**TVPEE**”).
952. The Tribunal has determined (*supra*, Section 5.2.3) that this piece of legislation qualifies as a “*taxation measure*” under Article 21 of the ECT and therefore falls outside the scope of the Tribunal’s jurisdiction *ratione materiae* under that Treaty. For this reason, the Tribunal will not analyze the impact, if any, of such measure on the Claimants’ legitimate expectations.

(iv) RDL 2/2013

953. On 1 February 2013, Spain issued Royal Decree-Law 2/2013 on urgent measures in the electrical system and the financial sector (“**RDL 2/2013**”).⁶⁰⁰ RDL 2/2013 notably replaced the Consumer Price Index (“**CPI**”), which served as the adjustment factor for updating the value of the premiums and feed-in tariffs, with a revised CPI which excluded unprocessed foods, energy products, and some tax effects from the calculation of inflation.⁶⁰¹ This new Royal Decree-Law remained in force for a very limited time, as it was repealed by the New Regulatory Regime.

⁵⁹⁵ **C-319**, RDL 14/2010, First Final Provision.

⁵⁹⁶ Brattle First Regulatory Report, para. 131.

⁵⁹⁷ **C-320**, Law 2/2011.

⁵⁹⁸ **C-319**, RDL 14/2010, First Temporary Provision.

⁵⁹⁹ Brattle First Regulatory Report, para. 134.

⁶⁰⁰ **C-330**, RDL 2/2013.

⁶⁰¹ **C-330**, RDL 2/2013, Article 1.

(v) The New Regulatory Regime

954. In the course of 2013 and 2014, Spain enacted several measures which, taken together, form the new regulatory regime applied to renewable energy producers as of 2013 (the “**New Regulatory Regime**”). The New Regulatory Regime is comprised of four pieces of legislation: RDL 9/2013, Law 24/2013, RD 413/2014, and Ministerial Order IET/1045/2014.

955. For the sake of clarity and consistency, the Tribunal deems it appropriate first to recall the content of the four pieces of legislation comprising the New Regulatory Regime before analyzing them together, as a single, combined set of rules.

- Part 1: Royal Decree-Law 9/2013

956. In substance, Royal Decree-Law 9/2013 of 12 June 2013, on urgent measures to guarantee the financial stability of the electricity system, (“**RDL 9/2013**”) entirely repealed the Special Regime provided for in RD 661/2007 and RD 1578/2008 and announced the establishment of a new framework for the regulation of electricity, and notably for the remuneration of renewable energy producers.⁶⁰²

957. As explained in more detail (*supra* Section 3.3.5.1, Spain stated in the Preamble to RDL 9/2013 that the “*economic sustainability*” of the energy sector had been severely impacted by a growing tariff deficit that had become a structural issue over the years, despite the measures taken in the previous years.

958. Spain explained that, as a result, it had to take urgent measures to address this critical economic situation and therefore authorized the government to enact a new regulatory framework in replacement of the former, thereby amending Article 30 of Law 54/1997.⁶⁰³

959. This new regulatory framework was notably based on a redefinition of the method of calculating the specific remuneration of electricity producers for a standard installation. Spain explained the new method as follows:

“[...] To calculate the specific remuneration for a standard installation, the following will be considered: the income from the sale of the valued energy generated at the price of the production market; the costs of means of exploitation necessary to carry out the activity; and the value of the initial investment of the standard installation, all this for an efficient and well-managed company

Consequently, a compensation regime will be established based on standard parameters according to the different types of installation that are established. [...]

⁶⁰² C-331, RDL 9/2013, Preamble.

⁶⁰³ C-331, RDL 9/2013, Preamble; see also Article 1(2).

This new regulatory framework globally addresses the material change of circumstances which took place in recent years, on the basis of justified reasons. Investments in these technologies continue to be protected and are duly encouraged in Spain under this new legal framework, which is undoubtedly favorable to all of them as a whole, basically because a criteria [sic] is adopted to conduct a review of remuneration parameters every six years, in order to maintain a reasonable return through a predictable, time-specific method [...].”

960. One of the most important aspects of RDL 9/2013 was the repeal of both RD 661/2007 and RD 1578/2008, coupled with the establishment of a transitory regime until the entry into force of the new regulatory framework:

*“In order to articulate this new framework, Section 4 of Royal Decree-law 6/2009 of April 30, 2009, whereby specific measures are adopted in the energy sector and the tariff discount for small consumers was approved; the Royal Decree-law 661/2007 of May 25, 2007, whereby electricity generation activities are regulated under a special regime; and the Royal Decree 1578/2008 of September 26, 2008, on the remuneration for electricity generation from solar photovoltaic technology for facilities after the expiration of the retribution for such facilities under Royal Decree 661/2007 of May 25, 2007, are hereby repealed. However, in order to maintain both the remuneration flows to the facilities and the remaining procedures, rights and obligations, the provisions of the referred laws shall temporarily apply, to the exception of certain cases, until new regulations are approved. Thus, the facilities shall be subject, where applicable, to a provisional calculation under this temporary regime and, after the approval of the required provisions under the new economic regime, a normalization process shall be subsequently conducted with respect to the collection rights or payment obligations arising from the new method, which shall be in force from the effective date of this royal decree-law”.*⁶⁰⁴

961. In addition, the First additional provision of RDL 9/2013 set out certain parameters for determining the reasonable profitability of production facilities entitled to feed-in tariffs:

“For purposes of what is provided in the next-to-last paragraph of article 30.4 of Law 54/1997 of November 27th - for the installations that at entry into force of the present royal decree law would have the right to a

⁶⁰⁴ **C-331**, RDL 9/2013, Preamble (emphasis added). See also Sole Derogatory Provision “1. All of the rules of equal or inferior rank which contradict or go against what has been set forth in the present royal decree-law are hereby repealed.

2. The following are expressly abolished:

a) Royal Decree 661/2007 of May 25, which regulates the production of electric energy under a special regime.

b) Royal Decree 1578/2008 of September 26, about remuneration over production of electric energy through solar and photovoltaic technology for facilities that are created after the closing date for remuneration maintenance stated in Royal Decree 661/2007, of May 25, regarding said technology”.

*prioritized economic regime - the reasonable profit will be around, before taxes, the average profit in the secondary market during the last ten years prior to the entry into force of the present royal decree-law of the Obligations of the State in ten years, all of this increased by 300 basis points, without prejudice to the review planned in the last paragraph of said article.*⁶⁰⁵

962. On 17 December 2015, the Constitutional Court ruled that RDL 9/2013 was not impermissibly retroactive, since it did not “*affect economic rights already consolidated and definitively incorporated into the assets of the recipient, or expired or consummated favourable legal situations*”.⁶⁰⁶

- Part 2: Law 24/2013

963. On 26 December 2013, in the wake of RDL 9/2013, Spain enacted Law 24/2013 on the Electricity Sector (“**Law 24/2013**”),⁶⁰⁷ which repealed Law 54/1997 almost entirely and established a new framework in order to implement the new regime envisaged by RDL 9/2013 based on the principle of economic and financial sustainability of the electrical system, as set forth in Article 13 thereof.⁶⁰⁸

964. Article 14 of Law 24/13 addressed the remuneration of electricity producers in general terms, including those using renewable energy:

“7. By way of exception, the Government may set a specific remuneration regime to promote production from renewable energy sources, high-efficiency and waste cogeneration when there is an obligation to comply with energy objectives deriving from Directives or other legal standards of the European Union or when its introduction entails a reduction in the energy cost and exterior energy dependency under the terms set out below:

a) The granting of this specific remuneration regime will be set by means of competitive basis procedures.

This remuneration regime, additional to the remuneration from the sale of energy generated, valued at the production market price, will comprise one standing charge per unit of installed power which covers, where applicable, the investment costs for each installation type which cannot be recovered by the sale of energy on the market and one standing charge for the operation it covers, where applicable, the difference between the operating costs and income from participation in the production market of said installation type.

⁶⁰⁵ **C-331**, RDL 9/2013, First additional provision (emphasis added).

⁶⁰⁶ **R-95**, App. 5347/2013.

⁶⁰⁷ **C-34**, Law 24/2013; **R-23**, Act 24/2013.

⁶⁰⁸ **R-23**, Act 24/2013, Title III, in particular Article 13.

This remuneration regime will be compatible with the economic sustainability of the electrical system in accordance with the provisions of article 13 and will be limited, in any case, to the power objectives set out in the planning regarding renewable energies and saving and efficiency.

b) To calculate said specific remuneration, for an installation type, throughout its regulatory working life and with reference to the activity carried out by an efficient, well-managed company, the figures set out below will be assumed:

i. Standard income from the sale of energy generated, valued at the production market price.

ii. The standard operating costs.

iii. The standard initial investment figure.

[...]

The remuneration regime will not exceed the minimum level required to cover costs which allow production installations from renewable energy sources, high-efficiency and waste cogeneration to compete on an equal footing with the other technologies on the market and which allows a reasonable return to be earned on the installation type in each applicable case. This reasonable return will refer, before tax, to the mean yield on the secondary market for Ten-Year State Bonds, applying the appropriate differential.

By way of exception, the remuneration regime may also incorporate an incentive to investment and implementation by a certain deadline when their installation entails a significant reduction in costs in the systems of non-peninsular territories.

c) The initial investment value will be determined by means of the competitive basis procedure to grant the additional remuneration regime to each installation.

The additional remuneration over and above that of the market which may correspond to each installation will be that deriving from applying the provisions of the previous sections, assuming as the standard value of the initial investment that which derives from the competitive basis procedure. [...]

- Part 3: Royal Decree 413/2014

965. On 6 June 2013, to further the changes brought by RDL 9/2013 and Law 24/2013, Spain enacted Royal Decree 413/2014 with the purpose of regulating the activity of

electric energy production from renewable energy sources, cogeneration, and waste (“**RDL 413/2014**”).⁶⁰⁹

966. RD 413/2014 set out the new regime applicable to PV plants,⁶¹⁰ and notably defined the standards and parameters of the specific remuneration regime on the basis of a comparison with the parameters of a standard facility, in accordance with RDL 9/2013 and Law 24/2013.⁶¹¹
967. In particular, RD 413/2014 calculated the amount of specific remuneration (on top of market revenue) necessary to provide a “standard installation” with that target rate of return.
968. The “specific remuneration” consists of two components: (i) an “investment incentive” calculated per MW of installed capacity; and (ii) an “operating incentive” calculated per MWh of electricity production. The investment incentive purports to compensate investors for the capital cost of their investment, while the operating incentive purports to compensate facilities for the gap between the operating costs of a renewable energy facility and the wholesale price of electricity.⁶¹²
969. In order to determine the parameters of a standard facility, while taking account of the diversity of those facilities, RD 413/2014 grouped facilities with similar characteristics (e.g. technology type, capacity, date of installation, location, etc.), all of which would receive investment and operating incentives under the same parameters. These parameters were further defined by MO IET/1045/2014, discussed *infra*.
970. In addition, RD 413/2014 made financial support contingent on certain thresholds of “equivalent hours of operation.”
- Part 4: Ministerial Order IET/1045/2014
971. On 16 June 2014, the Ministry of Industry, Energy and Tourism enacted Ministerial Order IET/1045/2014 approving the remuneration parameters of standard facilities applicable to certain facilities of electrical power generation by means of renewable energy, cogeneration and waste sources (“**MO IET/1045/2014**”).⁶¹³
972. MO IET/1045/2014 essentially implemented and developed the principles set out in RD 413/2014.
973. In particular, MO IET/1045/2014 further defined the parameters applicable to standard facilities. It assigned a standard facility code to each eligible facility in Spain

⁶⁰⁹ **C-332**, RD 413/2014.

⁶¹⁰ **C-332**, RD 413/2014, Article 2(1) which notably includes in the scope of application of the Royal Decree: “*Subgroup b.1.1 Facilities using only solar radiation through photovoltaic technology as a primary energy source.*”

⁶¹¹ **C-332**, RD 413/2014, Title IV.

⁶¹² **C-332**, RD 413/2014, Preamble and Article. 1.2.

⁶¹³ **C-333**, MO IET/1045/2014.

(“IT” in the Spanish acronym), defining the key parameters of compensation applicable to that facility. The parameters include:

- The amount of the investment incentive (in €/MW per year) (also called the “Return on investment” or “Rinv”). The investment incentive varies depending on year of initial operation and capacity;
- The operating incentive (in €/MWh) (also called the “Return on operation” or “Ro”); and
- The “*regulatory useful life*,” *i.e.* the duration for which the facility will receive the investment and operating incentive payments (if any). The regulatory useful life is set at 30 years from commissioning for all PV plants.⁶¹⁴

974. In addition, MO IET/1045/2014 set out the parameters that the government considered in setting the investment and operating incentives in each IT code, which include (among others): an imputed investment cost (*i.e.* what the government believes would be a reasonable investment cost for a hypothetical installation of the kind in that IT code); estimated historical operating costs; estimated future operating costs; estimated hours of operation; and estimated daily and intraday market prices of electricity.⁶¹⁵

(vi) Impact of the Disputed Measures on the Claimants’ Legitimate Expectations

975. The Tribunal must now analyze the impact of the Disputed Measures described above on the Claimants’ legitimate expectations in order to determine whether, and if so to what extent, such Measures frustrated those expectations.

976. The Claimants’ legitimate expectations and reliance analyzed in the preceding paragraphs were based on the terms of RD 661/2007 and RD 1578/2008, as the case may be. It is apparent that the Disputed Measures introduced changes in the legal regime applicable to the Claimants’ investments which were inconsistent with the features of the original regimes on which the Claimants relied. Therefore, to the extent that those changes significantly altered the treatment to which the Claimants were originally entitled pursuant to the regime applicable to their respective investments, the Tribunal (by majority) considers that they frustrated the Claimants’ legitimate expectations.⁶¹⁶

⁶¹⁴ C-333, MO IET/1045/2014, Article 5(1).

⁶¹⁵ *Id.*

⁶¹⁶ The Dissent criticizes this Decision for its alleged failure to recognize the fundamental nature of the principle of Reasonable Rate of Return (“RRR”) under Spanish Law (paras. 8-12). The Tribunal considers that criticism unfounded. This Decision explains in detail (see paras. 841, 853, 987) that in establishing the specific remuneration regimes set forth in RD 661/2007 and RD 1578/2008, the Spanish Government applied the criteria of Article 30.4 of Law 54/1997, which designated the achievement of “reasonable rates of return in reference to the cost of money in the capital markets” as the overall aim of the process of setting specific remuneration parameters. Those remuneration regimes were consistent with what the Government considered to be a RRR at that time and in those circumstances, as shown by the fact that no claim has been made that those remuneration regimes were illegal as inconsistent with Law 54/1997. As for the alleged “dynamic nature” of the RRR principle, it is obvious that the cost of money in capital markets may vary over time, but this variability in the RRR does not imply that the durable specific

RD 1565/2010

977. RD 1565/2010 curtailed the duration during which electricity producers enrolled under the Special Regime of RD 661/2007 could benefit from the fixed feed-in tariffs guaranteed by the latter, since it annulled the right to receive FITs after 25 years, while RD 661/2007 had guaranteed the right to receive 80% of the FITs for the remaining life of the Project after 25 years, bearing in mind that a standard PV plant may have a technical useful life of 30 to 40 years.⁶¹⁷ The impact of such curtailment was subsequently mitigated, however, by RDL 14/2010 (which re-extended the duration of the entitlement to FITs to 28 years) and Law 2/2011 (which further extended such duration to 30 years).
978. These changes, taken together, cannot be regarded as frustrating the Claimants' legitimate expectations to the entitlement set forth in RD 661/2007 or in RD 1578/2008 because it has not been shown that, on balance, the changes significantly affected the treatment offered to the investors enrolled under such regimes.

RDL 2/2013

979. RDL 2/2013 substituted the CPI that served as inflation factor for updating the value of the premiums and feed-in tariffs with a revised CPI which excluded unprocessed foods, energy products, and some tax effects from the calculation of inflation. Insofar as this measure had a limited impact on the remuneration of the Claimants that was otherwise offered to electricity producers enrolled under RD 661/2007 and RD 1578/2008, the Tribunal finds that RDL 2/2013 did not violate the Claimants' legitimate expectations.

RDL 14/2010

980. RDL 14/2010 capped the annual production of electricity eligible to feed-in tariffs and therefore had the intended effect of lowering the remuneration of eligible producers by eliminating all subsidies after production hit the cap. More specifically, and as seen above, RDL 14/2010 established two caps: (i) a permanent cap on operating hours of all PV facilities, starting on 1 January 2011 for PV facilities enrolled under RD 1578/2008 and on 1 January 2014 for PV facilities enrolled under RD 661/2007; and

remuneration regimes established to attract investments are automatically set aside – or the investors' expectations based on those regimes are transmuted – every time that the RRR changes. It is also relevant that in adopting RD 661/2007 and RD 1578/2008 Spain did not warn potential investors that the specific remuneration parameters it was setting could be changed at any time following changes in the cost of money in capital markets – a view that there is no evidence it held at the time. Such a warning would have (i) belied the claims that Spain repeatedly made at the time that the remuneration regime would be stable (or juridically secure) and (ii) defeated the objective of making the regime attractive to potential investors (see paras. 856 *et seq.*).

⁶¹⁷ See notably **BRR-21**, European Commission DG ENV, (2011), Study on Photovoltaic Panels Supplementing the Impact Assessment for a Recast of the [Waste Electrical and Electronic Equipment] WEEE Directive- Final Report, 14 April 2011 p. 13: “[a] challenge in recycling of photovoltaic panels is their long lifetime which is estimated at 25 years. However, this represents the warranty lifetime; technical lifetime could be as long as 30 to 40.” The Tribunal notes a slight disagreement between the Parties on this issue: according to the Respondent, the technical useful lifetime of a PV plant is around 30 years (Quadrant First Report, para. 232), while the Claimants have assumed a lifetime of 35 years (Brattle First Quantum Report, para. 24; Brattle First Regulatory Report, para. 243).

(ii) a transitory cap on operating hours of PV facilities enrolled under RD 661/2007 from 1 January 2011 until 31 December 2013.

981. The Tribunal (by majority) finds that the permanent cap imposed by RDL 14/2010 was at odds with the legitimate expectations of the Claimants in relation to the investments made under RD 661/2007, which did not contain any such limitations, because such measure significantly affected the remuneration of those Claimants.
982. By contrast, the Tribunal is not satisfied that the permanent cap imposed on the investments made under RD 1578/2008 breached the legitimate expectations of Edisun which, as found *supra*,⁶¹⁸ were not of the same degree as those of Claimant investors enrolled under RD 661/2007.
983. Similarly, the Tribunal does not find that the transitory cap imposed by RDL 14/2010 with respect to investments made under RD 661/2007 breached the Claimants' legitimate expectations in light of the fact that it was enacted for a limited duration of three years in a context of severe economic crisis.

New Regulatory Regime

984. Now turning, more fundamentally, to the impact of the four Disputed Measures forming part of the New Regulatory Regime, the Tribunal (by majority) observes that such Regime entirely modified the legal and regulatory framework applicable to renewable energy producers as of 2013 by notably abolishing RD 661/2007 and RD 1578/2008, *i.e.* the special regime on the basis of, and in consideration of, which the Claimants made their decision to invest in Spain.
985. In particular, the Tribunal (by majority) notes, on the basis of the evidence on record, that the New Regulatory Regime significantly altered the remuneration regime offered to the Claimants in several important ways:
- It abolished the fixed tariffs per MWh guaranteed under RD 661/2007 and RD 1578/2008 and replaced them with a new type of remuneration made of three components: (i) a wholesale price, (ii) an "investment incentive" calculated per MW of installed capacity, and (iii) an "operating incentive" calculated per MW of electricity production.

The New Regulatory Regime therefore structured the new remuneration in a way that gave more weight to capacity than to productivity on the basis of a hypothetical standard facility with no consideration for the actual investment and operational costs of existing facilities, including the Claimants".

- It set a *variable* reasonable rate of return (as opposed to a *fixed* feed-in tariff) based on a 10-year average of Spanish 10-year treasury bonds, plus 300 basis points, which was equal to a rate of 7.398% pre-tax, or 5.77% after tax. Such rate was significantly *lower* than the implicit after-tax rate of return of 7%

⁶¹⁸ See *supra* paras. 886 and 922.

to 8% which was the target rate used for the setting of premiums under RD 661/2007 (which could even be higher), as confirmed by the 2014 CNMC Consultation Report quoted by the Respondent.⁶¹⁹

- The new rate of return was *capped* and subject to change in accordance with the evolution of interest rates.
- The new remuneration only applied over a regulatory life of 30 years, meaning that eligible facilities were no longer entitled to incentives after 30 years of operation.

986. Moreover, the New Regulatory Regime applied retroactively in two respects: (i) by applying not only to newly constructed plants but also to pre-existing plants and (ii) by taking into account into the setting of the new remuneration of renewable energy producers enrolled under RD 661/2007 and RD 1578/2008 the profits made by the latter under the original regimes.

987. The Tribunal (by majority) is not persuaded by Spain's argument that the New Regulatory Regime did not significantly differ from the Original Regulatory Regime insofar as it would still offer a "*reasonable rate of return*" to the Claimants.⁶²⁰ Law 54/1997 left it open to the Spanish government to determine more precisely what remuneration system would satisfy, in form and quantity, that objective. This is what the government did in adopting RD 661/2007 and RD 1578/2008. Therefore, what qualified as a "*reasonable rate of return*" in 2007 and 2008 must be assessed by reference to what Spain itself considered to be a "*reasonable rate of return*" according to its own legislation at the time of the Claimants' investments, *i.e.* those target rates of return on the basis of which the Government set the premiums set forth in RD 661/2007 and RD 1578/2008 and which have been valued between 7 and 8 % after tax.⁶²¹

988. Because the rates of return that the Claimants have received under the New Regulatory Regime are substantially lower (an 18% to 28% decrease) than the rate of return implicit in the premiums set by RD 661/2007 and RD 1578/2008, the Tribunal (by majority) considers that, contrary to Spain's assertion, the New Regulatory Regime deprived those Claimants of the "*reasonable rate of return*" which Spain itself had used as a target in setting the original remunerations system.

989. Therefore, by completely overhauling the regulatory framework for PV production, the New Regulatory Regime frustrated all of the Claimants' legitimate expectations that their remuneration would not be significantly altered.

⁶¹⁹ **BRR-90**, CNMC Report, Assessment of the Proposal Order Approving the Remuneration Parameters for the Standard Installations Applicable to Renewable Generation Projects, Cogeneration and Waste Plants and Determining the Methodology to Update the Operating Incentive, 3 April 2014, p. 14; see also Resp. C-Mem., para. 802.

⁶²⁰ See notably Quadrant First Report, paras. 150-154.

⁶²¹ Brattle First Regulatory Report, para. 222, Fig. 26.

990. The Tribunal (by majority) concludes that, with the exceptions of RD 1565/2010, RDL 2/2013 and RDL 14/2010 (to the extent that it introduced a permanent cap for PV facilities enrolled under RD 1578/2008 and a transitory cap for PV facilities enrolled under RD 661/1007), the Disputed Measures did frustrate the Claimants' legitimate expectations. This is not the end of the matter, however, because "legitimate expectations" is only one set of relevant considerations, to be weighed against others in a comprehensive FET analysis.
991. The Tribunal now turns, then, to a second set of considerations: the extent to which the Respondent maintained the stability of the original regulatory regimes by respecting their fundamental features.

6.2.3.3 Considerations Related to Stability and Fundamental Changes

992. In addition to their argument that Spain breached the FET standard by violating their legitimate expectations, the Claimants have also separately argued in their Memorial on the Merits that Spain violated the FET standard by imposing "fundamental changes" to the incentives regimes on which their investments were based.⁶²² As will be seen, this contention is equivalent to saying that Spain failed to observe the required degree of stability of each regime under which the Claimants made investments and therefore presents a degree of overlap with the preceding analysis of the Claimants' legitimate expectations.
993. Be that as it may, the Tribunal recalls that considerations related to such stability are relevant factors in a comprehensive FET analysis that takes into account all the relevant circumstances of the case.⁶²³ The Tribunal also recalls that the first sentence of Article 10(1) ECT separately requires a Contracting Party *inter alia* to "*create stable [...] conditions for Investors of other Contracting Parties to make Investments in its Area.*"⁶²⁴
994. In this subsection the Tribunal will briefly discuss (a) the notion of stability referred to in the ECT and the relevant fundamental features of each regime under which the Claimants invested, and (b) the extent to which the various Disputed Measures altered those regimes or fundamental features thereof and, consequently, the extent to which they impaired the stability of such regime.

(a) Stability and Fundamental Features

995. The Parties agree, in effect, that the stability of the original conditions for the investment is not the same as the immutability (or "petrification") of such conditions. The Respondent denies that any such immutability or petrification is required, and

⁶²² Cl. Mem., paras. 469-483

⁶²³ See *supra* paras. 817 and 824.

⁶²⁴ C-1, The Energy Charter Treaty and Related Documents, 15 January 2016 ("ECT").

the Claimants point out that they are complaining only of allegedly “fundamental changes” in the original legal regimes under which the investments were made.⁶²⁵

996. Further, it is generally understood that changes that do not drastically or radically affect the original legal framework or substantially alter its key features are consistent with the stability of that framework.⁶²⁶

997. The Tribunal finds it unnecessary to identify the totality of the features of RD 661/2207 and RD 1578/2008 that can be considered key or fundamental. The Tribunal finds it sufficient, for present purposes, to identify three features that it considers fundamental in either regime as well as relevant to the issues under discussion. Those three key features are: (i) the Feed-in Tariff at which the electricity production of PV plants would be sold; (ii) the quantity produced that could be sold at that tariff; and (iii) the duration of the entitlement to sell such quantities at the Feed-in Tariff. Common sense indicates that these features are essential for a prospective investor to project the revenues of the intended investment and for the State to quantify the incentives it is offering as well as to project the cost of those incentives to the system.

(b) Did the Disputed Measures Impair the Stability of the Regimes of RD 661/2007 and RD 1578/2008?

998. In parallel with the preceding discussion on legitimate expectations, the Tribunal will analyze the impact of the Disputed Measures in four groups: (i) RD 1565/2010, RDL 14/2010 (in respect of the duration of the entitlement to sell electricity at the Feed-in Tariff), and Law 2/2011; (ii) RDL 14/2010 (in respect of the cap on hours of production eligible for the Feed-in Tariff); (iii) RDL 2/2013; and (iv) the New Regulatory Regime (RDL 9/2013, Law 24/2013, RD 413/2014, and MO 1045).

(i) RD 1565/2010, RDL 14/2010 (in Respect of the Duration of the Entitlement to Sell Electricity and the Feed-in Tariff), and Law 2/2011

999. These measures applied only to investments under RD 661/2007. Under that regime, the producer was entitled to sell electricity at 100% of the Feed-in Tariff for 25 years and thereafter, for the remaining life of the project, at 80% of that tariff. A standard PV plant may have a technical useful life of 30 to 40 years.⁶²⁷

1000. RD 1565/2010 abrogated the producer’s right to sell its production at 80% of the Feed-in Tariff after 25 years. One month later, RDL 14/2010 extended to 28 years the period in which the producer would have the right to sell its production of electricity

⁶²⁵ Cl. Mem., paras. 469 to 483.

⁶²⁶ See for instance, **RL-119**, *Antin Infrastructure Services Luxembourg s.à.r.l. y Antin Energia Termosolar B.V. v. Reino de España*, ICSID Case No. ARB/13/31, Award, 15 June 2018, para. 532.

⁶²⁷ See notably **BRR-21**, European Commission DG ENV, (2011), Study on Photovoltaic Panels Supplementing the Impact Assessment for a Recast of the [Waste Electrical and Electronic Equipment] WEEE Directive- Final Report, 14 April 2011 p. 13: “[a] challenge in recycling of photovoltaic panels is their long life time which is estimated at 25 years. However, this represents the warranty lifetime; technical lifetime could be as long as 30 to 40.” The Tribunal notes a slight disagreement between the Parties on this issue: according to the Respondent, the technical useful lifetime of a PV plant is around 30 years (Quadrant First Report, para. 232), while the Claimants have assumed a lifetime of 35 years (Brattle First Quantum Report, para. 24; Brattle First Regulatory Report, para. 243).

at 100% of the Feed-in Tariff. Three months later, Law 2/2011 extended to 30 years the period in which the producer could sell its production at 100% of the Feed-in Tariff. Law 2/2011 was repealed by the New Regulatory Regime in 2013.

1001. The short periods in which RD 1565/2010 and RDL 14/2010 were in effect justify that these enactments be considered together with Law 2/2011. In essence, these enactments (i) abrogated the producer's right to sell its production at 80% of the Feed-in Tariff between the end of year 25 and the end of the technical useful life of the plant but (ii) increased to 30 years the period in which the producer had a right to sell its production at 100% of the Feed-in Tariff. Because the end of the useful life of a facility cannot be known in advance or estimated with precision, it is not certain that the changes introduced by these enactments were substantially detrimental to the investor. On the contrary, it appears that the investor was deprived of the uncertainty of a post-25-year period at 80% of the Feed-in Tariff but gained the certainty of a 30-year period at 100% of that tariff.
1002. Given these circumstances, the Tribunal considers that these changes to the regime of RD 661/2207 did not impair the stability of that regime to the detriment of the Claimants.
- (ii) RDL 14/2010 (in Respect of the Cap on Hours of Production Eligible for the Feed-in Tariff)
1003. RDL 14/2010 imposed (i) on all PV facilities, a permanent cap on the annual production of electricity eligible to be sold at the applicable Feed-in Tariff and (ii) on facilities registered under RD 661/2007, a temporary (3-year) cap on their annual production eligible to be sold at that tariff. These changes were in effect only in 2011 and 2012 because RDL 14/2010 was replaced in 2013 by the New Regulatory Regime.⁶²⁸
1004. Both caps affected the *quantity* of electricity that the producer could sell at the Feed-in Tariff, which the Tribunal has identified as one of the relevant fundamental features of RD 661/2007 and RD 1578/2008. Nevertheless, the degree of impairment to the original regulatory framework is not the same.
1005. The transitory cap, which affected facilities registered under RD 661/2007, was only meant to last for three years and was enacted in a context of a severe economic crisis.
1006. The permanent cap, which affected facilities registered under RD 661/2007 as well as those registered under RD 1578/2008, was designed to have longer lasting and more profound effects than the temporary cap. On the basis of the evidence on record, the Tribunal (by majority) is satisfied that such permanent cap substantially altered the remuneration of the Claimants, *i.e.* a key feature of the original regime, with respect to facilities enrolled under RD 661/2007. However, it is not convinced

⁶²⁸ Brattle First Regulatory Report, paras. 329-332.

that the permanent cap had a similar effect on the plants enrolled under RD 1578/2008. The Tribunal indeed notes that, according to Brattle's own projections,⁶²⁹ the equivalent hours of operation of the Valle Hermoso II and Salinas plants were expected on average to remain below the permanent cap for the duration of the useful life of those two plants.

1007. The Tribunal (by majority) concludes that (i) the permanent cap introduced by RDL 14/2010 breached the stability of the regime of RD 661/2007 as far as the investments made under such regime are concerned but (ii) did not breach the stability of the regime of RD 1578/2008 as far as the investments made under such regime are concerned. The Tribunal further concludes that the temporary cap did not breach the stability of the regime of RD 661/2007.

(iii) RDL 2/2013

1008. RDL 2/2013 replaced the CPI that served as adjustment factor for updating the value of the premiums and feed-in tariffs with a revised CPI which excluded unprocessed foods, energy products, and some tax effects from the calculation of inflation. This change affected the calculation of the Feed-in Tariff, which the Tribunal has found to be one of the relevant fundamental features of RD 661/2207 and RD 1578/2008.

1009. Nevertheless, the Tribunal considers that the amendments to the CPI index did not *substantially* alter the calculation of the Feed-in Tariff to the detriment of the Claimants. Therefore, the Tribunal concludes that RDL 2/2013 did not breach the stability of RD 661/2007 or RD 1578/2008.

(iv) The New Regulatory Regime

1010. The four Disputed Measures that form part of the New Regulatory Regime, taken together, repealed RD 661/2007 and RD 1578/2008 and completely replaced the legal and regulatory framework applicable to renewable energy producers. The Tribunal (by majority) considers that the New Regulatory Regime radically and fundamentally altered the legal regimes under which the Claimants made their investments in Spain.

1011. In particular, the Tribunal (by majority) finds, on the basis of the evidence on record, that the New Regulatory Regime fundamentally altered the remuneration regime offered to the Claimants in several important ways which are worth recalling again:

- It abolished the fixed tariffs per MWh guaranteed under RD 661/2007 and RD 1578/2008 and replaced them with a new type of remuneration made of three components: (i) a wholesale price, (ii) an "investment incentive" calculated per MW of installed capacity, and (iii) an "operating incentive" calculated per MW of electricity production.

⁶²⁹ Brattle Quantum Update Model, Tables Q – Updated Financial Model_Dec 19.xlsb, Table A30: Production Forecast.

- It set a *variable* reasonable rate of return (as opposed to a *fixed* feed-in tariff) equal to a rate of 5.77% after tax which was significantly *lower* than the implicit after-tax rate of return of 7% to 8% which was the target rate used for the setting of premiums under RD 661/2007 and RD 1578/2008.⁶³⁰
 - The new rate of return was *capped* and subject to change in accordance with the evolution of interest rates.
 - The new remuneration only applied over a regulatory life of 30 years, meaning that eligible facilities were no longer entitled to incentives after 30 years of operation.
1012. Moreover, the New Regulatory Regime applied retroactively in two respects: (i) by applying not only to newly constructed plants but also to pre-existing plants and (ii) by taking into account in the setting of the new remuneration of renewable energy producers enrolled under RD 661/2007 or RD 1578/2008 the profits made by the latter under the original regimes.
1013. In light of the foregoing, the Tribunal (by majority) is satisfied that the New Regulatory Regime amounted to a “sea change” of the regulatory framework in which Claimants chose to invest. It also finds it relevant that such New Regulatory Regime came to be heavily criticized by both Spanish officials⁶³¹ and the EU,⁶³² notably in the context of the adoption of RDL 17/2019.
1014. The Tribunal (by majority) concludes that the New Regulatory Regime radically and fundamentally altered the regimes of RD 661/2007 and RD 1578/2008, to the Claimants’ detriment, and hence breached the stability of the original conditions for the Claimants’ investments.
1015. The Tribunal (by majority) is of the view that these findings do not imply that the ECT limits Spain’s sovereign, regulatory powers, except that such powers must be exercised in a manner consistent with the obligations assumed by Spain under the ECT, including that of affording investors of other Contracting States fair and equitable treatment. In other words, the Tribunal (by majority) does not consider that the effects RD 661/2007 or RD 1578/2008 under the ECT prevented Spain from amending its legislation on renewable energies in the future but rather that any radical or fundamental change to the key features of the regimes of RD 661/2007 or RD 1578/2008 (including the parameters for the remuneration of PV energy producers) would apply prospectively, with respect to future plants, no to existing plants.

⁶³⁰ **BRR-90**, p. 14; see also Resp. C-Mem., para. 802.

⁶³¹ **C-334**, Spanish Parliament, Minutes of the Sessions of Congress (Legislature XII, No. 599, Session No. 23), 19 September 2018, p. 3; **C-467**, Transcription of the RDL 17/2019 Validation.

⁶³² **C-325**, European Commission, Memo, Questions and Answers: EU Commission: Guidance for state intervention in electricity; **C-326**, *El Economista*, Press Article, Brussels reprimands Spain for adopting ‘retroactive’ cuts to renewables; see also **BRR-24**, European Commission Press Release, EU Commission: Guidance for State Intervention in Electricity, November 5, 2013, p. 3, emphasizing the need to respect “investors’ legitimate expectations concerning the returns on existing investments.”

6.2.3.4 Considerations Regarding Transparency and Consistency

1016. The Claimants allege that Spain failed to give their investments fair and equitable treatment because it failed to treat those investments transparently and consistently.⁶³³ According to the Claimants,

*“While it is clear that the principles of transparency and consistency are interrelated — and in fact, a few tribunals have conflated them with the notion of “legitimate expectations” — it is equally clear that a State may violate the FET standard either by violating an investor’s “legitimate expectations” or by failing to treat an investor or its investment transparently or consistently”.*⁶³⁴

1017. The Tribunal agrees with such statement to the extent that transparency and consistency are indeed relevant factors that need to be taken into account when assessing whether a host State has afforded fair and equitable treatment to an investor under Article 10(1) of the ECT. These factors are best considered separately from the investor’s legitimate expectations, although there will often be a degree of overlap with the latter.

1018. According to the tribunal in *Frontier Petroleum*, “[t]ransparency means that the legal framework for the investor’s operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework”.⁶³⁵

1019. The Tribunal recalls that the first sentence of Article 10(1) requires a Contracting Party to “create [...] transparent conditions for Investors of other Contracting Parties to make Investments in its Area.” It follows that Spain was required to make the regimes of RD 661/2007 and RD 1578/2008 transparent, in the sense that their meaning be “readily apparent.” In the course of the preceding analysis of factors relevant to the application of the FET standard, the Tribunal has noted several points at which the requirement of transparency plays a role in the reasoning. It finds it unnecessary to add anything to those observations.

1020. As for the Disputed Measures, the evidence does not show absence of transparency to any significant degree. In particular, the Tribunal notes that the Disputed Measures adopted as part of the New Regulatory Regime were accompanied by explanatory statements, reports and/or public consultations by the Spanish authorities,⁶³⁶

⁶³³ Cl. Mem., paras. 484-500; Cl. Reply, paras. 653-662.

⁶³⁴ Cl. Mem., para. 485.

⁶³⁵ **CL-47**, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 285.

⁶³⁶ See, for instance, the public consultation launched by the CNE in February 2012 seeking observations and suggestions from agents with respect to regulatory adjustment measures in the energy sector (and notably electricity) (**R-237**); see also, with respect more specifically to RD 413/2014: **R-30**, Index of administrative enquiry relating to Royal Decree 413/2014, 6 June 2014; **R-241**, Report by the Technical Secretary-General of the Ministry of Industry issued regarding the development of RD 413/2014, 9 January 2014; **R-305**, CNMC Report on the proposal for a Royal Decree (RD 413/2014) for regulating the activity of electricity production from renewable energy sources, cogeneration and biomass, 17 December 2013; and with respect to MO 1045/2014: **R-107**, Submissions from PROTERMOSOLAR against Ministerial Order OIET 1045/2014 presented before the National Competition Commission (CNMC), 25 February 2014; **R-306**, Index of the administrative file of Order 1045/2014, 16 June 2014.

sometimes on the express recommendation of the Spanish Council of State.⁶³⁷ The Tribunal notes that some of those measures were enacted at intervals of months from one another, sometimes leaving important information undefined for a certain period, notably with respect to the new remuneration parameters announced in RDL 9/2013 which were not determined until the adoption of MO 1045/2014. Yet, it is not uncommon for a complex reform to be implemented in stages and, in the Tribunal's view, the complexity of such process cannot be equated with a lack of transparency.

1021. On the requirement of consistency, the Tribunal notes that “consistency” *stricto sensu* has been defined as consistency between actions from two different government entities at the same time, as illustrated in *MTD v. Chile*:

*“What the Tribunal emphasizes here is the inconsistency of action between two arms of the same Government vis-à-vis the same investor even when the legal framework of the country provides for a mechanism to coordinate”.*⁶³⁸

1022. In a broader sense, “consistency” is sometimes used as requiring the host State to refrain from drastically changing course and altering the applicable rules over time. This concept of consistency over time coincides with the concept of stability. As one author correctly observes, “*the requirement of consistency overlaps with the need for stability under the FET rule*”.⁶³⁹
1023. In the present case, the Tribunal finds no evidence that Spain acted in an inconsistent manner by taking contradictory actions simultaneously, and therefore finds that the factor of consistency, in this sense, does not support a claim for breach of the FET standard.
1024. As a matter of fact, what the Claimants essentially allege here is inconsistency of Spain in the broader sense, *i.e.* a lack of consistency of the host State in the formulation and application of its rules over time. However, the Tribunal finds that such claim overlaps with the Claimants' claim for breach of their legitimate expectations and lack of stability, which the Tribunal has addressed in the preceding subsection 6.2.3.3.

⁶³⁷ See notably **R-65**, the Opinion No. 39/2014 of the Spanish Council of State, 6 February 2014 with respect to the draft Royal Decree 413/2014, pp. 42-43: “*In the opinion of the Council of State, the referral of those parameters to a ministerial order which must be passed subject to a resolution by the Delegated Committee of the Government in Economic Affairs is justified in view of the extremely technical nature of its contents, reflected in the foreseeable classification of existing facilities into approximately 900 benchmark facilities. This notwithstanding, the importance must be stressed of encouraging the participation of the interested operators in the preparation of that classification through the corresponding public consultations and the adequate weighting of the comments presented during that time.*” (emphasis added).

⁶³⁸ **CL-36**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004, para. 163.

⁶³⁹ **CL-27**, R. Dolzer, *Fair and Equitable Treatment: Today's Contours*, Santa Clara Journal of International Law, 2014, Vol. 12, Issue 1, Article 2, p. 21.

6.2.3.5 Final Analysis and Conclusions on the Claimants' Claims for Breach of the Obligation to Afford Fair and Equitable Treatment

1025. In the preceding subsections 6.2.3.2, 6.2.3.3, and 6.2.3.4 the Tribunal has considered various sets of relevant circumstances that are relevant to a comprehensive FET analysis and has reached provisional conclusions in respect of each. In this subsection the Tribunal will consider those circumstances holistically and assess their relative weights for the purpose of determining whether the Respondent's conduct breached the Fair and Equitable Treatment obligation of Article 10(1) of the ECT.
1026. Before proceeding with the FET analysis, the Tribunal will briefly consider another set of relevant circumstances invoked by Spain in the form of a defense to the Claimants' FET claim as well as others. In a nutshell, the Respondent argues that the Disputed Measures were justified as an appropriate response to the unsustainability of its electricity system, resulting from the growth of the tariff deficit, aggravated by an international economic crisis which caused a drop in the demand for electricity.⁶⁴⁰ The Respondent further argues that the Disputed Measures were the most reasonable and proportionate response to those macroeconomic problems.
1027. The Tribunal first notes that, this being an affirmative defense, the Respondent has the burden of proof of the facts on which it is based. In this regard, the Tribunal considers sufficiently established that in late 2009 and 2010 Spain faced a sharp increase in its tariff deficit, made worse by a general economic crisis. The Tribunal (by majority) notes that the tariff deficit was also the result of Spain's political decision not to transfer to consumer prices the entire cost of the system, including the subsidized remunerations for investors in renewable energy. This does not negate the severity of the problem Spain faced at that time.
1028. The question before the Tribunal is whether the Disputed Measures are justified by that economic problem, notwithstanding the other circumstances discussed in the preceding subsections. The Respondent argues that the Disputed Measures were "reasonable" and "proportionate" to the goal of eliminating the tariff deficit and in fact were the most reasonable and proportionate measures to that end.
1029. The Tribunal will address the "reasonableness" argument in its proper context, in connection with the Claimants' claim that the Respondent impaired, by unreasonable measures, the management, maintenance, use, and enjoyment of their investments in breach of the third sentence of Article 10(1) ECT. As for the contention that the Disputed Measures were "proportionate" or "the most proportionate," the Tribunal (by majority) considers that the requirement of proportionality is not met just because a measure is designed to pursue a valid end or even because it proves effectual enough to achieve that end. Proportionality requires consideration of alternative measures that would have pursued the same end in a way less harmful to the investor

⁶⁴⁰ See notably Resp. Rej., para. 1032, and more generally, Resp. Rej., paras. 1025-1042. The Respondent also alleges (i) an increase in consumer tariffs, which is related to the growth of the tariff deficit, and (ii) over-compensation in the renewable-energy sector, an assertion that the Tribunal has already rejected in its analysis of the "reasonable rate of return" referred to in Law 54/1997 and the remuneration systems adopted by RD 661/2007 and RD 1578/2008.

or without forcing the investor to bear a disproportionate portion of the harm in comparison with other stakeholders.

1030. In this regard, the Tribunal (by majority) cannot conclude, on the evidence of record, that the Disputed Measures, however effectual, were proportionate. The Respondent had alternatives, recommended by the European Commission or the CNE, which included raising or deregulating the prices paid by consumers for electricity, adopting a carbon dioxide tax or a fuel consumption levy, or rescheduling the Feed-in Tariffs to reduce them temporarily to address the tariff deficit, to be increased later to preserve the net present value of the plants.⁶⁴¹ It is not for the Tribunal to determine which one of these alternatives should have been adopted, but it is for the Respondent to prove that the Disputed Measures were the least harmful to the investors and the most equitable in the distribution of burdens, and that is something that the Respondent has failed to do. The Tribunal (by majority) finds, therefore, that the macroeconomic circumstances invoked by the Respondent are not sufficient to conclude that the Disputed Measures did not breach the FET standard.
1031. The Tribunal (by majority) has provisionally concluded that (i) the Respondent frustrated the Claimants' legitimate expectations based on the terms of the legal regimes under which they invested and (ii) the Respondent breached the stability of the conditions for the Claimants' investments by radically and fundamentally altering the entirety of those conditions or by substantially impairing fundamental features thereof. These provisional conclusions coincide in all respects.
1032. All relevant circumstances considered and weighed, the Tribunal (by majority) concludes that the Respondent breached the standard of Fair and Equitable Treatment in the following respects:
- In relation to the Claimants' investments made under RD 661/2007, by imposing, by means of RDL 14/2010, a permanent cap on the production of electricity eligible to be sold at the Feed-in-Tariff.
 - In relation to all of the Claimants' investments, by abolishing the legal regimes under which the Claimants invested and replacing them with the New Regulatory Regime.

⁶⁴¹ Brattle First Regulatory Report, paras. 188-203; Brattle Second Regulatory Report, paras. 91-103; **BRR-135** to **BRR-139**.

6.3 Article 10(1) of the ECT: The Impairment Clause

6.3.1 The Claimants' Position

1033. The Claimants submit that Spain unreasonably impaired the “*management, maintenance, use, and enjoyment*” of their investments in violation of Article 10(1) of the ECT.⁶⁴²
1034. The Claimants contend that “*impairment*” covers “*any negative impact or effect*” and includes State acts as well as omissions. Either unreasonable or discriminatory measures violate this provision. The Claimants refer to investment tribunals which have held that a measure may be unreasonable if it is taken without due consideration of the potential negative effects it will have on foreign investors.⁶⁴³
1035. The Claimants submit that the measures were unreasonable because they inflicted financial harm on the Claimants’ investments without serving a legitimate purpose,⁶⁴⁴ and because they contravened fundamental principles of non-retroactivity and singled out renewable-energy investors.⁶⁴⁵
1036. According to the Claimants, all of Spain’s measures in this case were “*unreasonable,*” because they violated the guarantees in RD 661/2007 and RD 1578/2008 and the repeated assurances of Spain’s officials, which induced the Claimants to invest. The individual measures imposed by Spain were also “*unreasonable*” when considered on a stand-alone basis. The Claimants submit that, “*for instance, it was unreasonable for Spain to impose ‘operating hour’ limits on plants that cannot be shut down to control costs; to impose a ‘tax’ on incentive revenues; and to manipulate routine adjustments for inflation based on the Consumer Price Index*”.⁶⁴⁶
1037. In addition, the Claimants contend that, from an economic and regulatory perspective, there were better options available to the Spanish Government to address the alleged “*problems*” that it cited to justify its harmful measures.⁶⁴⁷
1038. The Claimants add that the impairment clause is distinct from the FET provision of the ECT, and that a conclusion on whether Spain violated the impairment clause therefore has no incidence on whether Spain undermined the Claimants’ legitimate expectations and treated the Claimants’ investments unfairly and inequitably.⁶⁴⁸

⁶⁴² Cl. Mem., paras. 501 *et seq.*; Cl. Reply, paras. 676 *et seq.*

⁶⁴³ Cl. Mem., paras. 503-504.

⁶⁴⁴ Cl. Reply, paras. 677 *et seq.*

⁶⁴⁵ Cl. Reply, paras. 682 *et seq.*

⁶⁴⁶ Cl. Mem., para. 505.

⁶⁴⁷ Cl. PHB, para. 59.

⁶⁴⁸ Cl. PHB, para. 60.

6.3.2 The Respondent's Position

1039. In substance, Spain submits that the Disputed Measures are not irrational, disproportionate, or discriminatory and did not cause the deterioration of the Claimants' investments.⁶⁴⁹
1040. Spain's position is that a measure is rational if it is linked to the exercise of a reasonable public policy and of general interest and is proportional if all the affected interests have been taken into account in the execution of that public policy. Spain argues that the disputed measures are rational because they were carried out to solve a tariff deficit that jeopardized the sustainability of the Spanish electricity system. Furthermore, they are also proportional and non-discriminatory because for that purpose measures were taken in relation to all the agents of the electrical system, both on the income side and on the expense side.⁶⁵⁰
1041. The Respondent further submits that the compliance of the disputed measures with the tests set out in *EDF v. Romania* and *AES* implies that the measures were neither irrational nor discriminatory.⁶⁵¹
1042. The Respondent stresses the economic circumstances, which the Claimants have omitted: the existence of an international economic crisis that led to a reduction in electricity demand; the rise in consumer tariffs; the existence of excess remuneration in the RE sector; and the existence of expectations of growth of the tariff deficit. All of these circumstances involved the economic sustainability of the SES.⁶⁵²
1043. The Respondent contends that the disputed measures are proportional, as they guaranteed investors reasonable returns.⁶⁵³ When assessing the reasonableness of return, the Respondent argues that one of the criteria consists in comparing it with the return offered by the Spanish system for activities subject to a comparable or slightly lower level of risk, and specifically, by comparing this return with other regulated activities such as transport and distribution. In this regard, Spain recalls that the return on transport and distribution is set by Law for the first regulatory period as the return from the Spanish 10-year bond plus 200 basis points, which is, in other words, 100 basis points less than production from renewable sources. From this point of view, the return is also reasonable.⁶⁵⁴
1044. The Respondent argues that the return of 7.398% resulting from increasing the average yield from the Spanish 10-year bond prior to RD-Act 9/2013 by 300 basis points is the return that the sector demanded from the Spanish Government in 2009.

⁶⁴⁹ Resp. C-Mem., paras. 1025 *et seq.*; Resp. Rej., paras. 1021 *et seq.*

⁶⁵⁰ Resp. Rej., para. 1024.

⁶⁵¹ Resp. C-Mem., para. 1044.

⁶⁵² Resp. Rej., para. 1027.

⁶⁵³ Resp. Rej., para. 1038.

⁶⁵⁴ Resp. Rej., paras. 1038-1039.

Consequently, the return is also reasonable, in accordance with the demands of the sector itself.

1045. The Respondent argues that the Claimants base their argument about the proportionality of the disputed measures on different decisions of the European Commission in order to affirm that profitability of up to 13% is considered reasonable. Spain believes that it is incomprehensible to refer to Decisions about other countries when the European Commission has already ruled on the Spanish case, noting that the proposal of a profitability of the 7.398% conforms to comparable European systems.⁶⁵⁵
1046. Finally, Spain recalls that the Claimants' plants are still not getting an average return, with the measures in dispute of 8.6% and that they will receive, throughout their regulatory life, public subsidies that represent 87% of their compensation.⁶⁵⁶
1047. The Respondent further argues that the Disputed Measures were non-discriminatory, insofar as they affected all agents in the SES. All the activities have seen their remuneration modified according to: (i) whether the remuneration they received was effectively reasonable or adequate; and (ii) its contribution to the problem of unsustainable imbalance in SES between income and expenses.⁶⁵⁷
1048. Spain also underlines the fact that the General State Budgets have included, in 2013, 2014 and 2015, budget entries that represent direct contributions to the electricity system in order to mitigate the deficit situation that existed. This external allocation was an exception to the principle of financial self-sufficiency of the SES as a closed system. This means that Spanish taxpayers are paying a total of 4,206 billion euros to the electricity system in order to promote facilities with a remuneration regime which generate electricity from renewable sources. These amounts detracted from other public policies, however, because the State decided to maintain these subsidies in accordance with the principle of reasonable profitability.⁶⁵⁸
1049. Spain further recalls that it is not invoking a defense of necessity, but only exposes the micro and macroeconomic situation in which the dispute was taken to adopt the measures to analyze their proportionality and reasonableness under the protection of the ECT and the standard of fair and equitable treatment.⁶⁵⁹
1050. The Disputed Measures have been recognized as necessary, stabilizing, and reasonable macroeconomic control measures. Because of the renewable energy regime, the Tariff Deficit (which acquired unsustainable levels since 2010),

⁶⁵⁵ Resp. Rej., paras. 1042.

⁶⁵⁶ Resp. Rej., para. 1047.

⁶⁵⁷ Resp. Rej., para. 1053.

⁶⁵⁸ Resp. Rej., para. 1061-1062.

⁶⁵⁹ Resp. Rej., para. 1064-1070.

threatened not only the whole of the Spanish electricity system, but also the Spanish economy in general, generating a cumulative debt.⁶⁶⁰

1051. Spain therefore refutes the existence of an “impairment” in the Claimants’ investment.⁶⁶¹

6.3.3 The Tribunal’s Analysis

1052. At the outset, the Tribunal recalls the relevant part of Article 10(1) ECT:

“Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.” (emphasis added)

1053. In their submissions, the Parties have referred to the emphasized part in the above quotation as the “impairment clause.” The Tribunal adopts this terminology and will refer to the clause as the Impairment Clause.

1054. As a preliminary remark, and in light of the way the Impairment Clause is drafted and located in the third sentence of Article 10(1), the Tribunal is satisfied that this clause sets out a separate obligation for the host State under Article 10(1), distinct from the fair and equitable treatment discussed in the preceding section, and containing its own legal standard.

1055. A plain analysis of the terms of the Impairment Clause shows that a breach thereof requires demonstrating:

- That the management, maintenance, use, enjoyment or disposal of an investment was “*impaired*” “*in any way*” by the state measure, and
- That such measure was either “*unreasonable*” or “*discriminatory*.”

1056. The burden of proof of these requirements lies, in principle, with the Claimants. As these requirements are cumulative, the Tribunal agrees with the tribunal in *AES v. Hungary* that “[a]n analysis of the nature of a state’s measures, in order to determine if they are *unreasonable or discriminatory*, is only necessary when an impairment of the investment took place”.⁶⁶²

1057. The first requirement is the existence of an “impairment” of the management, maintenance, use, enjoyment, or disposal of the investment. These terms must be interpreted in accordance with the rules of the VCLT, in particular Article 31. The

⁶⁶⁰ Resp. C-Mem., paras. 1050 *et seq.*

⁶⁶¹ Resp. C-Mem., para. 1067.

⁶⁶² **CL-10**, *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (“**AES**”).

ordinary meaning of the term “*impairment*” is “*any negative impact or effect.*”⁶⁶³ The Tribunal finds no basis for the argument that an “*impairment*” has to be “*significant*” to qualify as such for the purposes of Article 10(1) ECT, as no such qualification appears in that provision.⁶⁶⁴ On the contrary, the addition of the words “*in any way*” in the sentence “*shall not in any way impair*” suggests that the drafters intended to give the notion of “*impairment*” a very broad meaning, intended to encompass a large variety of situations.⁶⁶⁵

1058. In the present case, the Tribunal (by majority) is satisfied from the evidence on record that all of the Disputed Measures have, to varying degrees, negatively affected, and hence impaired, the use, enjoyment or disposal of the Claimants’ investments by progressively reducing their profitability.⁶⁶⁶
1059. The second requirement is proof that the Disputed Measures were either *unreasonable* or *discriminatory*. Although the Claimants have mostly presented their case by reference to the lack of reasonableness of the Disputed Measures, and in particular the New Regulatory Regime, they have also contended that “*Spain discriminated against renewable energy investors to avoid allocating the burden of the tariff deficit elsewhere*”.⁶⁶⁷
1060. With respect to the allegation of discrimination, the Respondent has contested such allegation by referring to what it calls the *EDF v. Romania* test.⁶⁶⁸ The relevant part of the *EDF v. Romania* award reads as follows:

“303. In an attempt to give a content to general expressions such as “*unreasonable or discriminatory measures,*” Claimant relies on the categories of measures that its legal expert, Professor Christoph Schreuer, has described in his opinion as “*arbitrary*”:

⁶⁶³ See notably **CL-18**, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Partial Award, Mar. 17, 2006, paras. 458-459.

⁶⁶⁴ See notably **CL-94**, *Electrabel*, para. 7.152.

⁶⁶⁵ See also for a similar interpretation, **CL-144**, *Greentech*, para. 461.

⁶⁶⁶ See Brattle First Regulatory Report, paras. 240 et seq. The Dissent criticizes this finding (see para. 40 et seq.). In that criticism, the Dissent seems to equate impairment with loss of profitability and loss of profitability with substantial loss of the value of the investments, a double equivalence for which there is no basis in the ECT or economic reality. An investment will suffer impairment, even though it remains profitable, if the level of profitability is reduced by measures in breach of the Impairment Clause of the ECT. And such an impairment may cause a loss in the value of the investment even though such loss of value may not reach the level of substantial deprivation needed to sustain a claim for indirect expropriation. These are the answers to the first two rhetorical questions posed in paras. 41 and 42 of the Dissent. As for the third rhetorical question posed in para. 43 of the Dissent, the mere fact that the Claimants chose to maintain their investments in Spain after the enactment of the New Regulatory Regime is not inconsistent with the majority’s finding that those investments were impaired by such Regime. Indeed, it is not disputed that PV plants are “capital intensive” and that most of the costs incurred in the development of a PV plant are borne upfront at the installation stage and are later recouped with the revenues obtained from the sale of electricity. Therefore, it might very well be the case that the Claimants found it more rational, from an economic standpoint, to keep their PV Plants running albeit at a lower profit than selling them altogether and leave Spain. That does not mean, in the majority’s view, that the Claimants did not suffer an impairment of the value of their investments in the sense of Article 10(1) of the ECT.

⁶⁶⁷ Cl. Reply, para. 682.

⁶⁶⁸ Resp. C-Mem., paras. 1046 et seq.

a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in wilful disregard of due process and proper procedure.

*The Tribunal will consider the claim of “unreasonable or discriminatory measures” according to the terms proposed by Claimant”.*⁶⁶⁹

1061. As shown by the above extract, the measures listed correspond to what Professor Schreuer viewed as “*arbitrary*” measures, as distinguished from “*discriminatory*.” The Tribunal notes that these two terms are not synonymous. While it appears that the *EDF* tribunal chose to “*consider the claim of ‘unreasonable or discriminatory measures’*” by reference to Professor Schreuer’s opinion, the Tribunal does not find this extract to be of assistance in identifying what constitutes “*discriminatory*” conduct for the present purposes.
1062. The Tribunal finds more assistance in the *Saluka* award, which expressed the view that “*the standard of “non-discrimination” requires a rational justification of any differential treatment of a foreign investor*”.⁶⁷⁰ Another way to describe this concept is that a discriminatory measure is one that treats a claimant’s investment worse than it treats another investment or group of investments which are in similar circumstances with the claimant’s investment.⁶⁷¹ The rational justification of the differential treatment to which *Saluka* refers amounts to a demonstration (to the Tribunal’s satisfaction) that the two terms of the comparison are *not* in similar circumstances.
1063. In the present case, the Tribunal is not persuaded by the evidence on record that the Disputed Measures discriminated against the Claimants, in comparison with other investors placed in a similar situation (including other investors in renewable energy), and the Claimants have not in fact attempted to make such a claim. As stated by the tribunal in *Cube*,

“The entire point of the Special Regime, of which the Claimants were and remain a beneficiary, was to discriminate precisely in that way. The Claimants cannot be heard to complain that such discrimination

⁶⁶⁹ **CL-17**, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, para. 303.

⁶⁷⁰ **CL-18**, *Saluka*, para. 460.

⁶⁷¹ See notably in that regard, **CL-43**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/08, Award, 12 May 2005 (“**CMS**”), para. 293: “*The Respondent’s argument about discrimination existing only in similarly situated groups or categories of people is correct, and no discrimination can be discerned in this respect.*”

continued. The measures in question were general legislative measures that did not discriminate against the Claimants or their investments, compared with other investors in PV or hydro plants.⁶⁷²

1064. The question remains, whether the Disputed Measures could be characterized, alternatively, as “unreasonable.”
1065. The text of Article 10(1) ECT does not offer any specific guidance as to the meaning of the term “unreasonable.” Accordingly, pursuant to Article 31 VCLT, the Tribunal will interpret this term according to its ordinary meaning taking into account the context and the object and purpose of the ECT.
1066. In order to do so, the Tribunal refers to the test set out in *AES v. Hungary*, on which the Respondent has relied in its submissions.⁶⁷³ According to the tribunal in *AES*,

“10.3.7 There are two elements that require to be analyzed to determine whether a state’s act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.

10.3.8 A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.

*10.3.9 Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented”.*⁶⁷⁴

1067. The *AES* test is not inconsistent with the finding of the tribunal in *LG&E v. Argentina* – on which the Claimants rely – that measures that “affect the investments of nationals of the other Party without engaging in a rational decision-making process” are contrary to the provisions of the treaty.⁶⁷⁵
1068. According to the *AES* test, the Claimants must therefore either demonstrate that the Disputed Measures (i) were not based on a rational policy or (ii) that, even if they were based on a rational policy, their nature and/or the way they were implemented was unreasonable in relation to such policy.

⁶⁷² **CL-178**, *Cube*, para. 448 (emphasis added).

⁶⁷³ Resp. C-Mem., paras. 1049 *et seq.*

⁶⁷⁴ **CL-10**, *AES*, paras. 10.3.7 *et seq.*

⁶⁷⁵ Cl. Mem., para. 504; **CL-32**, *LG&E v. Argentine Republic*, para. 158.

1069. Contrary to the Claimants' allegation, the Tribunal is satisfied that the Disputed Measures enacted by Spain did arise from a rational policy.
1070. In light of the evidence on record, there is no question that, starting approximately in 2009, Spain faced an international financial crisis that severely affected the sustainability of its electricity sector, notably because of an unprecedented drop in electricity demand, which aggravated its tariff deficit.⁶⁷⁶ The pre-existence of such tariff deficit does not disprove the aggravation caused by the financial crisis. The fact is that such deficit increased to a point where Spain decided that it had to address this matter of public interest urgently⁶⁷⁷ and notably chose to do so by enacting the Disputed Measures between 2010 and 2014.
1071. It is also worth noting that, in this context of financial crisis, Spain sought financial support from the European Union, which it obtained under the condition that it would agree to carry out a number of structural reforms domestically, and notably to "*address the electricity tariff deficit in a comprehensive way*".⁶⁷⁸
1072. For these reasons, the Tribunal accepts that the Disputed Measures were adopted in relation to a rational policy of Spain.
1073. That is not the end of the matter because, under the AES test, "*there [also] needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it.*"
1074. According to the AES tribunal, this "appropriate correlation" between the state's public policy objective and the measure adopted to achieve it "*has to do with the nature of the measure and the way it is implemented.*" This indicates that the AES tribunal did not have in mind just a means-ends relationship between the measure and the public policy but a deeper inquiry into the nature of the measure and the actual implementation thereof. Even allowing for the breadth of the concept of

⁶⁷⁶ See notably **R-34**, RDL 6/2009, the Explanatory Statement of RDL 6/2009 of 7 May 2009 where the Spanish State stated that "[t]he growing tariff deficit, i.e. the difference between that collected from the regulated tariffs set by the government and that which the consumers pay for their regulated supply and from the access tariffs set by the liberalised market, and the real costs associated with these tariffs, is producing serious problems, which in the current context of international financial crisis is profoundly affecting the system"; see also **R-238**, Journal for the Sessions of the Congress. Ratification of RD-Act 14/2010, establishing urgent measures for the correction of the tariff deficit in the electricity sector; **R-308**, Press Release from the Ministry of Industry, Energy and Tourism: "The electric reform puts an end to the deficit of the electrical system and ensures that it is in balance", 27 November 2015; **R-99**, Submissions from the AEE to the CNE during hearing proceedings with the Electricity Advisory Board concerning the Draft Royal Decree that regulates and modifies certain aspects relating to the special regimen, 30 August 2009; **RL-46**, Memorandum of Understanding on Financial-Sector Policy Conditionality subscribed with EU: "VI. Public Finances, Macroeconomic Imbalances and Financial Sector Reform", 20 July 2012; Quadrant First Report, paras. 353 *et seq.*; Margarit Regulatory Report, p. 51 (notably figure 5).

⁶⁷⁷ See in particular **R-238**, the speech of the Spanish Minister for Industry, Tourism and Commerce before the Spanish Congress made on 26 January 2011 in the context of the ratification of RDL 14/2010, establishing urgent measures for the correction of the tariff deficit in the electricity sector, p. 47.

⁶⁷⁸ **RL-46**, Memorandum of Understanding on financial-sector policy conditionality dated 20 July 2012, para. 31; see also **R-308**, Press Release from the Ministry of Industry, Energy and Tourism: "*The electric reform puts an end to the deficit of the electrical system and ensures that it is in balance*", 25 November 2015.

reasonableness, not every measure designed to pursue a rational public policy and not every way of implementing such measure can be considered reasonable.

1075. In the present case, the Tribunal (by majority) considers that a distinction must be drawn between (i) the pre-2013 Disputed Measures, *i.e.* RD 1565/2010, RDL 14/2010 and RDL 2/2013 and (ii) the New Regulatory Regime, *i.e.* RDL 9/2013, Law 24/2013, RD 413/2014 and MO IET/1045/2014.
1076. The Tribunal does not consider that the pre-2013 Disputed Measures qualify as “*unreasonable*” for the purposes of the third sentence of Article 10(1) ECT, insofar as these Measures, no matter how much they disappointed investors enrolled under the Special Regime, were not an unreasonable way of seeking to correct the tariff-deficit imbalance. This conclusion is not in contradiction with the Tribunal’s earlier finding that the permanent cap imposed by RDL 14/2010 breached Spain’s obligation of Fair and Equitable Treatment with respect to plants enrolled under RD 661/2007 because the two analyses have been conducted under two different legal standards.
1077. Nevertheless, and while it is not for the Tribunal to pass judgment on whether the New Regulatory Regime was the best (or even the only) way of implementing Spain’s objective of reducing the tariff deficit, the Tribunal (by majority) finds that the Measures adopted as part of the New Regulatory Regime were plainly unreasonable. The Tribunal recalls that the New Regulatory Regime subjected the Claimants’ investments to an entirely new set of remuneration parameters that had nothing to do with the regulatory framework under which the Claimants initially invested, leading to a significant decrease of their remuneration going forward. Moreover, by taking their past earnings into consideration when calculating their future remuneration, the New Regulatory Regime introduced a “super-retroactivity” (or claw-back) effect that further penalized investors enrolled under the Special Regime.⁶⁷⁹
1078. For these reasons, the Tribunal (by majority) finds that the Disputed Measures comprising the New Regulatory Regime were unreasonable and impaired the use, enjoyment or disposal of the Claimants’ investments, contrary to the third sentence of Article 10(1) ECT.
1079. The Tribunal (by majority) therefore, finds that Spain breached its non-impairment obligation under Article 10(1) ECT to the extent that it enacted the New Regulatory Regime.
1080. However, absent any demonstration by the Claimants that the breach of the impairment clause would have caused them a distinct loss, such breach shall not affect the amount of compensation to which the Claimants are already entitled as a result of Spain’s breach of the FET obligation, which the Tribunal (by majority) has found *supra*.

⁶⁷⁹ Brattle First Regulatory Report, paras. 153 et seq. and notably Figure 16; see also **BRR-97**, Dr. Dörte Fouquet and Nysten, Jana Victoria, Policy Briefing Report, Retroactive and Retrospective Changes and Moratoria to RES Support, co-founded by the Intelligent Energy Europe Programme of the EU, March 2015, p. 22.

6.4 Article 10(1) of the ECT: The Umbrella Clause

6.4.1 The Claimants' Position

1081. The Claimants further submit that Spain's New Regulatory Regime violates the umbrella clause of the ECT.⁶⁸⁰
1082. The Claimants contend that (i) the umbrella clause of the ECT covers any obligations, rather than only contractual obligations, with an investor or an investment, and (ii) Spain's legislative and regulatory promises fall within its scope.
1083. The umbrella clause in Article 10(1) ECT explicitly states that “[e]ach Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”
1084. The Claimants submit that under Article 31 VCLT, the Tribunal must interpret the umbrella clause “*in good faith in accordance with the ordinary meaning*” of its terms. The Claimants argue that if the Contracting Parties to the ECT had wanted the umbrella clause to cover only contractual obligations, they would have drafted “*contractual obligations*” instead of “*any obligation*” as they did.⁶⁸¹ The Claimants refute Spain's contention that such obligations may only be entered into in the form of a contract: the Oxford English Dictionary defines “*enter into*” as to “*undertake to bind oneself by (an agreement or other commitment)*” and this understanding is supported by arbitration practitioners.⁶⁸²
1085. The Claimants contend that a number of cases confirm that the wording of the umbrella clause of the ECT is broad and does not differentiate between contractual obligations and legislative or regulatory undertakings:⁶⁸³
- The tribunal in *Al-Bahloul v. Tajikistan* confirmed that the umbrella clause in the ECT “*is broadly stated, referring as it does to ‘any obligation’ and, as such, by the ordinary meaning of the words, includes both statutory and contractual obligations.*”
 - The tribunal in *AMTO v. Ukraine* recognized the “*wide character*” of the umbrella clause of the ECT.
 - In *Khan Resources v. Mongolia*, the tribunal held that a breach by Mongolia of any provision of its Foreign Investment Law would constitute a breach of the umbrella clause of the ECT.

⁶⁸⁰ Cl. Mem., paras. 509 *et seq.*; Cl. Reply, paras. 663 *et seq.*

⁶⁸¹ Cl. Reply, para. 665.

⁶⁸² Cl. Reply, para. 666.

⁶⁸³ Cl. Mem., paras. 510 *et seq.*

1086. In addition, the Claimants submit that the cases cited by Spain do not support its position:⁶⁸⁴

- The *CMS v. Argentina* tribunal interpreted the umbrella clause under the Argentina-US BIT to be broad and not limited to contractual obligations.
- The *SGS v. Philippines* tribunal referred to “*legal obligations*,” rather than strictly contractual obligations.
- While Spain repeatedly quotes the *Blusun v. Italy* award to argue that it did not enter into any obligations with investors, the sections cited are not related to the umbrella clause but are rather part of the tribunal’s legitimate-expectations analysis.
- The language Spain quotes from the *Perenco v. Ecuador* and *Plama v. Bulgaria* awards is from the tribunals’ respective analyses on the fair and equitable treatment standard and not the umbrella clause.
- The tribunal in *Enron v. Argentina* stated that “*the phrase ‘any obligation’ refers to obligations regardless of their nature*” and noted that prior tribunals had “*found it to cover both contractual obligations ... as well as obligations assumed through law or regulation.*”
- The tribunal in *Continental Casualty v. Argentina* also stated that a State’s obligations under the umbrella clause “*can include the unilateral commitments arising from provisions of the law of the host State regulating a particular business sector and addressed specifically to the foreign investors in relation to their investments therein.*”
- While the *Noble Ventures* tribunal found that States may enter into general commitments in legislative acts, it did not suggest that all legislative acts are general in nature.

1087. The Claimants point out that they do not argue that the umbrella clause is a stabilization clause, which is a concept relevant to a legitimate-expectations analysis. Rather, the Claimants argue that the umbrella clause obligates States to “*observe any obligations [they] have entered into with an Investor or an Investment of an Investor.*”⁶⁸⁵

1088. The Claimants submit that each of Spain’s measures violated the umbrella clause of the ECT.⁶⁸⁶

1089. According to the Claimants, Spain violated the obligations it had undertaken toward the Claimants’ investment starting in 2010, when it progressively reduced the

⁶⁸⁴ Cl. Reply, paras. 667 *et seq.*

⁶⁸⁵ Cl. Reply, para. 673.

⁶⁸⁶ Cl. Mem., paras. 515 *et seq.*

remuneration that it had agreed to provide in its regulatory framework. Spain further revoked the rights it had granted to the Claimants' facilities in 2013/2014 when it abrogated the RD 661/2007 and RD 1578/2008 regulatory regimes in their entirety.

1090. The Claimants add that when Spain cancelled the right of the Claimants' plants registered under RD 661/2007 to receive fixed tariffs after Year 25 (and then after Year 30) of operation, Spain violated the obligation it had undertaken to pay fixed tariffs to the Claimants' plants for their full operating lives, as per Article 36 of RD 661/2007. Spain also violated the Claimants' right to receive fixed tariffs on all the electricity produced by their plants when Spain imposed "*operating hour*" limitations on the Claimants' facilities, thus breaching Article 17 of RD 661/2007 (also applicable to RD 1578/2008).
1091. Moreover, the Claimants argue that Spain's imposition of a 7% reduction on all revenues (allegedly disguised as a "tax") violated its commitment to pay tariffs at the rates specified in Article 36 of RD 661/2007 and Article 11 of RD 1578/2008 (as well as the resolutions issued in respect of *Valle Hermoso II* and *Salinas*), and its modification to the inflation-adjustment mechanism violated the terms of Article 44(1) of RD 661/2007 and Article 12 of RD 1578/2008. According to the Claimants, all those measures violated the non-retroactivity obligation in Article 44(3) of RD 661/2007, which was also applicable to RD 1578/2008, in which Spain had committed not to apply future revisions of the tariff system to existing facilities.
1092. The Claimants contend that Spain failed to fulfil its obligations in RD 661/2007 and RD 1578/2008 by abrogating the combined regimes entirely and replacing them with the New Regulatory Regime. Spain's abrogation of RD 661/2007 and RD 1578/2008 violated all the obligations it had undertaken toward the Claimants' investments in its legislative and regulatory framework.

6.4.2 The Respondent's Position

1093. The Respondent contests the Claimants' allegation that Spain has violated the so-called umbrella clause of Article 10(1) ECT.⁶⁸⁷
1094. First, the Respondent submits that the interpretation made by the Claimants is contrary to the wording of Article 10(1) ECT and to the interpretation thereof by the doctrine and arbitral precedents.⁶⁸⁸
1095. The Respondent argues that the Claimants misrepresent the content and purpose of Article 10(1) last section of the ECT. It is obvious that Article 10(1) last section of the ECT clearly uses the term "*entered into*," which implies the assumption of specific obligations on the part of the State in respect of a specific investor or a specific investment. The obligations of the State must therefore be specific and must have been assumed by the State with respect to a particular investor in a vis-à-vis

⁶⁸⁷ Resp. C-Mem., paras. 1070 *et seq*; Resp. Rej., paras. 1071 *et seq*.

⁶⁸⁸ Resp. C-Mem., paras. 1072-1091; Resp. Rej., paras. 1074-1086.

relationship. Other essential elements of the umbrella clause are that the obligation should exist in accordance with the internal law of the State receiving the investment, and that the obligation should have been contracted with the foreign investor. The umbrella clause does not transmute the obligation, so that compliance of the same can only be required in the international scenario by the “*creditor*” of such obligation.⁶⁸⁹

1096. Contrary to the “*ECT Reading Guide*”, the Claimants aim to include a State regulatory rule in this scope, regardless of the existence of a specific consensual relationship between the State and the investor or its investment. This means ignoring the very essence of the umbrella clause, which authors like Wälde call “*pacta sunt servanda clause*”, emphasizing its “*contractual*” nature. In this case, the Spanish regulatory framework, including RD 661/2007 and RD 1578/2008 has an *erga omnes* character, not addressed to a specific investor. The individuals to which these regulations were addressed were tens of thousands of people, national and foreign. The regulation invoked is, therefore, not covered by this last section of Article 10(1) ECT.⁶⁹⁰
1097. The Respondent further argues that the arbitral awards and doctrine invoked by the Claimants do not cover their interpretation of the umbrella clause of the ECT. None of the awards cited by the Claimants allow supporting a generic and lax interpretation of the umbrella clause.⁶⁹¹
1098. Second, the Kingdom of Spain has not entered into a “*vis-à-vis*” relationship with the Claimants through unilateral acts, either under RD 661/2007 or RD 1578/2008. Regarding the alleged obligations unilaterally contracted by the Kingdom of Spain towards the Claimants or their investments through RD 661/2007 and RD 1578/2008, the Respondent argues that the umbrella clause does not cover this type of obligations. Royal Decrees 661/2007 and 1578/2008 neither contain specific obligations nor grant the foreign investor a specific treatment covered by the umbrella clause.⁶⁹²
1099. Third, the Kingdom of Spain has not breached the umbrella clause. Even if, hypothetically, the Tribunal was to accept the Claimants’ contention that Spain had undertaken, under those acts, some kind of commitment with the Claimants or their investments, the Respondent argues that such a commitment would be limited to applying the legal regime in force in its entirety and not limited to RD 661/2007 and 1578/2008.⁶⁹³
1100. Law 54/1997 established the legal framework of the electricity sector and established two basic guarantees for renewable energy producers: (i) the right of access and dispatch priority and (ii) the right to obtain a premium which, added to the market price, allows them to obtain a “*reasonable rate of return according to the cost of*

⁶⁸⁹ Resp. C-Mem., paras. 1072-1078; Resp. Rej., paras. 1074-1078.

⁶⁹⁰ Resp. C-Mem., paras. 1079-1084.

⁶⁹¹ Resp. C-Mem., paras. 1085-1091.

⁶⁹² Resp. C-Mem., paras. 1092-1097; Resp. Rej., paras. 1087-1099.

⁶⁹³ Resp. C-Mem., paras. 1098.

money in the capital market”, established in Article 30(4). This “*reasonable rate of return*” principle is deliberately ignored by the Claimants. This legal regime has been interpreted by multiple rulings of the Supreme Court of the Kingdom of Spain, which the Claimants knew or should have known, when they made their investments. Simply put, under Spanish law there is no obligation such as the one that the Claimants wish to rise to the international level under the umbrella clause.⁶⁹⁴

1101. Therefore, the Claimants’ claims on the violation of the standard comprised in Article 10(1) ECT should be dismissed according to the literal interpretation of last section of Article 10(1). Neither the Claimants, as investors, nor the Claimants’ investments are protected under the umbrella clause of the ECT as Spain has not entered into specific commitments with them to petrify its remuneration regime.⁶⁹⁵

6.4.3 The Tribunal’s Analysis

1102. The claim to be examined is governed by the last sentence of Article 10(1) ECT, which reads as follows:

“Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”

1103. In keeping with the usual terminology, the Tribunal will refer to this provision as the Umbrella Clause. The issue before the Tribunal is whether, by enacting the Disputed Measures, Spain breached the Umbrella Clause, giving rise to the international consequences of a breach.

1104. In substance, the Claimants contend that the language of the Umbrella Clause is sufficiently broad to include the obligations that Spain allegedly undertook *vis-à-vis* the Claimants and their investments through RD 661/2007 and RD 1578/2008. They argue that, consequently, the Umbrella Clause was breached when Spain subsequently amended (and ultimately, repealed) those regulations.⁶⁹⁶ Spain contests this claim and submits, in essence, that RD 661/2007 and RD 1578/2008 do not fall within the scope of the Umbrella Clause because they are *erga omnes* regulations not specifically addressed to the Claimants and, in any event, Spain did not breach that clause.⁶⁹⁷

1105. The Tribunal considers that it must interpret the Umbrella Clause under the rules of treaty interpretation set forth in the VCLT, especially those established in Article 31. The key terms which are under contention and must be interpreted are “any,” “obligations,” and “entered into.” The Tribunal agrees with the Claimants⁶⁹⁸ that the use of the phrase “*any obligation*” suggests that this provision was meant to be given

⁶⁹⁴ Resp. C-Mem., paras. 1099-1102.

⁶⁹⁵ Resp. C-Mem., paras. 1111; Resp. Rej., para. 1099.

⁶⁹⁶ Cl. Mem., paras. 509-522; Cl. Reply, paras. 663-675.

⁶⁹⁷ Resp. C-Mem., paras. 1070-1112; Resp. Rej., paras. 1071-1099.

⁶⁹⁸ Cl. Mem., paras. 510-513.

a broad scope of application, insofar as it is not expressly limited to contractual obligations but may include obligations of another source. However, this phrase must be read in conjunction with the rest of the sentence, *i.e.* “any obligation entered into with an Investor or an Investment of any other Contracting Party.” (emphasis added).

1106. The interpretation of the phrase “entered into with” suggests that the obligation referred to in the Umbrella Clause is one undertaken by the State with respect to an investor or an investment in particular (or a defined class of them), for instance, by way of a contract or a binding unilateral declaration or any other form of binding personal promise or commitment, such as an individual license. This phrase does not suggest that it encompasses any general legislative or regulatory act, even if such act was addressed to an open-ended category of persons, a point confirmed by several of the Claimants’ legal authorities.⁶⁹⁹
1107. In the present case, the Tribunal notes that RD 661/2007 and RD 1578/2008 are regulatory acts which were not specifically addressed to the Claimants or their investments but to an open-ended class of producers of renewable energy, whether domestic or foreign. On this basis, the Tribunal concludes that these regulations could not have been the source of obligations entered into with the Claimants or their investments, unless appropriate separate steps were taken to individualize the Claimants as members of that class in a manner sufficient to create a legal obligation between the Claimants and the State.
1108. The Claimants contend that the RAIPRE registration performed that function of identifying the Claimants as beneficiaries of the obligations allegedly undertaken by Spain in the Special Regimes of RD 661/2007 or RD 1578/2008. The Tribunal is not persuaded by this argument, because the RAIPRE registration was merely an administrative requirement imposed on producers that wished to benefit from those regimes, and no evidence has been produced to the effect that at the time either the government or the Claimants understood that registration as a fact that would complete the formation of a contract or another source of legally binding obligations.
1109. Finally, the Tribunal takes comfort from the observation that none of the decisions on the record involving the Respondent and dealing with the same legislative and regulatory framework appears to have upheld the Claimants’ claim for breach of the “umbrella clause” of the ECT based on the fact that Spain amended and subsequently repealed RD 661/2007 and RD 1578/2008.

⁶⁹⁹ See notably in a similar factual context, **CL-150**, *9REN*, para. 342: “That context is apt for a bilateral contract, such as a concession or licence agreement. It is not apt to describe a State’s public legislation or administrative regulations. A State does not “enter into” such legislation with a private party. In any event, a legitimate expectation, divorced from its anchorage in the FET standard, is itself not a free standing “obligation” in the sense of Article 10(1) of the ECT”; **CL-26**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 July 2009, para. 257: “In both cases, however, it is clear that the obligation must have been entered into “with” an Investor or an Investment of an Investor. Therefore, this provision does not refer to general obligations of the State arising as a matter of law.”; see also **RL-21**, *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 121; **RL-22**, *Noble Ventures, Inc v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 51.

1110. Therefore, the Tribunal unanimously concludes that the Claimants cannot rely on the Umbrella Clause of Article 10(1) ECT to seek to engage the international responsibility of Spain as a result of the Disputed Measures.

1111. The Claimants' claim for breach of the last sentence of Article 10(1) ECT is accordingly dismissed.

6.5 Defense of Necessity

6.5.1 The Claimants' Position

1112. In substance, the Claimants allege that the Respondent's violations of the ECT are not excused by the defense of necessity.⁷⁰⁰

1113. First, the Claimants submit that Spain enacted its electricity sector reforms to address the tariff deficit that it had ignored since the year 2000⁷⁰¹ and that Spain's retroactive cuts by way of the New Regulatory Regime were the result of a conscious political decision to avoid raising electricity costs on end-consumers, when Spain had been under-charging those consumers for years.⁷⁰² Spain could have taken other measures to address such tariff deficit, like raising regulated tariffs on consumers or creating a carbon dioxide tax or fuel levy.⁷⁰³ Spain has not offered any meaningful response to the alternatives that Claimants proposed, and it has not explained why it could not have taken other measures to eliminate the tariff deficit.⁷⁰⁴

1114. Second, the Claimants also note that no authority has independently concluded that a state of necessity excused Spain's changes to RD 661/2007 and RD 1578/2008.⁷⁰⁵ While there are general statements to the effect that Spain needed to reform its electricity sector to address its tariff deficit, Spain has not established that it needed to reduce the remuneration granted to existing facilities under RD 661/2007 and RD 1578/2008 to accomplish that goal.

1115. Finally, it is the Claimants' contention that Spain has not and cannot establish a "*defense of necessity*" under international law.⁷⁰⁶ Even if Spain could satisfy the extremely high legal standard to prove "*necessity*"—which it cannot—it does not follow that Spain is relieved from the obligation to compensate the Claimants for the harm its measures caused. A number of arbitral tribunals have maintained that a necessity defense does not exclude the duty to compensate the harmed investor, which is also reflected in Article 27 of the ILC Articles on State Responsibility. For example, in *CMS v. Argentina*, the tribunal stated that "*the plea of necessity may*

⁷⁰⁰ Cl. Reply, paras. 690-733.

⁷⁰¹ Cl. Reply, paras. 692-709.

⁷⁰² Cl. Reply, para. 732.

⁷⁰³ Brattle Rebuttal Regulatory Report, para. 101; see also Cl. Opening Presentation, Slides 134-39; Tr., Day 1, 115:-119:11, Cl. PHB, para. 54.

⁷⁰⁴ Brattle Rebuttal Regulatory Report, para. 103.

⁷⁰⁵ Cl. Reply, paras. 710-720.

⁷⁰⁶ Cl. Reply, paras. 721-733.

preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed".⁷⁰⁷ In *BG Group v. Argentina*, the tribunal stated that a State "*remains obligated to pay compensation*" even if necessity is found.⁷⁰⁸

6.5.2 The Respondent's Position

1116. The Respondent does not invoke a defense of necessity in the present case⁷⁰⁹ nor does it argue that the Disputed Measures were the only means available to tackle the tariff deficit. According to the Respondent, however, the Disputed Measures were, the most reasonable and proportionate of the alternatives.⁷¹⁰
1117. The Respondent contends that the electric tariff deficit –the imbalance between incomes and costs of the SES– is a fact in this arbitration that has been unquestionably proven by Spain. This fact is relevant to the merits of the case for two reasons: it is a fact that shapes the Claimants' alleged legitimate expectations, and it is a fact that must be taken into consideration by the Tribunal when assessing if the disputed measures were reasonable and proportionate.⁷¹¹
1118. In particular, the Respondent explains that the tariff deficit reached unsustainable levels since 2010⁷¹² to a large extent because of the renewable energy regime and that such deficit threatened not only the whole of the Spanish electricity system, to the risk of collapsing, but also the Spanish economy in general, generating a cumulative debt amount for all consumers.⁷¹³ According to the Respondent, the Disputed Measures therefore prevented the collapse of the Spanish electricity system by eliminating an accumulated deficit of approximately € 40 billion, with annual deficits of over € 5 billion and by generating an annual surplus of € 550 million, thereby pursuing and achieving an object of clear public interest.⁷¹⁴
1119. Contemporaneous government estimates further show that, absent the Measures taken in 2012 and 2013, the annual tariff deficit would have reached € 10.5 billion in 2013.⁷¹⁵ Therefore, even if Brattle's calculations were correct and its "*alternative Measures*" were feasible and viable (which the Respondent denies), they would not have eliminated the tariff deficit.⁷¹⁶

⁷⁰⁷ **CL-43**, *CMS*, para. 388.

⁷⁰⁸ **CL-49**, *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, para. 409.

⁷⁰⁹ Resp. Rej., para. 1065; Resp. PHB, para. 113.

⁷¹⁰ Resp. Rej., paras. 1066-1067; Resp. PHB, paras. 113-125.

⁷¹¹ Resp. PHB, para. 114.

⁷¹² Quadrant First Report, para. 353, Figure 44.

⁷¹³ Resp. Rej., para. 1068.

⁷¹⁴ Resp. Rej., para. 1069.

⁷¹⁵ **QE-102**, Gómez-Acebo & Pombo, "Recent Amendments and Reforms to the Energy Sector: Law 15/2012 and Royal Decree Law 29/2012," Legal Analysis, January 2013, p. 12.

⁷¹⁶ Resp. PHB, paras. 123-125.

6.5.3 The Tribunal's Analysis

1120. The Tribunal notes that the Respondent has expressly confirmed in this arbitration that it did not rely on the international law defense of necessity, which may, in certain exceptional cases, relieve a State from its international obligations. Therefore, in the interest of procedural economy, the Tribunal does not need to engage further into an analysis of whether this defense could be theoretically available to Spain in the present case or to reach a finding on this issue.
1121. That being said, the Tribunal agrees with the Respondent that the tariff deficit and related macroeconomic circumstances are relevant considerations in the FET analysis. Those circumstances have been considered as part of that analysis⁷¹⁷ and also in discussing the claim for breach of the Impairment Clause.⁷¹⁸

6.6 **General Conclusion on Liability**

1122. In conclusion, the Tribunal (by majority) finds that the Respondent has breached Article 10(1) of the ECT (i) by failing to accord fair and equitable treatment to the investments of the Claimants and (ii) by impairing the management, maintenance, use, enjoyment or disposal of such investments by unreasonable or discriminatory measures.
1123. The Claimants are therefore entitled to compensation as a result of the Respondent's breach of its ECT obligations to the extent detailed below.

7. **DAMAGES**

7.1 **The Claimants' Position**

7.1.1 The Applicable Legal Standard for Compensation

1124. The Claimants submit that they are entitled to full compensation as a result of Spain's violations of the ECT.
1125. The Claimants argue that the only *lex specialis* on compensation that present in the ECT is Article 13, which sets out the conditions to satisfy in order lawfully to expropriate investments held by protected investors. Nevertheless, the ECT does not clearly set out a standard of compensation for the violation of its provisions. Therefore, the Tribunal should apply the rules of customary international law on reparation.⁷¹⁹

⁷¹⁷ See notably paras. 1026-1032 *supra*.

⁷¹⁸ See notably paras. 1070-1079 *supra*.

⁷¹⁹ Cl. Mem., para. 524.

1126. The Claimants rely on the 1928 *Chorzów Factory* case,⁷²⁰ which first established the principle of full compensation. According to that case,

*“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.*⁷²¹

1127. Additionally, the Claimants cite Article 35 of the ILC’s Draft Articles stating that “a State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.”

1128. The Claimants also refer to Article 36 of the ILC’s Draft Articles which states that in case full restitution is impossible, “the compensation shall cover any financially assessable damage including loss of profits insofar as it is established”.⁷²²

7.1.2 Valuation Methodology and Quantification of Damages

1129. The Claimants seek as damages the diminution in the fair market value of their investments, calculated according to the discounted cash flow (“**DCF**”) method, caused by Spain’s violations of the ECT.⁷²³

7.1.2.1 Valuation Date

1130. The Claimants submit that the appropriate valuation date for the assessment of damages is the date of the award (*ex post*).⁷²⁴

1131. According to the Claimants, the New Regulatory Regime is causing increasing harm to their investments. Thus, the date of the Award will permit the Tribunal to have all of the information available in order to calculate the damages. To support their argumentation, Claimants cite the *Burlington Resources v. Ecuador* case:

“Such a valuation will obviously be more accurate and reliable if actual information is used in respect of relevant facts that have occurred between the expropriation and the award, rather than projections based on information available on the date of the expropriation. The valuation

⁷²⁰ **CL-65**, *Case Concerning Factory at Chorzów (Germany v. Poland)*, Judgment 13, PCIJ, Sept. 13, 1928 (1928 PCIJ, Series A. No. 17)

⁷²¹ Cl. Mem., para. 525.

⁷²² Cl. Mem., para.531, citing **CL-12**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Arts. 35-36.

⁷²³ Cl. Mem., para.535.

⁷²⁴ Cl. R-Mem., section VI, C.

*will be closer to reality if the Tribunal decides with “maximum information” rather than “maximum ignorance”.*⁷²⁵

1132. The Claimants also rely on other cases in which the tribunal adopted the same approach, such as *ADC v. Hungary*:

*“ [...] However, in the present, sui generis, type of case the application of the Chorzów Factory standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed”.*⁷²⁶

1133. In the Claimants’ view, Spain’s argumentation based on Article 13 of the ECT is not valid, as this article only applies to legal expropriation, not illegal expropriations, or breaches of Article 10 of the ECT, as in the case at hand.⁷²⁷

7.1.2.2 Comparison Between a But-For Scenario and an Actual Scenario

1134. In substance, and as set out in their two quantum reports (as updated after the hearing), Brattle, the Claimants’ expert, calculated the quantum of compensation that the Claimants claim to be owed based on the difference between: (a) the value that the Claimants’ investments in Spain would have had if Spain had not introduced the measures that the Claimants contend in this arbitration violated the ECT (the “**But-For Scenario**”); and (b) the value of those investments after the introduction of those measures (the “**Actual Scenario**”).⁷²⁸

1135. Brattle employs a three-step method to compute the quantum of damages required to put the Claimants in the position they would have occupied but for the illegal measures.

(a) Historical Damages Up to the Valuation Date

1136. First, to calculate damages from the historical effects of Spain’s measures (prior to the Valuation Date), Brattle calculates the amount of additional cash flows that the investments would have generated in the But-For scenario based on actual historical operating and financial data for each of the Claimants’ installations on the assumption that Spain had not implemented any of the illegal measures.⁷²⁹ Thus, Brattle calculates the amount of additional cash flow the plants would have generated had they: (i) continued to receive the remuneration guaranteed by the Original Regulatory Regime on all of their production; (ii) not been subjected to the 7% tax; and (iii) continued to receive cash flows without the delay in payment introduced by RD

⁷²⁵ Cl. R-Mem., para. 761.

⁷²⁶ Cl. R-Mem., para. 762.

⁷²⁷ Cl. R-Mem., para. 764.

⁷²⁸ Cl. Mem., para. 537; Brattle Quantum Report, para. 22.

⁷²⁹ Cl. Mem., para. 539; Brattle Quantum Report, paras. 22, 72-81.

9/2013. Brattle then “rolls forward” that amount to the Valuation Date at the rate of pre-award interest.

1137. According to Brattle’s latest calculation in its Quantum Update Model submitted in May 2020, the Disputed Measures reduced the operating income attributable to the Claimants’ interests in the plants between December 2010 and December 2019 by € 16 million (including interest).⁷³⁰

(b) Fair Market Value of the Claimants’ Investments as of the Valuation Date

1138. Second, to calculate damages from the future effects of Spain’s measures, Brattle calculates the difference in the fair market value of the Claimants’ investments in the Actual and But For scenarios as of the Valuation Date (updated to December 2019 in its latest calculation), using the discounted cash flow (DCF) method.⁷³¹

(i) Use of the DCF Method

1139. The DCF method values an investment based on the stream of future cash flows that the investment is expected to generate, “discounted” by a particular percentage rate per year to determine a present value.⁷³²

1140. Claimants state that “*the DCF method is the primary valuation tool in the power sector, both for investment decisions and for measuring damages in disputes, because power stations have a relatively simple business model with operating parameters, costs, and revenues that can be predicted with a high degree of confidence based on readily available data*”.⁷³³

1141. In response to Spain’s criticisms as to the use of the DCF method,⁷³⁴ the Claimants further contend that this method is appropriate and reliable⁷³⁵ for the following reasons:

- First, the DCF method focuses on future cash flows generated by tangible assets, therefore such cash flows are less speculative than those of intangible assets.
- Second, the DCF method is the primary valuation tool used in the power sector, and the PV plants were not supposed to be subject to market volatility as the tariff was fixed.
- Third, the plants are expected to operate at highly predictable production levels for 30-35 years.

⁷³⁰ Brattle Quantum Update Model, Tables Q – Updated Financial Model_Dec 19.xlsb., Table Q2.

⁷³¹ Cl. Mem., para. 539; Brattle Quantum, Report, paras. 23-31 and Section V.

⁷³² Brattle Quantum Report, para. 146.

⁷³³ Cl. Mem., para. 541; Brattle Quantum Report, paras. 83-84.

⁷³⁴ Resp. C-Mem., Section VI, B; Resp. Rej., Section VI, A.

⁷³⁵ Cl. Reply, Section VI, B.

- Finally, nearly every arbitration case that has found a violation of the ECT in a case such as the one at hand has used the DCF method to calculate damages.⁷³⁶

1142. Brattle has therefore performed a DCF calculation for each scenario: Actual and But-For.⁷³⁷

(ii) Calculation of Future Cash Flows in Both Actual and But-For Scenarios

1143. Both scenarios share common assumptions regarding certain variables that are not expected to differ between the But-For Scenario and the Actual Scenario, notably: future power production,⁷³⁸ inflation,⁷³⁹ limit on the tax deductibility of interest pursuant to RDL 12/2012.⁷⁴⁰

1144. As explained in Brattle's first quantum report, however, the DCF models used in the But-For and Actual Scenarios differ with respect to several parameters: operating costs,⁷⁴¹ depreciation and amortization,⁷⁴² the 7% tax,⁷⁴³ pool price forecast,⁷⁴⁴ financial support,⁷⁴⁵ operating lifetime,⁷⁴⁶ and cash collection delays.⁷⁴⁷ In particular,

- The But-For scenario assumes the continued application of feed-in-tariffs available to the plants in the absence of the Disputed Measures for the four projects operating under RD 661/2007 and the project operating under RD 1578/2008.
- The But-For scenario and Actual scenarios assume different time horizons for the projects operating under RD 661/2007. Brattle assumes that PV plants have a technical useful life of 35 years and that the projects under RD 661/2007 could have operated for the entirety of their useful lives in the But-For scenario. Brattle further assumes that the projects operating under RD 1578/2008 would operate for 25 years consistent with the period of regulatory support under RD 1578/2008. In the Actual Scenario, Brattle assumes that all of the PV projects would operate for 30 years, consistent with the period of regulatory support under the New Regulatory Regime.
- The But For model assumes lower regulatory risk than in the Actual scenario. Less regulatory risk implies less uncertainty and consequently a lower

⁷³⁶ Cl. Reply, paras. 753-756; **CL-41**, *Eiser*, **CL-6**, *Masdar*, **CL-7**, *Antin*.

⁷³⁷ Cl. Mem., para. 542.

⁷³⁸ Cl. Mem., para. 542; Brattle Quantum Report, para. 94.

⁷³⁹ Cl. Mem., para. 542; Brattle Quantum Report, para. 99.

⁷⁴⁰ Brattle Quantum Report, para. 100.

⁷⁴¹ *Id.*, paras. 101-116.

⁷⁴² *Id.*, para. 117.

⁷⁴³ *Id.*, para. 118.

⁷⁴⁴ *Id.*, paras. 119-123.

⁷⁴⁵ *Id.*, paras. 124-129.

⁷⁴⁶ *Id.*, paras. 130-137.

⁷⁴⁷ *Id.*, paras. 138-139.

discount rate, leading to a higher value for the Claimants' investments compared to the Actual Scenario (see below).

(iii) Discount Rate

1145. Thereafter, Brattle discounts the future project free cash flows in each scenario to present value using a discount rate derived using the Capital Asset Pricing Model (CAPM). In its second quantum report, Brattle uses the 20-year EURIBOR swap rate as risk-free rate and an asset beta of 0.5. However, Brattle accepts Quadrant's proposed use of a market risk premium of 4.3% (instead of 5.5% in its first report). Brattle therefore reduces its discount rate from 4.2% (2017 Valuation Date) to 3.5% (2018 Valuation Date).⁷⁴⁸

(iv) Regulatory Risk or "Revenue Haircut"

1146. Next, Brattle accounts for the increased regulatory risk resulting from the Disputed Measures by applying a "revenue haircut."

1147. According to the Claimants, this adjustment recognizes that the Disputed Measures demonstrate Spain's willingness to enact retroactive changes to the regulatory regime governing PV projects, which increases the risk of more such changes in the future compared to investors' expectations in the But-For Scenario. To capture that risk in its DCF models, the Claimants explain that Brattle has analyzed the historical price movements in bonds financing the Spanish tariff deficit, which rely for repayment on long-term electricity system collection rights and are exposed to similar risks of retroactive change in these rights by Spain. Using a probability model, Brattle calculates a "revenue haircut" reflecting the increased regulatory risk in the Actual scenario over the But-For scenario.

1148. In response to Quadrant's assumption that the regulatory risk would be significantly higher in the But-For Scenario than in the Actual scenario, the Claimants and Brattle reply that such assumption is speculative and illogical.

1149. According to Brattle, regulatory risk is in fact materially higher in the Actual scenario than in the But-For scenario, for the obvious reason that the Disputed Measures demonstrate Spain's willingness to violate its legal obligations. Indeed, several arbitral tribunals (*Masdar*, *Novenergia*, *Antin*, *Greentech*, *Cube*) have accepted this conclusion, and rejected identical arguments on regulatory risk to those advanced by Quadrant.

1150. The Claimants further submit that Spain should bear the burden of proof on this issue because its argument asserts a theory of alternative causation – *i.e.* that if Spain had not enacted the Disputed Measures, its electricity system would have collapsed amid the strain of the global financial crisis and ensuing recession, leaving the Claimants in the same position or worse off than they are now.

⁷⁴⁸ Second Brattle Quantum Report, para. 264; Brattle PowerPoint Presentation of 19 February 2020, p. 10.

1151. In this case, the Claimants have met their burden of proving that the Disputed Measures caused their injury because those measures directly reduced the cash flows that the PV plants were previously entitled to receive. Accordingly, the burden must shift to Spain to prove that the same injury would have occurred regardless of whether it enacted the Disputed Measures. Spain has not even explained, much less proven, this alternative causation theory.

(c) Valuation of the Impact of the Disputed Measures on the Claimants' Equity Interests

1152. Finally, the Claimants explain that Brattle has computed the impact of Spain's Disputed Measures on the Claimants' equity interests (as distinguished from the enterprise value of the project companies themselves) by adjusting for several effects related to the project debt, the percentage of the Claimants' distribution rights, and the illiquid nature of the Claimants' interests.⁷⁴⁹

(d) Pre-Award Interest

1153. Third, Brattle has "rolled forward" the loss from the Valuation Date to the date of the Award at the rate of pre-judgment interest.⁷⁵⁰

(e) Impact of RDL 17/2019

1154. In their Post-Hearing Brief, the Claimants confirmed that RDL 17/2019 had an impact on the calculation of the Claimants' damages.⁷⁵¹

1155. The Claimants notably recall that:

- RDL 17/2019 adopted a new methodology to calculate the target rate of return under the New Regulatory Regime: in RDL 17/2019, Spain adopted 7.09% (pre-tax) as the target rate of return for the second regulatory period, "*following the methodological and numerical proposals made by the [CNMC] for these activities*".⁷⁵²
- RDL 17/2019 substantially increased the risk premium component of the target rate of return without economic justification.⁷⁵³
- RDL 17/2019 offered to maintain remuneration based on the 7.398% (pre-tax) rate of return through the second and third regulatory periods for plants whose investors should waive their rights to pursue remedies against Spain in court and arbitration.⁷⁵⁴

⁷⁴⁹ Cl. Mem., para. 549; Brattle Quantum Report, paras. 190-213.

⁷⁵⁰ Cl. Mem., para. 539; Brattle Quantum, Report, paras. 32-33 and Section VI.

⁷⁵¹ Cl. PHB, para. 96.

⁷⁵² Cl. PHB, para. 97.

⁷⁵³ Cl. PHB, Section I, para. 99.

⁷⁵⁴ Cl. PHB, Section I, para. 101.

1156. In the present case, the Claimants allege that RDL 17/2019 has had an impact on the financial position of the Claimants' plants because, as stated above, the target rate of return for the second regulatory period applicable to those plants is now 7.09% (pre-tax).⁷⁵⁵
1157. While that target rate of return for the second regulatory period is lower than the target rate of return for the first regulatory period, it is higher than the rate of return that Brattle contemplated at the time it prepared its Second Quantum Report (which was based on the treasury yield plus 300 basis points formula used to set the return for the first regulatory period).⁷⁵⁶
1158. Hence, the quantum claim is somewhat lower than the calculations in Brattle's Second Quantum Report, as Brattle explained at the Hearing. The figures that Brattle presented at the Hearing addressed this issue, but those figures were merely a sensitivity analysis, not an updated model incorporating all the detailed parameters for the second regulatory period or the other macroeconomic factors that must be updated under an *ex-post* valuation date.⁷⁵⁷

(f) Conclusion on the Claimants' Valuation of Damages

1159. On 21 May 2020, the Claimants submitted an updated model (prepared by Brattle) of its quantum claim in order to reflect the impact of RDL 17/2019 on such calculation.
1160. According to such last updated calculation, Spain's Disputed Measures reduced the fair market value of the Claimants' investments on the Valuation Date (updated to December 2019) by € 30.4 million.
1161. Combined with the historical damages quantified at € 16 million, Brattle thus calculated total damages, as of the Valuation Date, of € 46.6 million, including € 0.2 million of pre-award interest until November 2020 and excluding tax gross-up.

7.1.2.3 Spain's "Reasonable Return" Analysis is Irrelevant

1162. According to the Claimants, the primary quantum valuation put forward by Spain's expert, Quadrant, is not a relevant valuation at all. Quadrant simply measures the difference between what Spain says the Claimants' plants were entitled to receive (a reasonable rate of return) with what Spain says the plants actually receive now (the same rate of return), and not surprisingly concludes that the Claimants suffered no damages.
1163. That mathematical exercise does not attempt to assess the damages based on the claims presented, *i.e.* the difference between the tariff rates that Claimants say their plants were entitled to receive and the returns that they actually receive under the New Regulatory Regime. Because the Quadrant valuation does not respond to the

⁷⁵⁵ Cl. PHB, Section I, para. 99.

⁷⁵⁶ Cl. PHB, Section I, para. 112.

⁷⁵⁷ Cl. PHB, Section I, para. 112.

Claimants' claims or Brattle's quantum analysis at all, it should be simply disregarded.⁷⁵⁸

1164. Moreover, Quadrant implements its return analysis incorrectly, by swallowing Spain's manipulation of post-tax and pre-tax rates of return between RD 661/2007 and the New Regulatory Regime (among other problems). When those flaws are corrected, Quadrant's own method demonstrates that the Claimants' plants are not earning a reasonable return under any definition.
1165. Alternatively, if the Tribunal accepts the argumentation of the "*reasonable return*" instead of the feed-in tariffs, Brattle performed a DCF method based on the reasonable return. This alternative calculation brings the claim to € 43.4 million.⁷⁵⁹

7.1.3 Interest

1166. The Claimants further request that the Tribunal order pre- and post-award compounded interest⁷⁶⁰ on the basis of international commercial rates.
1167. The Claimants argue that compounded interest is the generally-accepted standard for compensation in international investment arbitration and that as a result any award of interest granted by this Tribunal should be compounded.⁷⁶¹ To support this assertion, the Claimants notably cite a number of cases that have awarded compounded interest:

*"[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations... As professor Gotanda has observed 'almost all financing and investment vehicles involve compound interest...If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest'".*⁷⁶²

*"[I]nterest is an integral part of the compensation due ... and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases".*⁷⁶³

⁷⁵⁸ Cl. Reply, Section VI, A.

⁷⁵⁹ Second Brattle Quantum Report, Section XII, Table 19.

⁷⁶⁰ Cl. Mem., Section VII, C.

⁷⁶¹ Cl. Mem., Section VII, C, para. 552.

⁷⁶² Cl. Mem., Section VII, C, para. 553, **CL-76**, *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 ("**Wena Hotels**"), para. 129.

⁷⁶³ Cl. Mem., Section VII, C, para. 555, **CL-77**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 174.

1168. The Claimants deny that compound interest is punitive⁷⁶⁴ and submit that an award of interest would prevent an unjust enrichment of the Respondent. Moreover, compound interest is a way of promoting efficiency by creating an incentive not to delay the arbitral proceeding.⁷⁶⁵
1169. Finally, ordering compounded interest would compensate the Claimants for the delay between the date of the harm suffered and the award of damages and put the Parties in the same position they would have been in had the award been rendered immediately.⁷⁶⁶ To this end, Brattle has applied pre-award interest at the rate of Spain's cost of borrowing.⁷⁶⁷

7.1.4 Tax gross-up

1170. The DCM Claimants further request a tax gross-up (“TGU”) in order to compensate for the tax consequences of an award in their favor.⁷⁶⁸ They rely on an opinion on German tax law as well as an “*internal legal note*” on Spanish tax law to affirm that, while an award would not be taxed in Germany, it would however attract Spanish corporate income tax at a rate of 25%.⁷⁶⁹
1171. Since Brattle calculated the compensation due based on the value of cash flows to the DCM Claimants after payment of Spanish corporate income tax, the DCM Claimants argue that a tax gross-up is required in order to avoid double taxation⁷⁷⁰ and to place the Claimants in the same after-tax financial position as they would have been in otherwise (in the But-For scenario).⁷⁷¹ Alternatively, the DCM Claimants note that the Tribunal has the authority to resolve this issue by crafting the final disposition of its award as the *OperaFund* tribunal did, to clarify that “*the Award is made net of all taxes and/or withholdings by Spain, and Spain is ordered to indemnify Claimants for any tax liability or withholding that may be imposed in Spain*”.⁷⁷²

⁷⁶⁴ Cl. Mem., Section VII, C, para. 552, **CL-80**, *Bernardus Henricus Funnekotter and ors v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 146, (quoting: **CL-75**, *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 104).

⁷⁶⁵ Cl. Mem., para. 557.

⁷⁶⁶ Cl. Mem., para. 558.

⁷⁶⁷ Brattle Quantum Report, para. 237.

⁷⁶⁸ Cl. Reply, Section VI, E.

⁷⁶⁹ Crowe Kleeberg Report (p. 16 of the pdf).

⁷⁷⁰ Cl. Reply, para. 783.

⁷⁷¹ Second Brattle Quantum Report, paras. 332-334; Cl. PHB, paras. 113-118.

⁷⁷² Cl. PHB, para. 118.

7.2 The Respondent's Position

7.2.1 The Applicable Legal Standard for Compensation

1172. The Respondent argues that the Claimants do not meet the required burden of proof and that the damages should be rejected as they are totally and absolutely speculative.⁷⁷³
1173. The Respondent submits that the profitability figures provided by the Claimants are adequate and proportionate to a highly subsidised market, and consequently the Claimants cannot have been dispossessed of anything which may give rise to damages.⁷⁷⁴ The Respondent supports this affirmation by referring to the award in *Gemplus v. Mexico* which stated that "*Burden of Proof: Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent*".⁷⁷⁵

7.2.2 Valuation Methodology and Quantification of Damages

1174. In a nutshell, the Respondent submits that the Claimants' alleged damages are speculative and that the DCF method of valuation is inappropriate. Furthermore, Spain argues that the Original Regulatory Regime only granted a reasonable rate of return, which the New Regulatory Regime has fulfilled.⁷⁷⁶ In support of its contentions, the Respondent relies on two expert reports prepared by Quadrant, the content of which was examined during the Hearing and (partly) updated thereafter.⁷⁷⁷

7.2.2.1 Valuation Date

1175. The Respondent submits that the Tribunal should assess the Claimants' alleged damages at the date of the breach (*ex ante*),⁷⁷⁸ as notably affirmed by Professor Stern in its dissenting opinion in *Quiborax v. Bolivia*:

*"The purpose of the reparation is to compensate the consequences of the illegal act of the State, as appreciated at the time of such expropriation, not the consequences of some posterior evolution of prices or evolution of demand or other circumstances".*⁷⁷⁹

⁷⁷³ Resp. Rej., para. 40.

⁷⁷⁴ Resp. Rej., para. 42.

⁷⁷⁵ Resp. Rej., para. 1110.

⁷⁷⁶ Resp. C-Mem., para. 1119; Resp. C-Mem., para. 1106.

⁷⁷⁷ Quadrant First Report (with exhibits); Quadrant Second Report (with exhibits); Quadrant Updated Models (**QE-135** and **QE-136**).

⁷⁷⁸ Resp. C-Mem., section VI, D; Resp. Rej., section VI, F.

⁷⁷⁹ **RL-67**, *Quiborax S.A. & Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Dissenting Opinion to the Award, 16 September 2015.

1176. The Respondent also refers to several cases where the arbitral tribunal applied an *ex ante* date to support its assertion that compliance with the principle of full reparation can only be compatible with the principle of causality if an *ex ante* date is applied.⁷⁸⁰
1177. Furthermore, the Respondent highlights that the date of the breach (or *ex ante* date) is the only date considered in the ECT.⁷⁸¹ By contrast, applying an *ex post* date would be arbitrary and therefore contrary to the law.⁷⁸² Therefore, the Tribunal should not consider the Award date as the valuation date but rather the date of the contested measure.⁷⁸³
1178. Finally, the Respondent argues that the *ex ante* date is the only one that may guarantee compliance with the principle of full reparation and the principle of causality.⁷⁸⁴ According to the Respondent, the principle of causality would not be respected if the Tribunal applied the date of the Award, as it has no connection with the damages or with the measures taken. Moreover, as the value of the assets fluctuates in time and the regime may evolve, the Award date does not ensure or make certain a full reparation to the Claimants.

7.2.2.2 The PV Plants Have Earned a Rate of Return that Exceeds the Benchmark Reasonable Rate of Return

1179. In substance, the Respondent submits that the Claimants' approach distinguishing between "historical" flows and future flows, on the one hand, and between an Actual scenario and a But-For scenario, on the other hand, should be rejected as too speculative and that the quantification of the Claimants' damages, if any, must be assessed by reference to a reasonable rate of return.⁷⁸⁵
1180. First, the Respondent recalls that, according to its expert Quadrant, the internal rate of return ("**IRR**") of the Claimants' Plants is 8.6% after taxes⁷⁸⁶ and therefore exceeds the benchmark reasonable rate of return of 7 % after taxes for PV plants (as notably

⁷⁸⁰ **RL-68**, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para. 646; **RL-62**, *Gemplus SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4, Award, 16 June 2010, paras. 12,43,44; **RL-63**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, para. 788; **RL-69**, *Flemingo Duty Free Shop Private Limited (India) v. Republic of Poland*, UNCITRAL Award, 12 August 2016, paras. 903-904; **RL-70**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paras. 80, 708; **RL-71**, *Azurix Corporation v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 418; see also **RL-72**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 8.3.19; **RL-73**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 23 July 2012, para. 1183, Resp. C-Mem., para. 1155, Resp. Rej., section VI, (F), para. 1153.

⁷⁸¹ **RL-11**, ECT, Article 13; Resp. C-Mem., para. 1157.

⁷⁸² Resp. C-Mem., paras. 1160-1162, Resp. Rej., para. 1154.

⁷⁸³ Resp. C-Mem., paras. 1157-1159.

⁷⁸⁴ Resp. C-Mem., paras. 1163-1171, Resp. Rej., paras. 1156-1163.

⁷⁸⁵ Resp. C-Mem., paras. 1120 *et seq.*, in part. para. 1122; Resp. Rej., paras. 1103-1110.

⁷⁸⁶ Quadrant Second Report, paras. 24-31 and Figure 1 (Project IRR of the PV Plants After the Enactment of the Measures Under Brattle's Prevailing Scenario as of the 2018 Valuation Date).

evidenced by the PER 2000-2010, the PER 2005-2010 and the *Memoria Económica* for RD 661/2007).⁷⁸⁷

1181. The Respondent further recalls that the IRR of the PV plants exceeds the rate of 7.398% pre-tax established by the Disputed Measures⁷⁸⁸ and submits that this target return is reasonable according to market criteria and bearing in mind that incentives for renewable energies are state aid that must be proportionate to its purposes.⁷⁸⁹ The Respondent notably relies on the Decision of the European Commission of 11 November 2017, in that regard, which notably held that :

*“For all examples provided, the Commission has verified that the aid does not exceed what is required to recover the initial investment costs and the relevant operational costs, plus a margin of reasonable return, based on the past and estimated costs and market prices (7.503% before tax for new facilities and 7.398% for existing facilities). These rates appear to be in line with the rates of return of renewable energy and high efficiency cogeneration projects recently approved by the Commission and does not lead to overcompensation”.*⁷⁹⁰

1182. And that:

*“Based on the above considerations, the Commission concludes that the aid granted under the scheme is proportionate within the meaning of point (69) EEAG”*⁷⁹¹

1183. In light of the foregoing, the Respondent concludes that the Claimants’ plants have continued to earn a reasonable rate of return under the New Regulatory Regime and have accordingly suffered no negative impact.⁷⁹²
1184. In response to Brattle’s assertion that the project IRR is much lower, 4.5%, Spain’s expert argues that Brattle has deducted hypothetical taxes that the PV Plants have not paid and will not pay, reduced projected subsidies, and deducted fund management fees paid by the PV Plants to the Claimants that have nothing to do with the management of the PV Plants. Quadrant therefore concludes that Brattle’s IRR calculation does not reflect the actual profitability of the PV Plants but understates it.⁷⁹³
1185. The Respondent’s expert also objects to Brattle’s assertion that the benchmark reasonable rate of return should be above 8%. Brattle’s assertion is based on two premises that are unsupported and incorrect, *i.e.* (i) that the PV Plants were more

⁷⁸⁷ Second Quadrant Report, paras. 32-38.

⁷⁸⁸ Resp. C-Mem., para. 1144.

⁷⁸⁹ Resp. C-Mem., paras. 1145-1148.

⁷⁹⁰ **RL-3**, State Aid S.A. 40348 (2015/NN), para. 120.

⁷⁹¹ *Id.*, para. 131.

⁷⁹² See notably Quadrant First Report, Figure 22 (Economic Impact of the Measures on the PV Plants as of 31 December 2017).

⁷⁹³ Quadrant Second Report, paras. 54-70.

efficient than the typical photovoltaic facilities and, therefore, were expected to obtain a higher return than typical PV Plants; and (ii) that one study, a CNE report showed that photovoltaic facilities much older and smaller than the PV Plants could earn returns up to 8%. According to the Respondent's expert, the PV Plants are not more efficient than typical projects, even by Brattle's own calculation. The CNE report to which Brattle refers expressly refers to a 7% benchmark, not 8%.

1186. Even if the benchmark IRR for the PV Plants were as high as 8%, the 8.6% project IRR would still be higher, so the Disputed Measures have not had a negative impact on the PV Plants.⁷⁹⁴

7.2.2.3 The DCF Method is Inappropriate in the Present Case

1187. The Respondent argues that the DCF method is inappropriate in this case.⁷⁹⁵
1188. The Respondent recalls that the PV plant business is capital-intensive, with a significant asset base, as all of the Claimants' costs are investment costs in tangible infrastructures. As a consequence, there are no relevant intangibles to value. The Respondent also argues that the high dependence on cash flows of volatile and unpredictable exogenous items and the long-term projection for predictions further makes the DCF method inappropriate.⁷⁹⁶
1189. In support of its position, Spain relies on several arbitral precedents which either rejected the DCF method, as in *Nextera v. Spain*,⁷⁹⁷ or criticized such method, including the *Rusoro* case where the tribunal held that:

“DCF is not a friar's balm which cures all ailments [...] Small adjustments in the estimation can yield significant divergences in the results. For this reason, valuations made through a DCF analysis must in any case be subjected to a 'sanity check' against other valuation methodologies”.⁷⁹⁸

1190. The Respondent submits, as a result, that the Tribunal should not apply the DCF method and apply instead an asset-based calculation method,⁷⁹⁹ as notably recommended by Professors Ripinsky and Marboe.⁸⁰⁰
1191. In any event, even if the DCF method is applied, the Respondent submits that the Disputed Measures caused no damage to the Claimants' investments.

⁷⁹⁴ Quadrant Second Report, paras. 71-79.

⁷⁹⁵ Resp. C-Mem., Section VI, (B); Resp. Rej., paras. 1111-1116.

⁷⁹⁶ Resp. C-Mem., para. 1134.

⁷⁹⁷ **RL-129**, *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v. Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum principles, 12 March 2019 (“**NextEra**”), paras. 643-647.

⁷⁹⁸ **RL-106**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (“**Rusoro**”), para. 760.

⁷⁹⁹ Resp. C-Mem., para. 1141.

⁸⁰⁰ Resp. C-Mem., paras. 1136-1139.

7.2.2.4 In Any Event, Even Under a DCF Calculation, the Disputed Measures Caused No Damage to the Claimants' Investments

1192. The Respondent's expert, Quadrant, also performed a DCF calculation by modifying the data in the DCF performed by Brattle.⁸⁰¹
1193. In its first quantum report, Quadrant submits that Brattle's analysis contains several conceptual flaws and calculation errors:
- Brattle's so-called historical cash flows are based on lower revenues and higher costs than the PV Plants actually experienced;
 - Without support, Brattle assumes that the production of one plant, Cam Mestre PV, will be much higher than historical production;
 - Brattle makes numerous formula errors in its calculation of historical and projected operating costs;
 - Brattle incorrectly assumes that the reduction in operating costs that many of the PV Plants experienced after the Disputed Measures would have occurred in the But-For Scenario;
 - Brattle assumes a 35-year technical useful life, which is much longer than the 25 years that Claimants expected.
1194. According to Quadrant, correcting these errors increases the value of the PV Plants in the Actual (or Prevailing) Scenario and reduces the value in the But-For Scenario.
1195. Quadrant further disagrees with Brattle's calculation of the value of the PV Plants in its But-For Scenario. Brattle assumes that the tariffs according to RD 661/2007 would be frozen until 2040. Brattle claims to apply a regulatory risk adjustment, but its adjustment in the But-For Scenario is insignificant. The regulatory risk in the But-For Scenario is much higher than Brattle assumes.
1196. In contrast, Brattle applies a high level of regulatory risk in the Actual (or prevailing) scenario that is unsupported by market perceptions of regulatory risk. Indeed, Spain submits that the Disputed Measures have solved the Spanish tariff deficit of electricity and that, until such Measures, the Spanish electricity system had become unsustainable. Spain therefore concludes that the regulatory risk should be higher in the But-For scenario than in the Actual scenario.⁸⁰²

⁸⁰¹ Quadrant Second Report, Section V, Figure 7.

⁸⁰² Resp. Rej., paras. 1133-1135; Quadrant First Report, para. 268.

1197. Spain also disagrees with the discount for illiquidity, which should be lower in the Actual scenario than in the But-For scenario, as the Disputed Measures have increased the number of renewable plant transactions.⁸⁰³

1198. In its second quantum report,⁸⁰⁴ Quadrant reiterates its main criticisms against Brattle's assumptions and calculations under a DCF method and summarizes the effect of all the necessary corrections to Brattle's calculations:

- Assuming a 30-year technical useful life, as supported by the documentary evidence and the Claimants' initial assumptions, reduces Brattle's damages by € 5.4 million;
- Assuming continuation of the subsidies currently in place for the PV Plants, rather than Brattle's sharp projected reduction, reduces Brattle's damages by € 8.6 million;
- Modeling regulatory risk starting in 2013, when the But-For Scenario departs from the Actual (or Prevailing) Scenario, reduces Brattle's damages by € 4.0 million;
- Assuming regulatory risk in the But-For Scenario consistent with DCM 1's acquisition in 2009, scaled up by the deterioration that would have occurred absent the Measures, reduces Brattle's damages by € 33.6 million;
- Assuming that the tariff would apply for at most 25 years, consistent with the Claimants' initial expectation, reduces Brattle's damages by € 12.0 million;
- Correcting four other differences reduces Brattle's damages by over € 5 million.

1199. In light of the above, the Respondent and its expert conclude that, if a DCF method is correctly applied (on a subsidiary basis), it shows that the Disputed Measures had a positive impact on Claimants' interest in the PV plants by allowing them to earn € 9.6 million.⁸⁰⁵

7.2.2.5 The Impact of RDL 17/2019 on the Valuation of the Claimants' Alleged Damages

1200. According to the Respondent, RDL 17/2019 confirms that the Disputed Measures have caused no damages in the present case.⁸⁰⁶

1201. In its expert reports, Quadrant conducted an analysis of the economic impact of the Measures on the PV Plants. Quadrant explained that it measured the profitability of the PV Plants based on their internal rate of return ("IRR"). Quadrant's profitability

⁸⁰³ Resp. Rej., Section VI, D; Quadrant Second Report, para. 137.

⁸⁰⁴ Quadrant Second Report, Section V.

⁸⁰⁵ Resp. Rej., paras. 1147-1149.

⁸⁰⁶ Resp. PHB, Section III, H.

analysis is based on (i) the return for the project, not to specific equity investors; (ii) greenfield costs, excluding developer premiums, or other returns to investors; (iii) post-tax returns; and (iv) an exit IRR as of a valuation date, rather than a holding IRR that ignores market conditions. Based on these inputs, Quadrant calculated that the project IRR of the PV Plants is 8.6%. According to a benchmark reasonable return of 7%, post-tax, Quadrant concluded that the Measures have not had a negative impact on the PV Plants.⁸⁰⁷

1202. RDL 17/2019 stated that the reasonable rate of return (“RRR”) in the second regulatory period (2020-2025) will be 7.09%, slightly below the 7.398% RRR in the first regulatory period (2014-2019), should proceedings as the present one be maintained. Quadrant has updated the IRR of the PV Plants to reflect the revision to the RRR according to RDL 17/2019. The project IRR of the PV Plants with the Measures in place assuming a 7.09% RRR after the first regulatory period is 8.5% post-tax, above the benchmark reasonable rate of return of 7%. Therefore, Quadrant maintains its conclusion that the Measures have not had a negative impact on the PV Plants.⁸⁰⁸

1203. In its Second Report, Quadrant also concluded that even if Brattle’s approach to calculating the economic impact of the Measures was appropriate, there is no negative economic impact on the PV Plants. Quadrant has also updated its corrections to Brattle’s calculation of economic impact to reflect the revision to the RRR according to RDL 17/2019. After considering the revision to the RRR, Quadrant maintains its conclusion that Brattle’s approach shows that the Measures have not negatively affected the Claimants’ interest in the PV Plants.⁸⁰⁹

7.2.3 Interest

1204. The Respondent objects to the interest rate requested by the Claimants,⁸¹⁰ and argues that the interest, if any, should be based on a “short-term, risk-free rate”.⁸¹¹ Spain cites Professor Kantor:

“Historic earnings must be ‘brought forward’ to the valuation date by means of an interest rate, while future earnings are discounted back to the valuation date by means of a discount rate. The interest rate used for bringing historical amounts forward will clearly not contain the same risk factors as the discount rate used to present value future amounts. As a practical matter, the interest rate used for the historical amount is

⁸⁰⁷ Quadrant Second Report, Section V.

⁸⁰⁸ Resp. PHB, paras. 203-209.

⁸⁰⁹ Quadrant Second Report, Section II, B.

⁸¹⁰ Resp. C-Mem., Section VI, G; Resp. Rej., Section VI, H.

⁸¹¹ Resp. C-Mem., Section VI, G para. 1188.; Resp. Rej., para. 1172.

*often a 'risk-free' rate (such as the rate for US Treasuries) or a statutory rate for pre-judgment interest".*⁸¹²

1205. Pre-award interest is meant to be compensatory, not punitive. Therefore, Spain finds that a 10-year bond would imply an overcompensation by compensating risks that Claimants have never assumed.⁸¹³ Spain, therefore, argues that the Tribunal should rely on a 4 or 5-year period.⁸¹⁴

1206. With respect to post-award interest, Spain objects to such interest being compounded, since compounded interests have a punitive nature, as notably held in *National Grid v. Argentina*.⁸¹⁵ Post-award interest is therefore inappropriate and any award of interest should therefore be simple.⁸¹⁶

7.2.4 Tax Gross-Up

1207. The Respondent contests the TGU, as it finds this claim to be unfounded and inadmissible.⁸¹⁷ Spain also states that the TGU depends on the acts of another sovereign State and private acts or decisions of Claimants themselves. Therefore, Spain could not be liable, as it is not responsible for these elements.⁸¹⁸

1208. Spain also submits that the TGU is banned in Article 21 of the ECT, which states:

"Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency."

1209. Spain analyzes Article 21 of the ECT in the light of Article 15 of the ECT, as banning any obligations in relation with tax measures, from the "host country" and the "home country".⁸¹⁹ Therefore, no tax measures can create any obligation on Respondent based on the ECT, as Article 21 ECT establishes a TGU carve-out.⁸²⁰

1210. Additionally, Spain argues that to apply the principle of full reparation, an attribution and a causality are needed. Spain refuses that taxation is its fault, or even that it is attributable to it. To this end, Respondent cites the *Rusoro v. Venezuela* case:⁸²¹

⁸¹² Resp. Rej., Section VI, H, para. 1175; **RL-102**, M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence*, 2008, Kluwer Law International (excerpt), p. 49.

⁸¹³ Resp. Rej., Section VI, H, para. 1173.

⁸¹⁴ Resp. Rej., Section VI, H, para. 1172.

⁸¹⁵ **RL-111**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ("**National Grid**"), note 122.

⁸¹⁶ Resp. Rej., Section VI, H, para. 1176.

⁸¹⁷ Resp. Rej., Section VI, I.

⁸¹⁸ Resp. Rej., Section VI, I, paras. 1182-1184.

⁸¹⁹ Resp. Rej., Section VI, I, para. 1190.

⁸²⁰ Resp. Rej., Section VI, I, para. 1191.

⁸²¹ Resp. Rej., Section VI, I, para. 1194-1197.

*“In its Memorial and Reply, Rusoro sought indemnity in respect of any double taxation of the Award that may rise in Canada (or elsewhere), to the extent this liability would not have arisen had Venezuela observed its international commitments under the Treaty. This claim seems to have been abandoned in Rusoro’s Post Hearing Brief. In any case, the claim lacks merit. Any tax liability arising under Canadian tax laws (or from any other fiscal regime, other than the Venezuelan), does not qualify as consequential loss arising from Venezuela’s breach of the Treaty and does not engage Venezuela’s liability”.*⁸²²

1211. Spain concludes that it has no liability with respect to tax measures from another country.
1212. Furthermore, the Respondent says that there would never be in a Member State of the European Union any tax obligation to pay taxes for any amount granted in an upheld award. For this purpose, Spain bases its argumentation on the “*participation exemption*” issued from a European directive.⁸²³
1213. Additionally, Spain argues that this claim is essentially speculative and ambiguous. Spain also refers to several awards that have expressly rejected the TGU.⁸²⁴

7.3 The Tribunal’s Analysis

7.3.1 Applicable Legal Standard for Compensation

1214. The Tribunal (by majority) has found that the Respondent has breached Article 10(1) of the ECT (i) by failing to accord fair and equitable treatment to the investments of the Claimants and (ii) by impairing the management, maintenance, use, enjoyment or disposal of such investments by unreasonable or discriminatory measures. Under international law, the Claimants are entitled to compensation for the damage caused by those breaches.
1215. In contrast with Article 13 ECT concerning expropriation, the ECT does not set out a standard of compensation for breaches of Article 10(1) ECT. The Tribunal must therefore look to customary international law for the applicable standard of compensation.
1216. Under international law, a State is required to make full reparation for the damage caused by a treaty breach or other internationally wrongful act, as notably set out by

⁸²² Resp. Rej., Section VI, I, para. 1196; **RL-106**, *Rusoro*, para. 854.

⁸²³ Resp. Rej., Section VI, I, paras. 1198-1203, **RL-112**, Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, 30 November 2011.

⁸²⁴ **RL-58**, *Eiser Infrastructure Limited y Energia Solar Luxembourg S.À R.L. v. Kingdom of Spain*, Award, 4 May 2017 (“*Eiser*”), para. 456; **RL-119**, *Antin Infrastructure Services Luxembourg s.à.r.l. y Antin Energia Termosolar B.V. v. Reino de España (“Antin”)*, ICSID Case No. ARB/13/31, Award, 15 June 2018, para. 673; **RL-117**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, (“*Masdar*”), para. 660; **RL-130**, *SolEs Badajoz GMBH v. The Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019 (“*SolEs*”), paras. 547-554; **RL-124**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, (“*OperaFund*”), para. 704.

the Permanent Court of International Justice (PCIJ) in the landmark *Chorzów Factory* case:

*“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”.*⁸²⁵ (emphasis added)

1217. The Tribunal further observes that the principle of full reparation is generally accepted in international investment law. For instance, the arbitral tribunal in *Vivendi II* stated:

*“Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action”.*⁸²⁶

1218. In the present case, the Tribunal (by majority) finds that the Claimants are in principle entitled to full compensation for Spain’s violation of Article 10(1) ECT and therefore turns to the valuation of the damage and the calculation of the compensation owed as reparation therefor.⁸²⁷

7.3.2 Valuation of the Claimants’ Compensation

1219. As a preliminary remark, the Tribunal recalls that the Claimants bear the legal burden of proving their case on compensation pursuant to the general principle *onus probandi actori incumbit* which is well recognized under international law. In assessing the evidence on damages, the Tribunal recalls that such assessment is not an exact science, as it involves multiple and complex parameters. It is also

⁸²⁵ **CL-65**, *Concerning Factory at Chorzów (Germany v. Poland)*, Judgment 13, PCIJ, 13 September 1928 (1928 PCIJ, Series A. No.17), p. 47.

⁸²⁶ **CL-68**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award II, 20 August 2007, para. 8.2.7.

⁸²⁷ The Dissent (paras. 48-49) criticizes the Decision for applying the principle of full reparation articulated by the Permanent Court of International Justice in the *Chorzów Factory* case. It is true that *Chorzów Factory* was a dispute between States, but in the last few decades countless decisions by investment tribunals have interpreted the principle of full reparation broadly to apply also to disputes between States and investors. The Decision cites one example at para. 1217. The majority further notes that the Respondent has not questioned the application of the principle of full reparation to this case.

generally accepted that arbitral tribunals enjoy a significant margin of discretion when engaging in such an exercise, especially in the presence of diverging expert opinions.

1220. The Tribunal (by majority) also recalls that it has found the Respondent to be liable for breach of two separate clauses of Article 10(1) ECT: the Fair and Equitable Treatment Clause and the Impairment Clause. The Tribunal notes that the Parties have made no distinction between these two breaches in their respective arguments concerning damages, so that their respective positions on damages and compensation appear to refer to the Respondent's liability as a whole. Therefore, the Tribunal considers that the discussion on damages and compensation that follows applies to the reparations owed by Spain to the Claimants in respect of its liability for both breaches taken together, thus foreclosing any question of duplicative compensation.
1221. With these remarks in mind, the Tribunal will now determine the appropriate valuation date (7.3.2.1) and the appropriate valuation methodology (7.3.2.2) for quantifying the Claimant's losses.

7.3.2.1 The Valuation Date

1222. The first task of the Tribunal is to determine the appropriate valuation date for the quantification of the Claimants' losses. As recalled *supra*, the Parties differ on this point.
1223. The Claimants submit that the appropriate valuation date is the date of the Award (*ex post*),⁸²⁸ on the ground that adopting such date for the valuation will enable the Tribunal to have all the information available for the proper calculation of the damages sustained. By contrast, the Respondent submits that the Tribunal should assess the Claimant's alleged damages as of the date of the breach (*ex ante*),⁸²⁹ which is the only date considered in the ECT⁸³⁰ and the only one that may guarantee compliance with the principle of full reparation and the principle of causality.⁸³¹
1224. The Tribunal (by majority) agrees with the Claimants' position that the appropriate valuation date is the date of the Award, for the following reasons.
1225. First, while it is correct that Article 13 of the ECT refers to the use of an *ex ante* valuation date, that provision specifically deals with lawful expropriation which is not in issue in the present case, and therefore not relevant in the eyes of the Tribunal to determine the appropriate valuation date of the losses sustained by an investor as a result of a breach of Article 10 of the ECT. It is worth noting that, contrary to what the Respondent alleges, several arbitral tribunals have considered that in the context of unlawful expropriations or, as in the present case, other treaty violations, it was more

⁸²⁸ Cl. R-Mem., section VI, C.

⁸²⁹ Resp. C-Mem., section VI, D; Resp. Rej., Section VI, F.

⁸³⁰ Article 13 of the ECT; Resp. C-Mem., para. 1157.

⁸³¹ Resp. C-Mem., paras. 1163-1171, Resp. Rej., paras. 1156-1163.

appropriate to assess damages as at the date of the award.⁸³² This position has been endorsed by several scholars, including authors on whom the Respondent relies.⁸³³

1226. Second, the use of an *ex post* valuation date appears more appropriate, as it will allow the Tribunal to take into account events that occurred after the breach and therefore lead to a more realistic assessment of how the value of the Claimants' investments would have evolved but for the Disputed Measures, irrespective of whether this information is beneficial or detrimental to the latter.

1227. As stated by the tribunal in *Burlington Resources v. Ecuador*:

*“The Tribunal’s task is to place Burlington in the situation it would have been had Ecuador not expropriated the PSCs. For this, the Tribunal must assess what the PSC’s value would have been in real life on the date of the award. Such a valuation will obviously be more accurate and reliable if actual information is used in respect of relevant facts that have occurred between the expropriation and the award, rather than projections based on information available on the date of the expropriation. The valuation will be closer to reality if the Tribunal decides with ‘maximum information’ rather than ‘maximum ignorance’”.*⁸³⁴

1228. The Tribunal (by majority) endorses such reasoning which, in its view, should equally apply to the valuation of losses arising from a breach of the fair and equitable standard.

1229. Third, the Tribunal (by majority) is not persuaded by the Respondent's argument, relying on Professor Stern's dissent in *Quiborax v. Bolivia*, that applying an *ex post* valuation date would be arbitrary or unfair. Quite to the contrary, it is most likely that *ex post* data *would* have impacted the value of the Claimants' investments in a *but for* scenario. It is therefore appropriate to take such data into account to the extent that they are relevant and reliable in order to restore the situation the Claimants would have been in absent any breach and therefore compensate them in accordance with the principle of full reparation set out in the *Chorzów Factory Case*.

1230. For these reasons, the Tribunal (by majority) concludes that the Claimants' losses must be assessed *ex post* at the date of the Award (or at a proxy date) with the immediate consequence that, upon receipt of the present Decision, the Parties will be invited to revise their damage calculations using an updated Valuation Date closer

⁸³² See notably **CL-70**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (“**Burlington, decision on reconsideration**”) paras. 326-330; **CL-73**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 422.

⁸³³ See notably **CL-74**, I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, OUP, 2017, paras. 3.323 – 3.324; **RL-40**, S. Ripinsky, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 256.

⁸³⁴ **CL-70**, *Burlington*, decision on reconsideration, para. 332.

to the date of the Award taking into account the evolution of market parameters until such new Date.

7.3.2.2 Valuation Methodology

1231. The Parties strongly disagree on the appropriate valuation methodology for quantifying the Claimants' losses.
1232. As recalled *supra*, the Claimants' valuation of their losses is essentially based on a comparison between the value of their investments in an Actual scenario (*i.e.* with the Disputed Measures) and the value of the same investments in a But-For scenario (*i.e.* without the Disputed Measures). To achieve such comparison, the Claimants' quantum expert Brattle has calculated, for each scenario, historical damages up to the valuation date and forward-looking damages from the valuation date onwards. Brattle has then made further adjustments to determine the impact of Spain's Disputed Measures on the Claimants' equity interests (as distinguished from the enterprise value of the project companies themselves).
1233. As a result, the Claimants submit that they are entitled to damages currently valued at € 46.6 million,⁸³⁵ which they contend represents the diminution in the fair market value of their equity in the PV facilities as a result of all the Disputed Measures combined.
1234. By contrast, and as also recalled *supra*, the Respondent essentially submits that the Claimants' approach distinguishing between "historical" flows and future flows, on the one hand, and between an Actual and a But-For scenario, on the other hand, should be rejected as too speculative and that the quantification of the Claimants' damages, if any, must be assessed by reference to a reasonable rate of return.⁸³⁶
1235. According to the Respondent's expert Quadrant, the internal rate of return of the Claimants' Plants is 8.6% after taxes⁸³⁷ – which Brattle disputes – and therefore exceeds the benchmark reasonable rate of return of 7 % after taxes for PV plants (as notably evidenced by the PER 2000-2010, the PER 2005-2010 and the *Memoria Económica* for RD 661/2007).⁸³⁸ The Respondent further recalls that the IRR of the PV plants exceeds the rate of 7.398% pre-tax established by the Disputed Measures⁸³⁹ and submits that this target return is reasonable according to market criteria and bearing in mind that incentives for renewable energies are state aid that must be proportionate to its purposes.⁸⁴⁰

⁸³⁵ Cl. PHB, para. 177; Brattle Quantum Update Model, Tables Q – Updated Financial Model_Dec 19.xlsb, Table Q2.

⁸³⁶ Resp. C-Mem., paras. 1120 *et seq.*, in part. para. 1122; Resp. Rej., paras. 1103-1110.

⁸³⁷ Quadrant Second Report, paras. 24-31 and Figure 1 (Project IRR of the PV Plants After the Enactment of the Measures Under Brattle's Prevailing Scenario as of the 2018 Valuation Date).

⁸³⁸ Second Quadrant Report, paras. 32-38.

⁸³⁹ Resp. C-Mem., para. 1144.

⁸⁴⁰ Resp. C-Mem., paras. 1145-1148.

1236. The Respondent concludes that the Claimants' plants have continued to earn a reasonable rate of return under the New Regulatory Regime and have accordingly suffered no negative impact.⁸⁴¹
1237. In light of these irreconcilable approaches to quantum valuation, the Tribunal finds itself at a crossroads and must decide on the appropriate valuation methodology.
1238. Having carefully reviewed both Parties' positions and evidence, and in particular the evidence submitted by the Parties' respective quantum experts, the Tribunal (by majority) considers that the valuation methodology that is most likely adequately to compensate the Claimants for their losses is the methodology presented and applied by the Claimants' expert, Brattle.
1239. The Tribunal (by majority) is of the view that such methodology appears to be not only logical and based on common sense but also consistent with best practices in international investment arbitration dealing with the assessment of losses in comparable cases. By contrast, the Tribunal (by majority) is unable to follow the approach of the Respondent's expert Quadrant because such approach is essentially based on a comparison between the rate of return which the Respondent says the Claimants were entitled to, both as per the Original Regulatory Regime and the New Regulatory Regime, and the rate of return the Respondent says the Claimants actually achieved (which is supposedly higher, hence the Respondent's conclusion that the Claimants suffered no damage).
1240. As stated earlier, the Tribunal (by majority) finds this notion of "rate of return" too vague and imprecise to constitute a proper basis for the valuation of the Claimants' losses. Moreover, Quadrant's primary methodology is premised on Spain's legal position that the Claimants were entitled only to a reasonable rate of return without any precise quantification thereof, a position which the majority has dismissed *supra* in Section 6.2.3.2. The latter has indeed found that Spain quantified what it considered to be the reasonable rate of return at the time it adopted each of the regulations made in furtherance of Law 54/1997, including RD 661/2007 and RD 1578/2008. The Tribunal (by majority) will therefore disregard Quadrant's primary valuation methodology based on measuring profitability.
1241. Having said that, the Tribunal (by majority) is also well aware that the reliability of a given valuation methodology largely rests on the reliability of the assumptions included as inputs in the calculation. Therefore, while it finds that the Claimants' losses must be assessed by reference to Brattle's proposed methodology, the Tribunal must review the critical assumptions made by Brattle in order properly to reach a decision on *quantum*, taking into account, where appropriate, the criticisms voiced by Quadrant.

⁸⁴¹ See notably Quadrant First Report, Figure 22 (Economic Impact of the Measures on the PV Plants as of 31 December 2017).

1242. The Tribunal will now turn to Brattle's assessment of historical damages (*i.e.* from the date of the breach up until the Valuation Date) and forward-looking damages (*i.e.* from the Valuation Date onwards).

(a) Valuation of Historical Damages

1243. The Tribunal (by majority) generally accepts Brattle's methodology of calculation of historical damages until the Valuation Date (which, as stated *supra*, will be updated to a date closer to the Award), subject to the following findings and/or adjustments.

(i) Common Assumptions for the Actual and the But-For Scenarios

➤ *Electricity Production*

1244. The Parties appear to agree that the Disputed Measures did not affect the extent of solar radiation or the extent of electricity production and that therefore both Scenarios should rely on the historical figures for electricity production.⁸⁴²

1245. With respect to Project Cam Mestre, the Tribunal (by majority) notes that the Parties initially disagreed as to whether the production forecast should be based on the 2009 baseline projection (as submitted by Brattle) or on the (lower) historical average (as submitted by Spain). Brattle explained that the poor performance of the inverters at Cam Mestre reduced historical production until they were replaced in March 2017. For the period following such replacement, Brattle forecasted a higher production level at Cam Mestre based on the initial production projections for this Project.⁸⁴³ In light of Quadrant's agreement with this explanation in its Second Report,⁸⁴⁴ the Tribunal (by majority) understands that this disagreement no longer exists and therefore accepts the data relied upon by Brattle for electricity production (including for Project Cam Mestre).

➤ *Limit on Tax Deductibility of Interest*

1246. The Tribunal (by majority) notes that the application of RDL 12/2012 (which limits the tax deductibility of any interest payments over €1 million and in excess of 30% of the EBITDA) to both Scenarios is not in dispute between the Parties and is therefore accepted as a valid assumption for both historical and forward-looking damages.

(ii) Scenario-Specific Assumptions

➤ *Historical Revenues*

1247. First, the Tribunal (by majority) has taken note of Quadrant's criticisms regarding Brattle's use of modelled revenues as opposed to using the revenues shown in the financial statements of the PV plants. However, Brattle has provided persuasive

⁸⁴² Brattle First Quantum Report, paras. 74 and 94 and Appendix E; Quadrant First Report, para. 194.

⁸⁴³ Brattle Second Quantum Report, paras. 213; see also Brattle First Quantum Report, footnote 47 and para. 249.

⁸⁴⁴ Quadrant Second Report, footnote 133.

reasons for doing so. Mr. Caldwell of Brattle notably explained during his cross-examination at the Hearing that the purpose of using a model for calculating historical revenues in both the Actual and But-For Scenarios was to compare like with like and avoid distortions:

“[T]his is a standard feature in damages actually: you set up a model of the actual scenario as best you can, and then you change the regulatory assumptions, and then that’s the only thing you change between the actual and the but-for scenario. And in doing so, you ensure that the resulting difference between the but-for and the actual reflects only the regulations or the measures at issue between the parties. So in a sense, that going model to model ensures that there’s no distortions within the difference”.⁸⁴⁵

1248. The Tribunal (by majority), is also satisfied that, since the same model was used in both the Actual and the But-For Scenario, any difference between those modelled revenues and the revenues reported in the financial statements⁸⁴⁶ will have little to no impact on the assessment of damages, as explained in Brattle’s Second Quantum Report:

“In any event, we consider the use of modelled revenues to be preferable to those in the financial statements. Damages represent the difference between But For and Actual scenarios. We use the same Brattle Financial Model to compute revenues and operating performance in both the But For and Actual scenarios, and thereby isolate the impact of the Disputed Measures. Any differences between simulated and reported revenues in the Actual scenario are likely to stem from the need for us to interpolate between gaps in the available historical production data. The impact of these interpolations is likely to flow through to the revenues and cash flows in our But For scenario as well as in the Actual scenario, and thus likely to largely net out for the purposes of damages”.⁸⁴⁷

1249. The Tribunal (by majority) therefore accepts Brattle’s use of historical modelled revenues.
1250. Second, while it accepts the modelled revenues used by Brattle in the Actual Scenario,⁸⁴⁸ the Tribunal (by majority) nonetheless decides that the modelled

⁸⁴⁵ Tr. Day 3, 205:5 to 205-14; see also Brattle First Quantum Report, footnote 81: “Our simulation of revenues in the Actual scenario corresponds with the revenues recorded in the annual financial statements of the project companies. We simulate revenues in both the But For and Actual scenarios to ensure that the difference explicitly reflects only the impact of the Disputed Measures.”

⁸⁴⁶ According to Brattle, the difference between modelled revenues and the revenues reported in the financial statements represents less than 1% (Brattle Second Quantum Report, para. 205) after correcting several errors in Quadrant First Report, which Quadrant appears to accept in its Second Report (see Quadrant Second Report, footnote 133).

⁸⁴⁷ Brattle Second Quantum Report, para. 206.

⁸⁴⁸ Brattle First Quantum Report, para. 76.

revenues in the But-For Scenario, as calculated by Brattle, must be corrected in order to reflect the majority of the Tribunal's earlier findings on liability as follows:

- **For PV Projects registered under RD 661/2007**: The historical modelled revenues in the But-For Scenario shall:
 - include the financial impact of (i) the CPI adjustment as set out in RDL 2/2013, and (ii) the temporary operating hour cap as set out in RDL 14/2010,⁸⁴⁹ but
 - exclude the financial impact of (i) the permanent operating hour cap as set out in RDL 14/2010 and (ii) the New Regulatory Regime as enacted through RDL 9/2013, Law 24/2013, RD 413/2014 and MO IET/1045/2014.
- **For PV Projects registered under RD 1578/2008**: The historical modelled revenues in the But-For Scenario shall:
 - include the financial impact of (i) the permanent operating hour cap as set out in RDL 14/2010 and (ii) the CPI adjustment as set out in RDL 2/2013, but
 - exclude the financial impact of the New Regulatory Regime as enacted through RDL 9/2013, Law 24/2013, RD 413/2014 and MO IET/1045/2014.

➤ *7% TVPEE*

1251. Brattle assumes that the Spain would not have passed the 7% tax in the But-For Scenario (as opposed to the Actual Scenario). However, the Tribunal has found, by unanimity, that it had no jurisdiction over the 7% tax (or TVPEE) and therefore no jurisdiction to decide whether this measure is in breach of the ECT and, *a fortiori*, to award compensation to the Claimants as a result of such measure. Brattle should therefore reintegrate the 7% tax in its calculation of historical damages in the But-For Scenario.

➤ *Operating Costs*

1252. The Tribunal (by majority) understands that the experts differ as to which operating costs should be properly included in the Actual and the But-For Scenarios. The scope of the disagreement essentially relates to (a) whether the revision of certain operating and maintenance ("**O&M**") and lease contracts should be taken into account as

⁸⁴⁹ In line with its earlier finding, the Tribunal considers that the modelled revenues in the But-For Scenario should also include the impact of RD 1565/2010 (which was found not to be in breach of the ECT). However, since this regulation only affects the regulatory useful life of the PV Plants, it has no impact on the historical damages sustained by the Claimants until the Valuation Date and shall therefore be addressed *infra* when dealing with forward-looking damages.

operating costs in the But-For Scenario and (b) whether fund management fees charged to some of the PV Plants should be included in the operating costs.

1253. With respect to item (a), there is no dispute that certain O&M and lease contracts have been revised in a number of PV Projects in the Actual Scenario with an impact on operating costs of such Projects. The question is whether such revisions should also be taken into account in the calculation of operating costs of those Projects in the But-For Scenario. The Tribunal (by majority) notes that the remaining disagreement, according to Quadrant's Second Quantum Report,⁸⁵⁰ relates to the operating costs of the DCM 2 and Hannover PV Plants, and therefore understands that the experts are in agreement with respect to the impact of contract revisions on the other PV Projects.
1254. The DCM 2 PV Plants renegotiated their O&M and lease contracts in 2012. According to Quadrant, the resulting impact of this renegotiation on their operating costs should be included in the Actual Scenario but not in the But-For Scenario because such renegotiation was prompted by the Disputed Measures, which Brattle disputes.
1255. In light of the evidence submitted by the Claimants – which bear the burden of proving their damage – and in particular in light of the O&M and lease contracts for the Huéscar and Granada Projects, the Tribunal (by majority) is not satisfied that such renegotiation was unrelated to the Disputed Measures and therefore excludes these revisions in the But-For Scenario.
1256. The Hannover PV Plants renegotiated their O&M contracts in 2013 and 2017. It is not in dispute that such renegotiation was prompted by the Disputed Measures and therefore only affected the Actual Scenario. Therefore, it is correct to assume, as Brattle does, a *“continuation of the original O&M contracts in the But For scenario, and the incorporation of contract price reductions in the Actual scenario but also offsetting increases in non-contracted costs.”*⁸⁵¹
1257. The Tribunal understands that the Parties' experts essentially disagree on the valuation of these non-contracted costs in the Actual Scenario subsequent to the renegotiation and the reduction in scope of the O&M contracts. In light of the evidence on record, the Tribunal (by majority) agrees with Brattle that such non-contracted costs should be assessed by reference to the historical experience at Hannover's PV Projects, which is more reliable than Quadrant's assumption of a € 10,000 cost per MW per year which is based on an analogy with different PV Projects with different characteristics.
1258. With respect to item (b), the Tribunal accepts Quadrant's justification for excluding fund management fees (as opposed to actual management fees) from the operating

⁸⁵⁰ Quadrant Second Report, paras. 146-149.

⁸⁵¹ Brattle Second Quantum Report, para. 250.

costs of the PV Plants in both Scenarios,⁸⁵² absent any convincing demonstration by Brattle that such fees are sufficiently related to plant operation.

➤ *Inflation*

1259. With respect to the general consumer price index (or CPI), it is not in dispute that the general CPI applies to the costs and revenues⁸⁵³ in the Actual Scenario as well as to the costs in the But-For Scenario.⁸⁵⁴ The Parties shall therefore update their calculation of historical damages by taking into account the evolution of the general CPI for those components.

1260. With respect to the “amended” CPI which was implemented through RDL 2/2013 until it was repealed by the New Regulatory Regime, the Tribunal recalls that it found that RDL 2/2013 did not violate the ECT in respect of any of the Claimants. It should therefore be assumed that the “amended” CPI would have applied to the revenues of all PV Plants in the But-For Scenario as of 2013 for the purposes of updating the Claimants’ historical damages.

➤ *Depreciation and Amortization*

1261. According to Brattle, *“Edisun Power recorded asset impairments at its Trujillo, Salinas and Valle Hermoso II projects between 2013 and 2014 as a result of the Disputed Measures. The asset impairments reduce taxable income and create an immediate tax benefit.”*⁸⁵⁵ Brattle therefore assumes that *“Edisun Power would not have registered the asset impairments in the But For scenario, and thus that it would not have had the associated tax benefits. Where no impairments were registered, [Brattle] assume[s] that the project companies would have used the same depreciation and amortization amounts to determine taxable income in the But For and Actual scenarios”*.⁸⁵⁶

1262. Brattle’s assumption appears logical and undisputed by Quadrant and is therefore accepted by the Tribunal (by majority).

(b) Valuation of Forward-Looking Damages

1263. The Tribunal (by majority) generally accepts Brattle’s methodology for the calculation of forward-looking damages as of the Valuation Date (which, as stated *supra*, shall be updated to a date closer to the Award), subject to the following findings and/or adjustments.

⁸⁵² Quadrant Second Report, paras. 150-154.

⁸⁵³ As of the passage of RDL 9/2013 which repealed RDL 2/2013.

⁸⁵⁴ Quadrant Second Report, para. 140.

⁸⁵⁵ Brattle First Quantum Report, paras. 78 and 117.

⁸⁵⁶ *Id.*

(i) Use of a DCF Method

1264. The Tribunal (by majority) finds that the Claimants' approach to calculating forward-looking damages, which employs the Discounted Cash Flow (or DCF) method to model the present value of lost cash flows resulting from the Disputed Measures, is an appropriate basis for determining the quantum of compensation that should be awarded to the Claimants for the Respondent's violation of Article 10(1) ECT.
1265. The Tribunal has taken due note of the criticisms voiced by Spain and Quadrant as to the use of the DCF method which they consider to be inappropriate to assess damages in this case. Spain notably affirms that the DCF method should be discarded because it would *ignore "the regulatory principles of the market in which Claimant [sic] made the investment (the SES and the principle of reasonable return),"* rely on *"highly speculative inputs regarding regulatory risk and the overall sustainability of the SES,"* "petrify" the FITs and "[r]ejects the regulator's ability to act in the exercise of its legitimate power to intervene in a regulated market".⁸⁵⁷ Spain has also referred to several arbitral awards that, according to it, rejected the DCF method (for instance in *RREEF*, *NextEra* and *RWE*).
1266. The Tribunal also notes that the Respondent's quantum expert Quadrant has taken a more nuanced position by distinguishing between the Actual and the But-For Scenario. Quadrant indeed accepts that *"the DCF method can be used in the Prevailing [Actual] Scenario, where actual inputs are available,"* but *"it should not be used in a But For Scenario premised on highly speculative and uncertain inputs [...]"*.⁸⁵⁸
1267. Be that as it may, the Tribunal (by majority) is not convinced by the arguments advanced by the Respondent and Quadrant to disqualify the DCF method.
1268. First, the Tribunal (by majority) notes that the DCF method is commonly used in investment arbitration to value forward-looking damages in comparable cases, as notably confirmed by a number of arbitral awards including *OperaFund*,⁸⁵⁹ *SolEs*⁸⁶⁰

⁸⁵⁷ Spain's Hearing Presentation "Quantum Opening" of 17 February 2020, p. 13. See also Resp. C-Mem., Section VI.B; Resp. Rej., paras. 1111-1126.

⁸⁵⁸ Quadrant Hearing Presentation of 20 February 2020, p. 41. See also Quadrant Second Report, paras. 16 and 81.

⁸⁵⁹ **CL-184**, *OperaFund*, notably at para. 621: *"The Tribunal does not agree with Respondent's allegation that the DCF method, as shown in doctrine and arbitral precedents, is excessively speculative and, therefore, inappropriate for this case. Quite to the contrary, that method is generally recognized and used as the most appropriate technique to calculate damages arising from breaches of international law affecting investments in going concerns. It compares the actual free cash flows that the SPVs obtained or will obtain because of Respondent's ECT breaches ('Actual' scenario) with the free cash flows that they would have obtained in the absence of the breach ('But-For' scenario). Claimants' Plants had a sufficient operational track record of profitability and there is no reason to doubt that they would have benefitted from stable feed-in remuneration under RD 661/2007, but for Respondent's wrongful measures."*

⁸⁶⁰ **CL-182**, *SolEs*, notably at para. 488: *"Having considered the positions of the Parties, the Tribunal concludes that the DCF methodology is well-suited to the present case, in which the Tribunal has found that the Second Set of Disputed Measures violated Respondent's obligation to accord fair and equitable treatment to Claimant's investment and diminished the revenue that Claimant would have received had the Original Regime been maintained. It provides a sound basis to compare the present value of Claimant's investment in the absence of the Disputed Measures to the present value of Claimant's investment in light of the Disputed Measures. The DCF method is widely used and has been applied to assess damages in other proceedings in which Spain's repeal of the Special Regime has led tribunals to find liability."*

and *Watkins*,⁸⁶¹ which involved claims for compensation arising out of the same measures of Spain and where the DCF method was convincingly applied.

1269. Second, the Tribunal (by majority) agrees with the Claimants that none of the situations described by the Respondent⁸⁶² as justifying a dismissal of the DCF method apply in the present case. In particular, given the track record of the PV Plants which have been in operation for more than a decade, their future performance is reasonably predictable, notably in the But-For Scenario where the main assumption is that the PV Plants would have continued to benefit from the feed-in tariffs set in RD 661/2007 and RD 1578/2008, albeit with a number of adjustments.
1270. Third, it is an inevitable fact that any valuation of damages, and especially forward-looking damages, entails some measure of approximation. However, the duty of the Tribunal properly to assess the damage sustained by the Claimants requires it to conduct this valuation exercise as best as it can in the light of the evidence submitted by the Parties. The Tribunal (by majority) notes that, in the present case, the Respondent has not offered any more reliable method of valuation than the DCF. The Tribunal then concludes that the DCF method is acceptable in the circumstances, subject to a critical review of the inputs that have been used by the respective experts to calculate the Claimants' forward-looking damages.
1271. The Tribunal will now turn to these parameters, taking into account, where appropriate, the respective situation of the Projects considered.

(ii) Common Assumptions for the Actual and the But-For Scenarios

➤ *Electricity Production*

1272. As mentioned *supra*, the Parties agree - quite logically - that the Disputed Measures did not affect the extent of solar radiation or the extent of electricity production and that therefore both Scenarios should rely on the historical figures for electricity production.⁸⁶³

➤ *Inflation*

1273. The Parties disagree as to the correct long-term inflation rate to apply in both Scenarios. The extent of such disagreement is twofold.
1274. First, the Parties disagree as to the evolution of the general consumer index (or CPI). In substance, Brattle relies on long-term inflation swaps which they consider to

⁸⁶¹ **CL-189**, *Watkins*, notably at para. 693: "The DCF method is more appropriate than an IRR analysis because it looks to the difference in the value of the Claimants' assets before and after changes to the regime applicable to the Claimants' installation by a comparison of the But-For and Actual scenarios."

⁸⁶² Resp. C-Mem., para. 1135: "Considering the above elements, we shall examine different doctrinal pronouncements in this respect. Thus, we verify that the DCF has been rejected in numerous occasions for cases like this one, in which a series of characteristics concur: 'The DCF method has been rejected by tribunals on several grounds including: lack of sufficiently long performance record; failure to establish future profitability of the investment; lack of sufficient finances to complete and operate the investment; and large disparity in the amount actually invested and the FMV claimed.' (Emphasis added)."

⁸⁶³ Brattle First Quantum Report, paras. 74 and 94 and Appendix E; Quadrant First Report, para. 194.

provide the best indicator of long-run inflation,⁸⁶⁴ while Quadrant relies on an average of several surveys.⁸⁶⁵ Quadrant further submits that inflation swaps are not commonly used for long-term forecasts and that such swaps of long duration include premiums for liquidity and risk which distort their predictive power.⁸⁶⁶ Based on these different methods, Brattle assumes a long-term inflation of between 2 and 2.5%, while Quadrant assumes a long-term inflation of 1.9%.

1275. Second, the Parties disagree as to the evolution of the core (or “amended”) CPI (introduced by RDL 2/2013 until it was replaced with the New Regulatory Regime) which excludes price changes in food, energy products and certain tax effects from the calculation of inflation.⁸⁶⁷ Brattle submits that the amended CPI has “*remained at a similar or higher level than general CPI*” and that “*there is no basis to believe that core CPI will be systematically below general CPI in future*”.⁸⁶⁸ Quadrant argues, on the contrary, that “*more recently core CPI has been about 1% lower than general CPI*”.⁸⁶⁹
1276. With respect to the general CPI, the Parties agree that such general CPI applies to the costs and revenues in the Actual Scenario as well as to the costs in the But-For Scenario so that no decision is required on this point.
1277. Turning to the evolution of such index, the Tribunal (by majority) finds Quadrant’s approach to be the most reliable in the circumstances, as it is based on several sources of information from prominent financial institutions such as the ECB and the IMF. The Tribunal therefore finds that Brattle’s calculation of future cash flows should be adjusted to reflect the use of Quadrant’s assumption on inflation risk.
1278. With respect to the “amended” CPI, the Tribunal recalls again that it found that RDL 2/2013 did not violate the ECT in respect of any of the Claimants. It follows that the revenues of the PV Plants in the But-For Scenario must assume that the “amended” CPI would have been in force until the end of their regulatory lifetime.
1279. Turning to the evolution of such index, the Tribunal was not provided with the required information to take a position at this stage. It shall therefore be for the Parties and their experts to provide an updated assessment of the amended CPI forecast in their calculation of future cash flows.

⁸⁶⁴ Brattle Second Quantum Report, paras. 207-212.

⁸⁶⁵ Quadrant First Report, paras. 174-179.

⁸⁶⁶ Quadrant Second Report, paras. 140-142, notably footnote 257.

⁸⁶⁷ **C-330**, RDL 2/2013 of Feb. 1, 2013, Article 1.

⁸⁶⁸ Brattle Second Quantum Report, para. 370 and Figure 14.

⁸⁶⁹ Quadrant Second Report, para. 162 and footnote 300.

(iii) Scenario-Specific Assumptions➤ *Revenues*

1280. The Parties are in stark disagreement as to what future revenues the PV Plants would have received in the But-For Scenario, as opposed to the Actual Scenario. The Parties notably differ on whether the operating hour cap should be taken into account in the But-For Scenario.⁸⁷⁰
1281. In line with its findings on the revenues for the historical period, the Tribunal (by majority) considers that the modelled revenues in the But-For Scenario as calculated by Brattle must be corrected in such a way as to reflect the earlier decisions of the Tribunal (by majority) on liability. Therefore,
- **For PV Plants registered under RD 661/2007**: The modelled future revenues in the But-For Scenario shall:
 - include the financial impact of (i) the cap on the duration of the entitlement to sell electricity production at the Feed-in Tariff, as set out in RD 1565/2010 and subsequently amended by RDL 2/2011 and Law 2/2011 (30 years at 100% of the tariff), (ii) the temporary hour cap as set out in RDL 14/2010 and (iii) the CPI adjustment, as set out in RDL 2/2013 (see *supra*) but
 - exclude the financial impact of (i) the permanent operating hour cap as set out in RDL 14/2010 and (ii) the New Regulatory Regime as enacted through RDL 9/2013, Law 24/2013, RD 413/2014 and MO IET/1045/2014.
 - **For PV Plants registered under RD 1578/2008**: The modelled revenues in the But-For Scenario shall:
 - include the financial impact of (i) the permanent operating hour cap as set out in RDL 14/2010 and (ii) the CPI adjustment as set out in RDL 2/2013 (see *supra*), but
 - exclude the financial impact of the Spanish measures taken as part of the New Regulatory Regime through RDL 9/2013, Law 24/2013, RD 413/2014 and MO IET/1045/2014.
1282. In addition, with respect to the future revenues of the PV Plants in the Actual Scenario, it is important to recall that RDL 17/2019 set a target rate of return of 7.09% (pre-tax) for the second regulatory period (*i.e.* 2020-2025) applicable to the Claimants' PV Plants. As a result, and as already incorporated in Brattle Quantum Update Model, the updated calculation of forward-looking revenues in the Actual Scenario shall maintain the same assumption of a target rate of return of 7.09% (pre-

⁸⁷⁰ Brattle Second Quantum Report, paras. 218-219; Quadrant Second Report, paras. 143-144.

tax) for the second regulatory period until the end of the regulatory life of the PV Plants.

➤ *7% TVPEE*

1283. As recalled *supra*, the Tribunal has found unanimously that it had no jurisdiction over the 7% tax (or TVPEE) and therefore no jurisdiction to decide whether this measure is in breach of the ECT and, *a fortiori*, to award compensation to the Claimants as a result of such measure. Brattle should therefore reintegrate the 7% tax in its calculation of future cash flows in the But-For Scenario, taking into account the effects, if any, of the suspension of this tax in 2019.

➤ *Operating Costs*

1284. The Tribunal (by majority) refers to its findings *supra* on operating costs in the context of the valuation of historical damages, which shall apply *mutatis mutandis* with respect to the valuation of future cash flows.

➤ *Useful Life*

1285. According to Quadrant, there are three types of useful life that are relevant to assess the Claimants' forward-looking damages: (i) regulatory useful life, (ii) technical useful life, and (iii) economic useful life. Although Brattle does not really make a similar distinction and simply refers to "*useful life*," it does not seem to dispute such distinction as a matter of principle. Since those types of useful life can have different durations,⁸⁷¹ the Tribunal finds this distinction relevant. Accordingly, it understands that:

- the technical useful life refers to the number of years the PV Plants can technically operate and produce electricity;
- the regulatory useful life is "*the number of years the PV Plants are entitled to collect subsidies based on their installation year, assuming they are still operating*,"⁸⁷² and
- the economic useful life "*refers to the number of years that it is economically rational to operate a given plant*".⁸⁷³

1286. As further explained by Quadrant, "[t]he economic useful life is equal to the technical useful life, except when it is constrained by the lease terms on the land on which the PV Plants are located, which in some cases are as short as 23 years."⁸⁷⁴

⁸⁷¹ Quadrant First Report, para. 221, Figure 26 and **QE-3**, Sensitivity to Brattle's Table A – Economic Impact Calculation.

⁸⁷² Quadrant First Report, para. 227.

⁸⁷³ Quadrant First Report, para. 228.

⁸⁷⁴ Quadrant Second Report, para. 89.

1287. With respect to the regulatory useful life of the PV Plants in the But-For Scenario, the Tribunal has found that the Respondent did not breach the ECT by curtailing the duration of the entitlement of the PV plants enrolled under RD 661/2007 to the feed-in tariffs to 25 years under RD 1565/2010, a period subsequently extended to 28 years by RDL 14/2010 and then to 30 years by Law 2/2011. It follows that the financial impact of such curtailment on the future cash flows of the PV Plants, if any,⁸⁷⁵ must be taken into account in the But-For Scenario. With respect to the Edisun PV Plants Valle Hermoso II and Salinas, it is not disputed that their regulatory useful life in the But-For Scenario would have remained 25 years, as originally set out in RD 1578/2008.⁸⁷⁶
1288. With respect to the technical useful life of the PV Plants, the Parties agree - quite logically - that such duration shall remain the same in both Scenarios. However, they do not agree on the extent of such duration. Brattle submits that the technical useful life of the PV Plants should be 35 years,⁸⁷⁷ notably relying on a 2011 study from the European Commission,⁸⁷⁸ while Quadrant argues that such duration should not exceed 30 years.⁸⁷⁹
1289. The Tribunal notes that the 2011 study from the EU Commission, which both Parties seem to consider as a reliable source of information, is based on the assumption that PV Plants in 2011 had a minimum average lifetime of 25 years corresponding to the usual warranty lifetime given by producers.⁸⁸⁰ While it is correct that the study acknowledges that the technical lifetime “*could be as long as 30 to 40 years*”,⁸⁸¹ it also states that “[t]oday [*i.e.* in 2011], PV panels are being produced with lifetimes of at least 25 years. The target is to reach lifetimes of 40 years by 2020”.⁸⁸² In other words, at the time of the study, which post-dates the date of construction of the PV Plants in dispute in the present case, 40 years was viewed more as a target lifetime than a common reality. Moreover, Quadrant has submitted other sources of information selected at different dates that seem to evidence a general consensus that PV plants have an average technical lifetime of 25 to 30 years.⁸⁸³ The Tribunal

⁸⁷⁵ The Tribunal indeed understands that RD 1565/2010 (as amended) will not have a financial impact on the future cash flows of those PV Plants which are subject to a non-extendable land lease of up to 25 years, *i.e.* Projects Alicante, Sevilla, Cam Mestre, Granada and Huéscar. Quadrant Second Report, Figure 26 and **QE-3**, Sensitivity to Brattle’s Table A – Economic Impact Calculation; Brattle First Quantum Report, Tables 9 to 12.

⁸⁷⁶ Quadrant First Report, para. 221, Figure 26 and **QE-3**, Sensitivity to Brattle’s Table A – Economic Impact Calculation.

⁸⁷⁷ Brattle First Quantum Report, paras. 130-137; Brattle Second Quantum Report, paras. 256-258.

⁸⁷⁸ **BRR-21**, European Commission DG ENV, (2011), Study on Photovoltaic Panels Supplementing the Impact Assessment for a Recast of the [Waste Electrical and Electronic Equipment] WEEE Directive- Final Report, 14 April 2011.

⁸⁷⁹ Quadrant First Report, paras. 223-226; Quadrant Second Report, paras. 89-92.

⁸⁸⁰ **BRR-21**, European Commission DG ENV, (2011), Study on Photovoltaic Panels Supplementing the Impact Assessment for a Recast of the [Waste Electrical and Electronic Equipment] WEEE Directive- Final Report, 14 April 2011, p. 47, p. 13.

⁸⁸¹ *Id.*, p. 6.

⁸⁸² *Id.*, p. 47, footnote 44.

⁸⁸³ **QE-20**, Consejo Empresarial Español para el Desarrollo Sostenible, “Impulsar la edificación de alto rendimiento energético”, p. 22; **QE-21**, Ministry of Industry, Tourism and Trade, “Manual técnico de energía solar para procesos industriales,” 2010, p. 123; **QE-22**, International Finance Corporation, “Utility-Scale Solar Photovoltaic Power Plants – A Project Developer’s Guide,” World Bank Group, 2015, pp. 24, 28; **QE-23**, Cynthia E. L. Latunussa, Lucia Mancini, Gian Andrea Blengini, Fulvio Ardente and David Pennington, “JRC Technical Reports – Analysis of Material Recovery from Silicon Photovoltaic Panels,” European Commission, March 2016, p. 8.

also notes that the Claimants' initial financial models assumed a technical useful life of 25 years.⁸⁸⁴

1290. In light of the foregoing, the Tribunal (by majority) considers it proper to assume a 30-year technical useful life for the purposes of calculating the Claimants' forward-looking damages to the extent that the PV Plants are not constrained by the presence of lease clauses shortening their economic useful life. The Tribunal understands that the technical useful life assumption is relevant for (i) DCM 1 in respect of Project Bovera, (ii) Edisun in respect of Projects El Tesoro and El Trujillo, and (iii) Hannover in respect of Projects Cervia 2, Alamus and Borges Blanques.⁸⁸⁵

➤ *Regulatory Risk*

1291. The Parties and their respective quantum experts have taken diametrically opposed positions on the assessment of the regulatory risk to be considered in the Actual and the But-For Scenarios for the purposes of calculating the present value of the PV Plants' future revenues. Such opposition is all the more significant as it accounts for a very substantial part of the difference in the Parties' respective calculation of the Claimants' damages (*i.e.* € 27.5 million according to Brattle and € 33.6 million according to Quadrant).
1292. In substance, Brattle submits that the regulatory risk would have been higher in the Actual Scenario than in the But-For Scenario because of the Disputed Measures.⁸⁸⁶ On the basis of such assumption, Brattle applies a "haircut" to revenues based on a probability assessment of regulatory interference. Such probability assessment is based on the yields of FADE Fund securities and the credit ratings of Private Tariff Deficit Securities and assumes "*a three-notch uplift between the But For and Actual Scenarios reflecting the additional regulatory risk resulting from the market's loss in confidence in Spain due to the disputed measures*".⁸⁸⁷ Brattle explains that tariff-deficit securities were, in its view, the best and closest benchmark that faced analogous risks to renewable investors.⁸⁸⁸
1293. Brattle therefore concludes that, as of the Valuation Date, there was an annual probability of a tariff change of 1.51% in the But For Scenario and 2.81% in the Actual Scenario with a recovery rate of 60% based on the historical average for regulated

⁸⁸⁴ BQR-6, Financial Models.

⁸⁸⁵ Quadrant Second Report, Figure 26 and QE-3, Sensitivity to Brattle's Table A – Economic Impact Calculation; Brattle Second Quantum Report, para. 256.

⁸⁸⁶ Brattle First Quantum Report, paras. 166-176; Brattle Second Quantum Report, paras. 265-293. Brattle notably explains such assumption as follows: "*The First Brattle Quantum Report explained the connection between regulatory risk and Tariff Deficit Securities. The deterioration of the debt ratings since 2012 reflects several factors including investors' increasing concern that the regulator would not raise end-user tariffs to generate the necessary funds to satisfy the outstanding payments due to Tariff Deficit security holders, without recourse to the Government to make up the shortfalls. Investors in the renewable sector face the same or greater regulatory risk: that the regulator would not raise end-user tariffs but rather change the regulatory regime. The Disputed Measures demonstrate Spain's willingness to dismantle the established regulatory regime rather than raise end-user tariffs to fund system obligations.*" (Brattle Second Quantum Report, para. 266); see also Brattle First Regulatory Report, paras. 268-273.

⁸⁸⁷ Cl. Comments of 15 June 2020, para. 9.

⁸⁸⁸ Tr. Day 3, 213:12 to 213:25.

utility defaults reported by Moody's.⁸⁸⁹ According to Brattle, such assumptions translate into an added rate of 0.5% to 0.7% of regulatory risk (on top of the discount rate) in the But-For Scenario and into an added rate of 1.1 to 1.2% in the Actual Scenario.⁸⁹⁰

1294. By contrast, Quadrant claims that a continuation of the Original Regulatory Regime was unsustainable and that significant regulatory risk would have been present in the But-For Scenario.⁸⁹¹ It considers that the Disputed Measures were the only way to solve the Tariff Deficit and stabilize the electricity system and therefore prompted a reduction of regulatory risk in the Actual Scenario.⁸⁹² Quadrant further submits that Brattle double-counted such risk in the Actual Scenario.⁸⁹³
1295. With respect to the But-For Scenario, Quadrant argues that Brattle has understated the regulatory risk and committed several mistakes (i) by applying zero regulatory risk in the 2013-2018 period, (ii) by applying only a small adjustment for regulatory risk from 2019 onwards, and (iii) by assuming that subsidies would apply for up to a 35-year regulatory useful life, contrary to Claimants' financial models which end after 25 years.⁸⁹⁴ To assess the regulatory risk in the But-For Scenario, Quadrant notably relies on the DCM 1's acquisition price of the PV Plants Bovera and Cam Mestre in 2009 to affirm that the regulatory risk at that time was already equivalent to a 6.4% annual probability of regulatory revision and that such risk would have continued to increase between 2009 and the 2018 Valuation Date absent the Disputed Measures.⁸⁹⁵
1296. Quadrant therefore concludes that, as of the Valuation Date, there was a 10% annual probability of a tariff change in the But-For Scenario and a 2% annual probability of a tariff change in the Actual Scenario.⁸⁹⁶ Quadrant accepts Brattle's assumption of a 60% recovery rate.⁸⁹⁷
1297. Having carefully reviewed the Parties' detailed submissions and expert evidence on this issue, the Tribunal observes that both experts agree, as a matter of principle, on the need to factor in a regulatory risk, as a non-systematic risk, in the valuation of the PV Plants' cash flows in both the Actual and the But-For Scenarios.

⁸⁸⁹ Brattle Second Quantum Report, para. 265, and footnote 233.

⁸⁹⁰ Brattle Quantum Hearing Presentation, p. 11.

⁸⁹¹ Quadrant First Report, paras. 252-279; Quadrant Second Report, paras. 93-128.

⁸⁹² According to Quadrant, "*In the absence of the Measures, the Spanish electricity system would have remained in a state that was perceived to be unsustainable. Investors would have faced considerably higher regulatory risk than in 2008, when the tariff deficit began to accelerate. It is unreasonable to assume, as Brattle does, that specific regulations applicable to the PV Plants would have stayed in place as they existed at one precise point in time with a low regulatory risk involved.*" (Quadrant First Report, para. 268).

⁸⁹³ Quadrant Second Report, paras. 93-103.

⁸⁹⁴ Quadrant Second Report, paras. 105 *et seq.*

⁸⁹⁵ Quadrant Second Report, paras. 111-120.

⁸⁹⁶ Quadrant Second Report, para. 128.

⁸⁹⁷ Quadrant Second Report, para. 127.

1298. On the areas of disagreement, the Tribunal (by majority) agrees with Brattle that “*the appropriate But For scenario for the historical period prior to the Valuation Date should not be discounted for the risk that a tariff reduction, and thus ECT violation, would have occurred by then anyway*”.⁸⁹⁸ In the present case, the financial impact of the Disputed Measures which was found to be within the acceptable margin of change of the Spanish State in compliance with the ECT has already been taken into account *supra* in the valuation of the Claimants’ historical damages in the But-For Scenario. Therefore, the Tribunal (by majority) does not find it proper to add a further discount for regulatory risk on top of these adjustments.
1299. Now turning to the assessment of such regulatory risk in the determination of the Claimants’ forward-looking damages, the Tribunal (by majority) accepts, on the basis of the evidence on record, that such regulatory risk is higher in the Actual Scenario than in the But-For Scenario for the following reasons.
1300. First, one of the main purposes of the Original Regulatory Regime was to offer to renewable energy investors a legal and regulatory framework having sufficient legal certainty and predictability. Spain was also under a treaty obligation to maintain the stability of that regime. The Tribunal is not convinced that such Regime would have made the whole Spanish electricity system unsustainable, as alleged by Quadrant, notably because the evidence suggests that such Regime only played a limited role in the accumulation of the Tariff Deficit.⁸⁹⁹
1301. Indeed, it appears that there were a number of viable, alternative solutions that Spain could have adopted to remedy the tariff deficit without fundamentally altering the remuneration offered to renewable energy investors enrolled under RD 661/2007 and RD 1578/2008. Such measures notably included (i) raising consumer prices further and faster, (ii) de-regulating consumer prices entirely, (iii) imposing a tax on CO2 emissions, (iv) imposing a levy on fuel consumption, and/or (v) re-scheduling tariffs to CSP plants on NPV-neutral basis.⁹⁰⁰ The Tribunal (by majority) is of the view that the fact that those measures were recommended by the European Commission⁹⁰¹ or by the CNE,⁹⁰² demonstrates that Spain could have objectively chosen from a number of other solutions to address the issue of the Tariff Deficit without jeopardizing regulatory stability.

⁸⁹⁸ Brattle Second Quantum Report, para. 288.

⁸⁹⁹ Brattle First Regulatory Report, paras. 182-184. The Tribunal further notes that other EU countries adopted similar FIT mechanisms without encountering a comparable level of Tariff Deficit: see BRR-117, p. 23.

⁹⁰⁰ Brattle First Regulatory Report, paras. 188-203; Brattle Second Regulatory Report, paras. 91-103.

⁹⁰¹ See notably **BRR-135**, European Commission publication, Energy Markets in the European Union in 2011, published in 2012 and **BRR-136**, MO ITC/400/2007 of 26 February 2007.

⁹⁰² **BRR-137**, CNE Report, Spanish Energy Sector Report - Part I. Measures to Guarantee the Economic and Financial Sustainability of the Electricity System, 7 March 2012; **BRR-138**, EC Staff Working Document, The EU Environmental Implementation Review Country Report – SPAIN; Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; The EU Environmental Implementation Review: Common Challenges and how to combine efforts to deliver better results, Brussels, {SWD(2017) 42 final}, 3 February 2017; **BRR-139**, European Commission Staff Working Document, Assessment of the 2013 National Reform Programme and Stability Programme for Spain {SWD(2013) 359}, 29 May 2013.

1302. Second, and contrary to Quadrant’s position, the abolition of the Original Regulatory Regime was heavily criticized by market operators and political institutions alike and perceived as generating a loss of confidence of investors in the stability of the Spanish system.⁹⁰³ For instance:

- In a Staff Working Document of 13 October 2014, the European Commission stated:

*“In 2013, Spain began an electricity market reform, with the main aim of eliminating the tariff deficit. [...] The reform was criticized for having retrospective effects and limited consultation with stakeholders, therefore Spain should increase participation and transparency in the regulatory process to reduce perceived regulatory risks”.*⁹⁰⁴

- In October 2015, the credit rating agency Moody’s stated that “[i]nvestors in European renewable energy projects face the greatest regulatory risk in Spain”.⁹⁰⁵
- In a report issued in February 2016 entitled “*The impact of risks in renewable energy investments and the role of smart policies*” by renewable energy consultants and co-funded by the Intelligent Energy Europe Programme of the EU (the “Diacore Project”), the authors stated:

*“Besides these analysed policy designs, other factors highly impact the cost of capital. For example, retroactive policy changes, as implemented in Spain (FIT of PV) or as announced (but not implemented) in Germany, have affected the cost of capital, because the probability of retroactive policy changes has increased uncertainty about future revenues. Subsequently, investors’ risks have increased as well. This higher risk translates into a higher minimum threshold for ROE. Similarly, financing institutions reduce their risk exposure by demanding a higher equity share”.*⁹⁰⁶

- The Renewable Energy Country Attractiveness Index (“**RECAI**”) published by EY shows that Spain’s attractiveness to investment in renewable energies fell

⁹⁰³ Brattle First Regulatory Report, paras. 268-273 and Appendix 10, and the evidence referred to.

⁹⁰⁴ **BRR-181**, EC Report, Commission Staff Working Document, Country Reports - Accompanying The Document, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Progress Towards Completing The Internal Energy Market, {SWD(2014) 311 final}, 13 October 2014, p. 205 (emphasis added); see also **BRR-23**, European Commission Staff Working Document, (2013), European Commission Guidance for the Design of Renewables Support Schemes {SWD(2013) 439 final}, 5 November 2013, pp. 3-4 and 13; **BRR-209**, EUROFORES Report, EU Tracking Roadmap 2015 – Keeping Track of Renewable Energy Targets Towards 2020, June 2015, p. 95.

⁹⁰⁵ **BRR-184**, Moody’s Investors Service Report, Regulatory Risk for EU Renewables Investors Greatest in Spain, Italy, 5 October 2015, pp. 1 and 5 (emphasis added).

⁹⁰⁶ **BRR-211**, Diacore Project Report, The Impact of Risks in Renewable Energy Investments and the Role of Smart Policies, February 2016, pp. 76-77 (emphasis added).

significantly from the 14th most attractive position in August 2012 to the 29th position in May 2017.⁹⁰⁷

1303. Moreover, the Tribunal (by majority) finds it relevant in its assessment of regulatory risk (i) that the New Regulatory Regime led to many bankruptcies in the renewable energy sector⁹⁰⁸ and (ii) that Spain itself acknowledged the negative effect on market's perception of the changes introduced by the New Regulatory Regime and notably Law 24/2013.⁹⁰⁹
1304. In light of the foregoing, the Tribunal (by majority) is satisfied, as a matter of principle, that the regulatory risk is higher in the Actual Scenario than it would have been in a But-For Scenario in the absence of the Disputed Measures. The Tribunal (by majority) therefore accepts Brattle's assumption of a regulatory risk of 1.51% in the But-For Scenario and 2.81% in the Actual Scenario with a recovery rate of 60%, which, as explained by Brattle, is the financial equivalent of a discount for regulatory risk of 0.5% to 0.7% in the But-For Scenario and of 1.1% to 1.2% in the Actual Scenario respectively.⁹¹⁰

➤ *Discount Rate*

1305. The Tribunal (by majority) notes that the Parties no longer appear to dispute the application of a discount rate (or base WACC) of 3.5% on the PV Plants' future cash flows to reflect systematic risks⁹¹¹ and therefore accepts such assumption.

⁹⁰⁷ **BRR-213**, EY's Renewable Energy Country Attractiveness Indices Report, August 2012, Issue 34; **BRR-214**, EY's Renewable Energy Country Attractiveness Indices Report, September 2014, Issue 42; **BRR-215**, EY's Renewable Energy Country Attractiveness Indices Report, May 2017, Issue 49.

⁹⁰⁸ **BRR-216**, EREF Report, Policy Paper on Retrospective Changes to RES Legislations and National Moratoria, May 2013; **BRR-217**, Carmen Monforte, "The Ministry of Industry Announces that the Financial Sector Will Also Pay the Bill of the Electricity Reform", Cinco Días, 10 June 2013; **BRR-218**, Lorena López and Rubén Esteller, "The Renewable Sector Claims for a Reduction of the Interest Rates to the Financial Sector in Response to the Revenue Haircuts", El Economista, 7 July 2014; **BRR-219**, Ángeles Gonzalo Alconada, "The Financial Sector Requires Linde to Soften the Provisions in relation to Renewable Investments", Cinco Días, 1 October 2014; **BRR-220**, Revista Eólica y del Vehículo Eléctrico, ANPIER, APPA, PROTERMOSOLAR and UNEF Report the Expropriation of Renewable Investments (Photovoltaic, Wind and Thermal Solar), 19 July 2013; **BRR-221**, Baltasar Montaña, "90% of the PV Sector Will Declare Insolvency After the New Reduction in Financial Support", Voz Populi, 8 February 2014.

⁹⁰⁹ **BRR-185**, Agreement on the State General Budget 2019, 11 October 2018, p. 37, where Spain acknowledged the need to "introduce amendments to the New Spanish Electricity Act 24/2013 to provide stability to the remuneration regime for special regime producers, including renewable producers, and to guarantee a reasonable long-term return to those installations that were entitled to financial incentives under the previous regime and could not adjust their investments to the new framework that was unknown at the time" (in the original version: "Introducir modificaciones en la Ley del Sector Eléctrico 24/2013 para dotar de estabilidad al marco retributivo de la actividad de producción de energía eléctrica a partir de fuentes renovables, cogeneración y residuos, y para garantizar una rentabilidad razonable a largo plazo a los activos que gozaban de régimen económico primado antes de la entrada en vigor de la nueva normativa y que no pudieron adaptar sus esquemas de inversión a un marco que no conocían, cumpliendo así con el compromiso adquirido tanto por Unidos Podemos – En Comú Podem – En Marea como por el PSOE.")

⁹¹⁰ Brattle Hearing Quantum Presentation, pp. 6 and 11.

⁹¹¹ Brattle Second Quantum Report, para. 263; Quadrant Second Report, para. 87 (ix) and note 142; Brattle Hearing Quantum Presentation, p. 10.

➤ *Discount for Illiquidity*

1306. Although the Parties agree on the need to include a discount to reflect the risk of illiquidity which, unlike the discount rate, is a non-systematic risk, they disagree on the applicable discount rate.
1307. Brattle applies a 7.5% illiquidity discount for unleveraged projects (*i.e.* plants that do not hold external debt) and a 18% illiquidity discount for leveraged projects in both the Actual and the But-For Scenarios.⁹¹²
1308. Quadrant applies a 15% illiquidity discount in the Actual Scenario⁹¹³ and a 22% illiquidity discount in the But-For Scenario⁹¹⁴ for leveraged projects. However, it applies a 7.5% illiquidity discount in the Actual Scenario⁹¹⁵ and a 9.5% illiquidity discount in the But-For Scenario for unleveraged projects.⁹¹⁶
1309. The Tribunal (by majority) first notes that there is no dispute – and rightfully so – as to the need to apply an illiquidity discount to the projected cash flow in order to reflect the fact that the PV Plants in which the Claimants own an equity interest are illiquid physical assets. It further observes – also rightfully so in its eyes – that the Parties agree on the need to distinguish between leveraged and unleveraged projects to reflect the higher price volatility of the Claimants’ interests where external debt is serviced before the Claimants are paid. However, the Parties disagree as to the applicable rate and as to whether the same rate should apply in the Actual and the But-For Scenario.
1310. The Tribunal (by majority) is not satisfied that a higher illiquidity discount should apply in the But-For Scenario, as compared to the Actual Scenario, as argued by Quadrant. Such assumption is again premised on the idea – as with respect to the regulatory risk – that the Disputed Measures improved the economic and regulatory landscape for investments in renewables in Spain and would have led to an increase in the number of transactions in the PV sector. However, the Tribunal (by majority) has found *supra* that, in its view, the Disputed Measures had in fact deteriorated the market’s perception of the stability of the regulatory environment for such investments and therefore increased the regulatory risk.
1311. In such circumstances, the Tribunal (by majority) accepts Brattle’s assumption that a same illiquidity discount of 7.5% (for unleveraged projects) and of 18% (for leveraged projects) should apply in both the Actual and But-For Scenario.

⁹¹² Brattle Second Quantum Report, paras. 294-303.

⁹¹³ Quadrant First Report, paras. 290-297; Quadrant Second Report, paras. 133-139.

⁹¹⁴ Quadrant First Report, paras. 298-299; Quadrant Second Report, paras. 133-139.

⁹¹⁵ Quadrant First Report, para. 297, note 471.

⁹¹⁶ Quadrant First Report, para. 299, note 474.

➤ *Pre- and Post-Award Interest*

1312. The Parties' experts disagree as to the rate applicable to pre-award interest. Brattle relies on the Spanish 10-year bond yield,⁹¹⁷ while Quadrant claims that a short-term risk-free rate should apply⁹¹⁸ and suggests applying the six-month or one-year EURIBOR.⁹¹⁹
1313. As a preliminary remark, the Tribunal notes that the Parties' experts do not dispute the power of the Tribunal to award interest to the Claimants should it find that the latter are entitled to compensation. As a matter of fact, it is commonly agreed in international arbitration that interest is due in case of delayed payment to ensure full compensation of the aggrieved party and that arbitral tribunals enjoy significant discretion in the determination of the rate of such interest, whether at the pre-award or post-award stage.⁹²⁰
1314. In the case at hand, the Tribunal agrees with Quadrant that "[l]enders to a sovereign require interest above the risk-free rate to compensate for the ex ante risk that the sovereign will default on its debt at some point in the future" and that "[i]f the Tribunal were to award compensation to Claimant [sic], the amounts awarded will not have been subject to the borrower default risks that these rates take into account".⁹²¹
1315. The Tribunal (by majority) therefore finds it appropriate in this case to apply a risk-free rate.⁹²²
1316. The Tribunal further notes that such approach is supported by other experts on quantum, notably Mark Kantor who states:

"Historic earnings must be 'brought forward' to the valuation date by means of an interest rate, while future earnings are discounted back to the valuation date by means of a discount rate. The interest rate used for bringing historical amounts forward will clearly not contain the same risk factors as the discount rate used to present value future amounts. As a practical matter, the interest rate used for the historical amount is often a 'risk-free' rate (such as the rate for US Treasuries) or a statutory rate for pre-judgment interest".⁹²³

⁹¹⁷ Brattle First Quantum Report, paras. 234-239; Brattle Second Quantum Report, paras. 326-331.

⁹¹⁸ Quadrant First Report, Annex F, paras. 376-384 ; Quadrant Second Report, Annex D, paras. 255-260.

⁹¹⁹ Quadrant Second Report, Annex D, para. 260; Day 4, 57:4 to 57:11.

⁹²⁰ See notably **CL-86**, John Y. Gotanda, *A Study of Interest*, Villanova University School of Law Working Paper Series, Paper 83, pp. 29-30.

⁹²¹ Quadrant First Report, para. 381.

⁹²² Brattle itself admits that "[i]f the Tribunal does not wish to consider the risks borne by the Claimant in connection with deferred compensation, and does not want to consider the benefits of the disputed conduct to Spain, then the Tribunal should compute pre-award interest at the risk free rate." (Brattle First Quantum Report, para. 237, note 214).

⁹²³ **QE-73**, M. Kantor, "Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence" (Kluwer Law International, 2008), p. 49 (emphasis added).

1317. Applying a risk-free rate is also consistent with a number of previous arbitral awards, in particular *Vestey v. Venezuela*⁹²⁴ – relied upon by Quadrant – and other awards issued in the context of the same Spanish renewable energy reforms, such as *Cube*.⁹²⁵
1318. Both quantum experts further agree that the Euro Interbank Offered Rates (EURIBOR) provide a relevant reference for a risk-free rate.⁹²⁶
1319. For these reasons, the Tribunal (by majority) considers that interest shall accrue on the compensation due to the Claimants as of the Valuation Date until full payment at a rate of 12-month EURIBOR.
1320. Moreover, the Tribunal (by majority) notes that compound interest (as opposed to simple interest) better reflects market reality and is now more commonly awarded in international arbitration, as confirmed by the vast number of awards and the abundant literature cited by the Claimants.⁹²⁷ It therefore finds it appropriate to order that interest be compounded annually.

➤ *Tax Gross-Up*

1321. As recalled earlier, the Claimants submit that a tax gross-up (TGU) must be added to the compensation of the DCM Claimants in order to compensate for the fact that an award in their favor will be subject to a 25% Spanish corporate income tax. They argue that, because Brattle calculated quantum based on the value of cash flows to the DCM Claimants after payment of Spanish corporate income tax on the additional hypothetical cash flows in the But For scenario, a tax gross-up is required in order to eliminate double taxation.⁹²⁸ The Respondent submits, in response, that the claim for a tax gross-up is inadmissible and speculative, notably because it is excluded by Article 21 of the ECT and because the Crowe Kleeberg Report prepared by a tax legal expert and relied upon by the Claimants in support of their claim fails to analyze the actual tax implications of the award.⁹²⁹

⁹²⁴ **QE-74**, *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 440.

⁹²⁵ **CL-178**, *Cube*, paras. 537-538.

⁹²⁶ Brattle First Quantum Report, para. 156: “*Published Euribor rates provide a better estimate of the risk-free rate, because they do not pose default risk*”; Quadrant Second Report, para. 260.

⁹²⁷ Cl. Mem., paras. 552-558, in part. para. 552, note 877. See, for instance, **CL-75**, *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 104 (“[W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then becomes due to him, the amount of compensation should reflect [...] the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest [...] [Compound interest] is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.”). See also **CL-76**, *Wena Hotels*, para. 129: “[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations...As professor Gotanda has observed ‘almost all financing and investment vehicles involve compound interest...If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.’”

⁹²⁸ Cl. Reply, paras. 780-783; Cl. PHB, paras. 113-118; Brattle Second Quantum Report, paras. 332-334; Crowe Kleeberg Report.

⁹²⁹ Resp. Rej., paras. 1180-1218; Resp. PHB, paras. 210-217; Quadrant Second Report, Annex E, paras. 261-263.

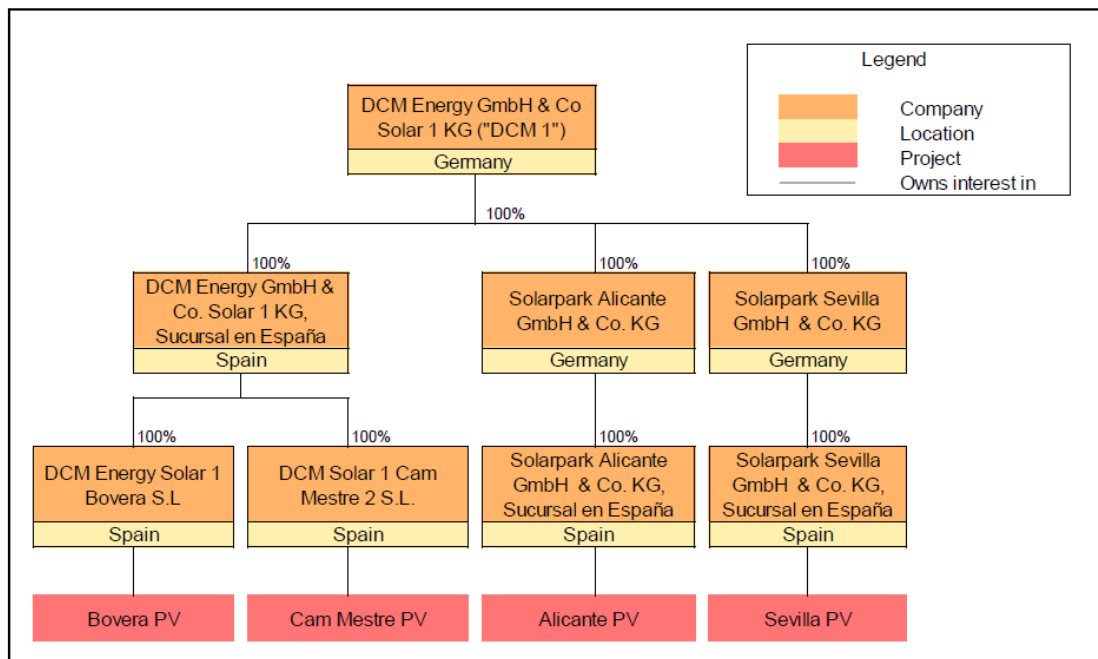
1322. In substance, the Tribunal finds that this claim – which is made only by DCM 1 and DCM 2 – remains unsubstantiated because the DCM Claimants have failed to demonstrate (i) that they would be *personally* liable to pay Spanish taxes on the compensation received through the Award and therefore (ii) that the loss arising from such tax liability – to the extent that it would materialize, which also remains unclear – would be their own loss, as opposed to a loss sustained by their relevant subsidiary, *i.e.* a third party.
1323. As a preliminary remark, the Tribunal does not consider that a tax gross-up is prohibited under Article 21(1) ECT insofar as the purpose of a tax gross-up is to avoid double taxation and to ensure the full compensation of the investor as a result of the host State’s breach of the ECT. The claim of the DCM Claimants for a tax gross-up is therefore admissible in theory.
1324. Now turning to the merits of such claim, the Tribunal recalls that the DCM Claimants bear the burden of proving that the compensation awarded to them would be taxed either in the host State, Spain, or in their home State, Germany and that a tax gross-up is therefore required to make them whole.
1325. In this regard, the Tribunal has carefully reviewed the Crowe Kleeberg Report produced by the Claimants, which is the only relevant piece of evidence on record on this tax issue. It is divided into two parts.
1326. The first part is an expert report of Frank Behrenz of Crowe Kleeberg titled “Opinion on the German tax treatment of a potential award” which opines on German tax law and concludes that a potential award to the DCM Claimants would be considered as Spanish-source income and would not be taxed in Germany. There is therefore no dispute that any compensation awarded to the DCM Claimants in this arbitration would not be taxed in the DCM Claimants’ home State.
1327. The second part is an “*internal legal note*” of Jesus Romero of Crowe Legal y Tributario, who opines on Spanish tax law. According to Mr. Romero,

*“On this basis, considering the ultimate purpose of the compensation to be granted to the claimants under the arbitration procedures, according to a financial rationale such compensation should be accounted for as extraordinary income of the relevant Spanish operating subsidiary or branch. That is, the compensation would be attributable, from an economic and accounting perspective, to the relevant operating company that would have obtained the (ordinary) income in the normal course of its commercial activity if the remuneration system had not been modified. In this respect, the compensation would be taxable in Spain in the same terms the ordinary income would have been taxed at the level of the operating company or branch, at the standard rate (*i.e.* 25% under the CIT [Corporate Income Tax] or the Spanish NRIT [Non-Resident Income Tax], in the case where the commercial activities were carried out by the permanent establishment of the foreign entities).*”

On the other hand, on the basis of the same accounting principles and financial rationale, at the level of the claimants (and any other intermediate entity within the corresponding corporate structure) the compensation would be accounted for net of the Spanish tax payable as per above and according to the income categorization that would have corresponded should the relevant legislation remain applicable".⁹³⁰ (emphasis added).

1328. The Spanish tax expert therefore acknowledges that, if the Award were to attract tax liability in Spain (which remains, at this stage, hypothetical), the payment of such tax would not be due by the DCM Claimants themselves but rather by “*the relevant operating company that would have obtained the (ordinary) income in the normal course of its commercial activity if the remuneration system had not been modified.*” By contrast, “*at the level of the claimants (and any other intermediate entity within the corresponding corporate structure) the compensation would be accounted for net of the Spanish tax payable as per above.*”
1329. At this juncture, it is worth recalling the ownership structure of DCM 1 and DCM 2 by referring to the figures used by Quadrant,⁹³¹ which are not contested:

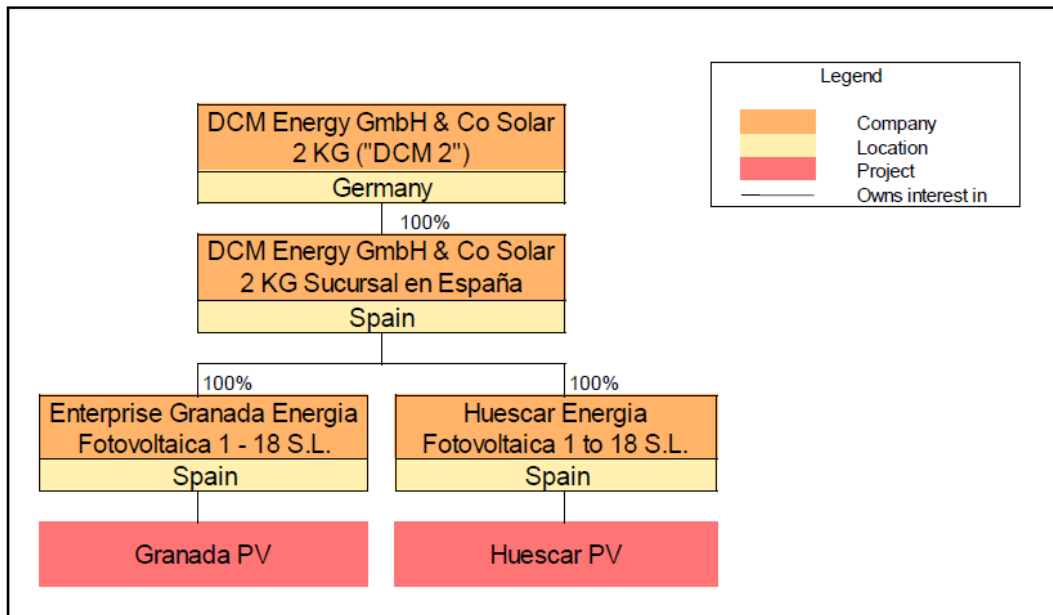
Figure 1
Ownership Structure of the DCM 1 PV Plants as of the Valuation Date²⁰



⁹³⁰ Crowe Kleeberg Report, pp. 16-17 (of the pdf).

⁹³¹ Quadrant First Report, Figure 1, para. 24 and Figure 2, para. 27.

Figure 2
Ownership Structure of the DCM 2 PV Plants as of the Valuation Date²⁸



1330. As it can be seen on the above, applying the reasoning of the tax expert to the facts of the case would mean that any Spanish CIT or NRIT would be due:
- in the case of DCM 1, either by its Spanish subsidiaries DCM Energy Solar 1 Bovera S.L. and DCM Energy Solar 1 Cam Mestre S.L. or by the Spanish branches of its German subsidiaries Solarpark Alicante GmbH & Co. KG and Solarpark Sevilla GmbH & Co. KG, and
 - in the case of DCM 2, by its Spanish subsidiaries Enterprise Granada Energía Fotovoltaica 1 - 18 S.L. and Huéscar Energía Fotovoltaica 1 to 18 S.L.
1331. In other words, any applicable 25% CIT or NRIT would ultimately have to be paid by those subsidiaries of the DCM Claimants but not by the DCM Claimants themselves. This is further confirmed by Mr. Romero himself when he states – although the meaning of the entire sentence is unclear – that “*compensation would be aimed to restore the financial situation of those Spanish subsidiaries and branches to the position it [sic] would have enjoyed should the amendments in the remuneration system would never have been introduced.*”⁹³²
1332. For this sole reason, the claim for tax gross-up must fail absent any demonstration by the DCM Claimants that the taxation of the Award would cause them a direct and personal loss (such as for instance, a loss in value of their participation in their German or Spanish subsidiaries, as the case may be).

⁹³² Crowe Kleeberg Report, p. 16 (emphasis added).

1333. In any event, although this is the assumption that he has made, the Spanish tax expert does not refer to any legal authority for the general proposition that compensation received through an arbitral award would be considered taxable in Spain. In fact, Mr. Romero remains very general in his opinion on Spanish tax law and does not engage in a detailed analysis of the specific tax situation of the various legal entities composing the ownership structure of DCM 1 and 2. It is also unclear what documents were or were not reviewed by him.
1334. In particular, as rightly pointed out by Quadrant,⁹³³ Mr. Romero assumes the application of a general 25% corporate tax rate on an award to DCM 1 and DCM 2 but does not analyze whether the relevant taxpaying entities could have offset some of their tax losses against taxable profits to reduce such rate and more generally, what would have been the effective tax rate ultimately paid by those taxpaying entities in the present case. The Tribunal further notes that counsel for the Claimants admitted, in their Closing Statement,⁹³⁴ that their “*tax advice may be incorrect.*”
1335. For these reasons, the Tribunal rejects the claim of DCM 1 and DCM 2 for a tax gross-up.

7.3.3 Conclusion on *Quantum*

1336. In light of the foregoing, and considering the findings made in the preceding subsections, the Tribunal is not in a position at this stage precisely to calculate the damages sustained by the Claimants and the compensation owed to them, it being recalled that such calculation must, in any event, be updated to reflect a closer Valuation Date. The Tribunal therefore invites the Parties to submit a joint updated report within three months from the date of this Decision taking into account the above findings, and alternatively two updated reports if the Parties cannot reach an agreement.

8. COSTS

1337. The Tribunal reserves its decision on costs to the Award.

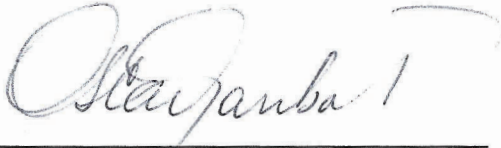
⁹³³ Quadrant Second Report, Annex E, paras. 262-263; Quadrant Hearing Presentation, slide 58; Resp. PHB, para. 216; see also the cross-examination of Mr. Caldwell, Day 3, 203:4 to 203:9: “Q. Okay. And can you also confirm that this tax opinion Crowe and Kleeberg does not analyse anywhere the effective tax rate of DCM 1 and DCM 2? A. (Mr. Caldwell) No, it doesn’t deal with the effective tax rate of these two entities. Q. Okay, thank you.”

⁹³⁴ Day 5, 69:18 (Cl. closing statement).

9. DECISIONS

1338. For the reasons set forth above, the Tribunal decides as follows:

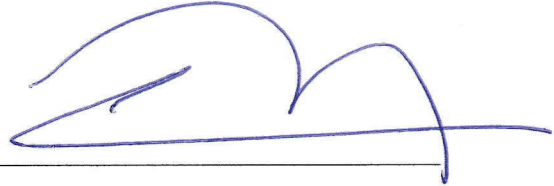
- i. The Tribunal declares unanimously that it has jurisdiction over the Claimants' claims in the present arbitration, except with respect to the Claimants' claim in relation to the introduction of the TVPEE.
- ii. The Tribunal (by majority) decides that the Respondent breached Article 10(1) ECT by failing to accord fair and equitable treatment to the Claimants' investments in PV plants.
- iii. The Tribunal (by majority) decides that the Respondent breached Article 10(1) ECT by impairing the management, maintenance, use, enjoyment or disposal of the Claimants' investments in PV plants through unreasonable measures.
- iv. All other claims in respect of the PV plants are dismissed.
- v. The Tribunal decides that the Claimants are entitled, as a matter of principle, to compensation in respect of losses caused to their PV investments.
- vi. Without prejudice to its final decision on the amount of compensation payable to the Claimants, the Tribunal (by majority) invites the Parties to submit a joint (or, failing an agreement thereupon, separate) updated damage calculation incorporating the findings of the Tribunal (by majority) in Section 7.3.2 *supra* (i) using an updated *ex post* valuation date and (ii) following the methodology applied by Brattle (in particular, by distinguishing between an Actual scenario and a But-For scenario) subject to the corrections and adjustments made by the Tribunal to Brattle's assumptions.
- vii. The Tribunal (by majority) accordingly directs the Parties to submit their updated and revised calculation (whether joint or separate) within three months from the date of this Decision.
- viii. In case of separate calculations, the Tribunal (by majority) directs the Parties to provide concise explanations as to the reasons for their disagreement.
- ix. The Tribunal will give such further directions as may be necessary.
- x. The Tribunal reserves all consequential matters, including costs, to the Award.



Mr. Oscar M. Garibaldi
Arbitrator

Prof. Dr. Pierre-Marie Dupuy
Arbitrator
Subject to the attached dissent

Ms. Carole Malinvaud
President of the Tribunal



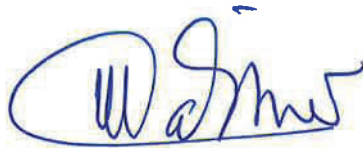
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President of the Tribunal

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Prof. Dr. Pierre-Marie Dupuy
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A handwritten signature in blue ink, appearing to read 'Carole Malinvaud', written in a cursive style.

Ms. Carole Malinvaud
President of the Tribunal