IN THE MATTER OF AN ARBITRATION UNDER THE 1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

AND

PURSUANT TO THE 1994 ENERGY CHARTER TREATY

BETWEEN:

WATKINS HOLDINGS S.À R.L.

WATKINS (NED) B.V.

WATKINS SPAIN, S.L.

REDPIER, S.L.

NORTHSEA SPAIN, S.L.

PARQUE EÓLICO MARMELLAR, S.L.

AND

PARQUE EÓLICO LA BOGA, S.L.

Claimants

v

THE KINGDOM OF SPAIN

Respondent

REQUEST FOR ARBITRATION

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26 October 2015

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1. INTRODUCTION

1. This Request for Arbitration (the **Request**) against the Respondent, the Kingdom of Spain (**Spain**), is filed by Watkins Holdings S.à r.l. (the **First Claimant**), Watkins (Ned) BV (the **Second Claimant**), Watkins Spain, S.L. (the **Third Claimant**), Redpier, S.L. (the **Fourth Claimant**), Northsea Spain S.L. (the **Fifth Claimant**), Parque Eólico Marmellar, S.L. (the **Sixth Claimant**), and Parque Eólico La Boga, S.L (the **Seventh Claimant** and, together, **Watkins** or the **Claimants**), pursuant to:

   (i) Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the **ICSID Convention**);

   (ii) Rule 1 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings; and

   (iii) Article 26(4)(a)(i) of the Energy Charter Treaty (the **ECT**).[1]

2. The Claimants respectfully request the Secretary-General of the International Centre for the Settlement of Investment Disputes (**ICSID** or the **Centre**) to register the Request.

3. The dispute to which this Request relates arises from a series of breaches by the Kingdom of Spain (**Spain**) of its obligations under the ECT and international law, which have caused substantial losses to the Claimants. A brief summary of the dispute is set out in Section 2 below, and the factual background giving rise to these breaches is set out in Section 4 below.

4. The Claimants reserve the right to expand upon the facts and claims set out in this Request and to make further submissions as may be necessary to complete or supplement the presentation of their claims, to present incidental or additional claims, or to respond to any allegations or defences put forward by Spain. The Claimants also reserve the right to produce further documentary, witness and expert evidence to supplement and support the claims made in this Request.

2. SUMMARY OF THE DISPUTE

5. In the late 1990s, in order to meet mandatory greenhouse gas emissions targets and minimise its dependence on imported energy, Spain made various efforts to attract investment into its renewable energy sector. Spain was aware that, to attract the necessary investment, it would need to put in place a regulatory regime that provided investors with appropriate investment incentives. This was necessary because, compared to other conventional power generation technologies, renewable

[1] **Exhibit C-1**, Energy Charter Treaty, Lisbon, 17 December 1994.

energies are typically more expensive on a cost-per-unit-of-energy-generated basis, have a lower utilisation rate and generally require significantly higher upfront capital investments. In addition, investments in renewable energy projects are also considered to be riskier investments due to technology and resource constraints. Therefore, investors are not generally willing to take the risks associated with investing large sums of capital in renewable energy projects, absent appropriate investment incentives which provide long-term and predictable revenue streams that allow such investors to recoup their investments and make a foreseeable return.

6. Despite Spain's initial efforts to stimulate investments, the renewable energy sector failed to grow at the rate that Spain had expected or wanted. Therefore, Spain put in place an economic regime for qualifying renewable energy projects based on a "feed-in-tariff" mechanism, which typically offers a generator a pre-determined, *above-market* price for the sale of each unit, or kWh, of energy produced. Under this economic regime, renewable energy generators of a certain installed capacity became part of a legislatively-defined "special regime" (the **Special Regime**). Spain expanded the scope of this Special Regime over the course of the years with the specific purpose of attracting more investments into its renewable energy sector.

7. In particular, on 25 May 2007, the Government of Spain (the **Government**) passed Royal Decree No. 661/2007 (**RD 661/2007**), which provided an inflation-linked, above-market feed-in-tariff for each unit of electricity produced by a qualifying generator for the lifetime of the installation. Pursuant to RD 661/2007, a qualifying generator could choose between receiving, for each kWh generated, either: (i) a fixed payment in the form of a regulated tariff (the **Regulated Tariff**); or (ii) a premium payment over and above the price received in the market (the **Premium**). A qualifying generator could choose between these two options – the Regulated Tariff or the market price plus Premium – on a yearly basis, as was best suited to it. Further, RD 661/2007 guaranteed qualifying generators the right to receive these benefits for the entire operational life of the installation. Spain also expressly promised under RD 661/2007 that any future changes to this economic regime would not affect existing installations that had satisfied the prescribed registration requirements.

8. The Special Regime attracted vast investment into Spain's renewable energy projects, for which Spain has accrued huge benefit. Far from the modest renewable sector it used to have, the investment in renewable generator capacity induced by the Special Regime now enables Spain to boast that it is "*a world leader*" in renewable energy, and wind energy in particular. Indeed, to market Spain as a brand worldwide, Spain now proudly declares that "*Spain is Europe's leading generator of wind power…* [with] *installed capacity (approximately 20,800MW at the end of 2012)*"[2] and "*the world's leading producer of renewable energies, principally wind energies*".[3] Indeed, Spain

[2] **Exhibit C-12**, Spanish Ministry of Foreign Affairs, Marca España, *Spain's Positioning: Leadership Key Factors*, July 2013, p.14.
[3] *Ibid.*, p.15.

now has the benefit of an entire industry in renewables. In its own words, Spain now "*has an industrial network with companies which are prominent in the international arena, established worldwide and heavy investors in R&D&I. This has given them a competitive advantage with the rest of the world*".[4] This is all a result of the inducements contained in the Special Regime.

9. Attracted by, and in reliance on, the incentives offered by the Special Regime, in 2011 the Claimants committed to large investments in various wind power plants installations in Spain. Without the Special Regime incentives, the Claimants would not have made the investments at issue in this arbitration. Notably, the Claimants did not invest in renewable energy installations in Spain until after the Special Regime's commitment to long-term incentives had been put in place. The Claimants only invested in installations that qualified for incentives under the provisions of the Special Regime.

10. However, once Spain had successfully enticed foreign investors (including the Claimants) to invest vast sums of capital in the Spanish renewable energy sector and once it had secured all the associated economic and environmental benefits of which it now boasts, Spain continually undermined and then abandoned altogether the Special Regime. Since 2012, rather than maintaining the long-term and predictable revenue streams which it had guaranteed under RD 661/2007, Spain has passed a series of laws and regulations which have eroded the benefits promised under the Special Regime. The Special Regime has now been repealed and replaced entirely with a new regime that bears no resemblance to the RD 661/2007 economic framework in which the Claimants were induced to invest and deprives them of virtually all of the benefits that were offered to them and indeed guaranteed to them under that regime.

11. The fundamental premise of the Special Regime, in which Spain had committed to provide renewable energy installations incentives for each unit of electricity produced in the form of the Premium or the Regulated Tariff, has been discarded. Now, under the new regime implemented in 2013, renewable energy generators are to be remunerated with reference to the government's concept of "*reasonable return*", based on the hypothetical investment costs of an abstract model renewable energy plant. For some installations, this means they will receive a fraction of what they were entitled to receive under the Special Regime. For others it means they will receive nothing at all.

12. These drastic changes do not apply only to *new* projects. Rather, they also apply retroactively to *existing* projects, despite Spain's express promise that any adjustments to the Special Regime would not apply to existing projects. Indeed, the new regime is a dramatic reversal which turns the provisions on which the Claimants relied to make their investments on their head. These measures, discussed in Section 6 below, are arbitrary, unreasonable, discriminatory, and have completely

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[4] *Ibid.*, p.15.

dismantled both the regulatory and economic framework applicable at the time the Claimants made their investments and the value of those investments.

13. In short, Spain is guilty of the classic "bait and switch". It enticed substantial investment into its renewable energy sector by implementing a Special Regime with the long-term, guaranteed incentives that were necessary to make such investments feasible. Once investors had sunk money into the acquisition and construction of renewable energy installations and once Spain had received the benefit of those investments, it simply tore up and abandoned the Special Regime. Spain's unlawful measures mean that the Claimants are left in a position where the very foundation of their investment decisions has been destroyed. For its part, Spain has already received – and continues to receive – the benefit of the substantial capital invested by the Claimants under the Special Regime. In stark contrast, having been subject to the upper hand of the State, the value of the Claimants' investments has been drastically reduced.

14. As discussed below, Spain's actions are in breach of its obligations under both the ECT and international law.

3. THE PARTIES

3.1 The Claimants

15. The First Claimant, Watkins Holdings S.à.r.l, is a private limited liability company incorporated in accordance with the laws of Luxembourg, having its registered address at 5, rue Guillaume Kroll L-1882, Luxembourg.[5]

16. The Second Claimant, Watkins (Ned) BV, is a limited liability company incorporated in accordance with the laws of the Netherlands and having its registered address at De Boelelaan 7, 1083 HJ, Amsterdam.[6] The Second Claimant is directly wholly-owned by the First Claimant.

17. The Third Claimant, Watkins Spain S.L., is a private limited liability company incorporated in accordance with the laws of Spain, having its registered address at Paseo de la Castellana 91, Madrid, Spain.[7] The Second Claimant directly owns 98.71% of the share capital of the Third Claimant.

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[5] The First Claimant has its official seat in Luxembourg and is registered with the Commercial Register under number B163 911, see **Exhibit C-4**, Extract from the Commercial Register in respect of the First Claimant dated 29 June 2015.

[6] The Second Claimant has its official seat in Amsterdam, The Netherlands and is registered in the Commercial Registry under number 53689135, see **Exhibit C-5**, Extract from the Commercial Register in respect of the Second Claimant dated 18 February 2015.

[7] The Third Claimant has its official seat in Madrid, Spain and is registered in the commercial registry of Madrid under volume (*tomo*) 29.122, page (*folio*) 67, sheet (*hoja*) M-524.382, see **Exhibit C-6**, Extract from the Commercial Register in respect of the Third Claimant dated 27 April 2015.

18. The Fourth Claimant, Redpier S.L., is a private limited liability company incorporated in accordance with the laws of Luxembourg, having its registered address at Paseo de la Castellana 91, Madrid, Spain.[8] The Third Claimant directly owns 98.71% of the share capital of the Fourth Claimant.

19. The Fifth Claimant, Northsea Spain S.L., is a private limited liability company incorporated in accordance with the laws of Spain, having its registered address at Paseo de la Castellana 91, Madrid, Spain.[9] The Fourth Claimant directly owns 98.71% of the share capital of the Fifth Claimant.

20. The Sixth Claimant, Parque Eólico Marmellar, S.L., is a private limited liability company incorporated in accordance with the laws of Spain, having its registered address at Paseo de la Castellana 91, Madrid, Spain.[10] The entire share capital of the Sixth Claimant is directly owned by the Third, Fourth and Fifth Claimants.

21. The Seventh Claimant, Parque Eólico La Boga, S.L., is a private limited liability company incorporated in accordance with the laws of Spain, having its registered address at Paseo de la Castellana 91, Madrid, Spain.[11] The entire share capital of the Seventh Claimant is directly owned by the Third, Fourth and Fifth Claimants.

22. Luxembourg is a Contracting Party to the ECT, and a Contracting State to the ICSID Convention. The Netherlands is also a Contracting Party to the ECT, and a Contracting State to the ICSID Convention. The Third Claimant, the Fourth Claimant, the Fifth Claimant, the Sixth Claimant and the Seventh Claimant are each wholly-owned, directly or indirectly, by the Second Claimant which, in turn, is directly wholly-owned by the First Claimant. Consequently, as discussed in Sections 7.1(b) and 7.2(c)(i) below, each of the Claimants is an "*Investor of another Contracting Party*" for the purposes of Article 26 of the ECT, and also a "*national of another Contracting State*" for the purposes of Article 25 of the ICSID Convention.

23. As discussed in Section 5 below, the Claimants invested heavily in renewable energy installations under the Special Regime with the result that they invested directly and indirectly in eight wind installations in Spain with a total installed production capacity of 329.99 MW (the **Wind Farms**).

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[8] The Fourth Claimant has its official seat in Madrid, Spain and is registered in the commercial registry of Madrid under volume (*tomo*) 29.122, page (*folio*) 56, sheet (*hoja*) M-524.381, inscription (*inscripción*) 1 see, **Exhibit C-7**, Extract from the Commercial Register in respect of the Fourth Claimant dated 27 April 2015.

[9] The Fifth Claimant has its official seat in Madrid, Spain and is registered in the commercial registry of Madrid under volume (*tomo*) 29.122, page (*folio*) 45, sheet (*hoja*) M-524.380, inscription (*inscripción*) 1, see **Exhibit C-8**, Extract from the Commercial Register in respect of the Fifth Claimant dated 27 April 2015.

[10] The Sixth Claimant has its official seat in Madrid, Spain and is registered in the commercial registry of Madrid under volume (tomo) 15,334, page (folio) 90, sheet (hoja) M-257,070, see **Exhibit C-9**, Extract from the Commercial Register in respect of the Sixth Claimant dated 27 April 2015.

[11] The Seventh Claimant has its official seat in Madrid Spain and is registered in the commercial registry of Madrid under volume (*tomo*) 15,334, page (*folio*) 81, sheet (*hoja*) M-257,069, see **Exhibit C-10**, Extract from the Commercial Register in respect of the Seventh Claimant dated 27 April 2015.

24. Each of the Claimants has taken all necessary internal actions to authorise this Request.[12] The Claimants are represented in these proceedings by the international legal practice of Allen & Overy LLP.[13] Contact details for all communications in relation to this matter are as follows:

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3.2 The Respondent

25. The Respondent, Spain, is a sovereign State, and, as discussed in Sections 7.1(a) and 7.2(c)(ii) below, a "*Contracting Party*" to the ECT and a "*Contracting State*" to the ICSID Convention. While Spain will act for the purposes of this arbitration by the authority designated by it, the Claimants respectfully request that the Secretary-General of ICSID serve a copy of this Request and of the accompanying documents on Spain at each of the following addresses:

His Excellency D. Mariano Rajoy Brey
President of the Government of Spain
Complejo de la Moncloa
Avda. Puerta de Hierro, s/n
28071 Madrid
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Abogacía General del Estado
The Ministry of Justice of the Government of Spain
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[12] **Exhibit C-13**, **Exhibit C-14**, **Exhibit C-15**, **Exhibit C-16**, **Exhibit C-17**, **Exhibit C-18** and **Exhibit C-19**, Letters from the Claimants confirming that they have taken all necessary internal actions to authorise this Request; **Exhibit C-20**, **Exhibit C-21**, **Exhibit C-22**, **Exhibit C-23**, **Exhibit C-24**, **Exhibit C-25** and **Exhibit C-26**, Resolutions of the Board of Directors of the Claimants authorising this Request and designating Jeffrey Sullivan and Virginia Allan of Allen & Overy LLP as the Claimants' attorneys for the purposes of this arbitration.

[13] **Exhibit C-27**, **Exhibit C-28**, **Exhibit C-29**, **Exhibit C-30**, **Exhibit C-31**, **Exhibit C-32** and **Exhibit C-33**, Powers of Attorney from the Claimants designating Jeffrey Sullivan and Virginia Allan of Allen & Overy LLP as the Claimants' attorneys for the purposes of this arbitration.

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4. FACTUAL BACKGROUND

26. The present dispute arises in relation to the investments that the Claimants have made in the wind generation sector in Spain. As described below, Spain vigorously pursued a policy of attracting investments in renewable energy projects – including wind installations – as a result of its international obligations on climate change, the objectives of the European Union (the **EU**) to meet certain renewable energy consumption targets, and Spain's desire to be a global leader in "green" energy production and manufacturing, while securing the supply of energy to its populace and developing its economy.

4.1 The 1997 Electricity Law

27. The liberalisation of the Spanish electricity sector commenced in 1997 when Spain passed the 1997 Electricity Law.[14] The 1997 Electricity Law partially opened up the Spanish electricity sector to competition and abandoned the previous system, which was primarily State-controlled. Further, the 1997 Electricity Law introduced a wholesale market or "pool" for electricity, which started operation in January 1998.

28. The 1997 Electricity Law set out the legal regime for different activities relating to electricity, including:

   (i) generation, which was liberalised to allow producers of electricity to compete in the market and receive a market price for their output;

   (ii) transmission and distribution, which were opened to allow third parties general access to the transmission and distribution networks, although the tariffs for accessing these networks continued to be set by the Government; and

   (iii) supply, which was partially liberalised to provide consumers with the freedom to choose the supplier from whom they bought electricity but with the Government retaining the power to set end-user tariffs for those consumers.

29. In relation to electricity generation, as noted above, the 1997 Electricity Law distinguished between two separate regimes, namely the ordinary regime (the **Ordinary Regime**) and the aforementioned Special Regime. Conventional generation facilities (i.e. those using non-renewable sources such as

[14] Since its adoption in 1997, the 1997 Electricity Law has been subject to numerous modifications.

coal-fired power plants) became subject to the Ordinary Regime and were required to sell their output into the wholesale electricity market at market price. The Special Regime was applicable to certain qualifying renewable energy generators.[15]

30. Pursuant to Article 30(4) of the 1997 Electricity Law, Special Regime generators were entitled to receive the market price of electricity plus a supplementary premium over and above the market price. The 1997 Electricity Law required the amount of that premium to be set out in statutory terms by a Government regulation.

31. The 1997 Electricity Law also established the framework for the exercise of competencies by certain public authorities, dividing those powers among the central Government and Spain's Autonomous Communities. Within the Government, the Ministry of Industry, Energy and Tourism (the **Ministry**)[16] would be the primary regulator. Subsequently, in 1998, a supervisory agency, the National Energy Commission (**CNE** in Spanish), was established and was conferred with certain regulatory powers.[17]

32. As noted in paragraph 28(iii) above, the 1997 Electricity Law required the Government to set the end-user tariffs for electricity. Critically, it obliged the Government to set those prices at a level that was sufficient to cover the officially acknowledged costs[18] of the competitive market elements of the electricity sector (i.e. generation), as well as the regulated activities (such as access tolls for transmission and distribution networks) and other commercial costs.[19] This requirement was essential to the viability of the system. Specifically, if the Government did not set prices to cover the cost of the provision of electricity, a systemic deficit would appear. However, as discussed in Section 6.3 below, despite the obvious consequences of not doing so, the Government repeatedly failed to comply with this legal obligation, and opted to set the end-user tariffs at levels that were far too low to cover the acknowledged costs of the electricity system. As a result, the Spanish electricity system has accumulated, over the course of several years, a substantial deficit.

4.2 The Kyoto Protocol and the EU Directives

33. In 1998, Spain signed the Protocol to the United Nations Framework Convention on Climate Change, also known as the Kyoto Protocol (the **Kyoto Protocol**).[20] The Kyoto Protocol, a binding international agreement, requires its Parties to reduce their greenhouse gas emissions and sets

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[15] In short, to be eligible for the Special Regime, generators had to have an installed capacity of less than or equal to 50MW and generate electricity using, inter alia, "*non-consumable renewable energy*" as primary energy (see the 1997 Electricity Law, Article 27(1)).

[16] The Ministry has changed its name several times during the course of the last few years. Currently, the Ministry is called the "Ministry of Industry, Energy and Tourism".

[17] The CNE has since been superseded in the administrative scheme. Law 3/2013, of 4 June, contemplated the integration of the CNE within a newly established National Commission on Markets and Competition (**NCMC**). Recently, Royal Decree 657/2013, of 30 August, approved the Organic Statute for the NCMC, which defines its organisational structure and functions of different organs. Pursuant to Order ECC/1796/2013, of 4 October, the NCMC commenced operations on 7 October 2013.

[18] The Spanish regulator specified the costs incurred that it acknowledged for the purposes of determining the costs of the system.

[19] The 1997 Electricity Law, original Article 17 and current Article 18.

[20] It was ratified by Spain on 10 May 2002 and entered into force on 16 February 2005.

mandatory targets for doing so. Spain's obligations under the Kyoto Protocol played an important role in its decision to encourage investment in its renewable energy sector.

34. On 30 December 1999, the Government approved a Plan for the Promotion of Renewable Energies for the period 2000-2010 (the **2000 Renewable Plan**) of the "*Instituto para la Diversificación y Ahorro de la Energía*", an advisory body that reports to the Ministry (the **IDAE**). The 2000 Renewable Plan was designed to further Spain's objective under the 1997 Electricity Law and the Special Regime to develop its renewable energy sector and to reduce the use of greenhouse gases. In particular, the 2000 Renewable Plan was aimed at increasing production from renewable energy sources to cover at least 12% of the national energy consumption by 2010.

35. In 2001, in order to comply with the Kyoto Protocol's requirements, the EU issued Directive 2001/77/EC on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market (the **2001 Renewable Energy Directive**).[21] The objective of the 2001 Renewable Energy Directive was to ensure that Member States "*take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources*".[22] To achieve this objective, the 2001 Renewable Energy Directive required the Member States to set "*national targets for future consumption of electricity produced from renewable energy sources*", and to outline the measures taken or planned, at national level, to achieve those targets.[23] Specifically, it called on Spain to set a target to obtain at least 29.4% of its electricity from renewable energy sources by 2010.[24] It further required Member States, including Spain, to enact the necessary legislation to implement the 2001 Renewable Energy Directive by October 2003.[25]

36. On 23 April 2009, the 2001 Renewable Energy Directive was amended by another EU Directive (the **2009 Renewable Energy Directive**).[26] The 2009 Renewable Energy Directive instituted more demanding mandatory national targets for its Member States and noted that: (i) the main purpose of mandatory national targets was to provide "*certainty for investors*" (Recital 14) and "*the business community with the long-term stability it needs to make rational, sustainable investments in the renewable energy sector*" (Recital 8); and (ii) one important means to achieve the aim of the Directive was to "*guarantee the proper functioning of national support schemes... in order to maintain investor confidence*" (Recital 25) (emphasis added). "*Support Schemes*" defined by the

21 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, OJ L 283, 27.10.2001. The 2001 Renewable Energy Directive was issued by the then European Community (**EC**). The EC became known as the EU with the adoption of the Treaty of Lisbon on 1 December 2009 and, for the sake of convenience, references to the EU should also be taken to mean the EC (as appropriate) in this Request.

22 *Ibid*., Article 3(1).

23 *Ibid*., Article 3(2).

24 *Ibid*., Article 3(2) and Annex.

25 *Ibid*., Article 9.

26 Directive 2009/28/EC of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009.

2009 Renewable Energy Directive included "*direct price support schemes*" such as "*feed-in-tariffs and premium payments*" (Article 2(k)).

4.3 A regulatory framework to encourage investments in renewable energy projects

37. To achieve its renewable energy targets and objectives, Spain required significant investment in the renewable sector, including the wind sector. Wind plants tend to be large, complex and expensive installations. They are typically built over large tracts of land or in a technically challenging environment and their development and construction requires considerable innovation and expertise. Therefore, as Spain had itself recognised in the 2000 Renewable Plan, it needed to put in place a regulatory framework that provided investment incentives specifically designed to attract foreign investors with the necessary capital and expertise in developing and maintaining energy and infrastructure projects, as well as create conditions which would facilitate financing of renewable energy projects.

38. The 1997 Electricity Law also created the Special Regime for certain qualifying renewable energy generators.[27] Pursuant to Article 30(4) of the 1997 Electricity Law, Special Regime generators were entitled to receive the market price of electricity plus a supplementary premium over and above the market price. The 1997 Electricity Law required the amount of that premium to be set out in statutory terms by a Government regulation. Notably, in light of later developments, the preamble to the 1997 Electricity Law stated that the electricity system would no longer be governed by the principle of "*remuneration being administratively fixed through investment costs by a process of standardisation of different technologies of electricity generation*".

39. To this end, on 12 March 2004, the Government passed Royal Decree No. 436/2004 (**RD 436/2004**), which updated the legal framework for the Special Regime generators. RD 436/2004 contained two alternative investment incentives for qualifying installations. The qualifying installations could either: (i) sell electricity at a regulated price; or (ii) sell electricity at market prices and receive a premium payment over and above the market price.[28] Both of these investment incentives were available for the lifetime of the installation. The provision of these economic incentives was a further recognition on Spain's part that renewable energy projects require long-term and predictable revenue streams to be economically viable.

40. The regulated price offered by RD 436/2004 was set on a yearly basis based on a multiple of the consumer tariffs paid by all electricity consumers at the time.[29] Given that the consumer tariffs upon

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[27] In short, to be eligible for the Special Regime, generators had to have an installed capacity of less than or equal to 50MW and generate electricity using, inter alia, "*non-consumable renewable energy*" as primary energy (see the 1997 Electricity Law, Article 27(1)).

[28] RDL 436/2004, Article 22.

[29] *Ibid.*, Article 23.

which this regulated price was based would fluctuate, the regulated price option had an element of unpredictability.

41. On 14 March 2004, just two days after RD 436/2004 was passed, a new Government came to power in Spain. A key element of the new Government's economic policy was to focus on the construction of a "green" infrastructure and creation of "green" jobs. The Government sought to develop an energy policy built on renewables and, in particular, on solar energy as part of its goal to create a new, sustainable economy. Indeed, Spain appeared to view renewable energy production as an opportunity to reap the benefits of its geography and climate – characterised by high solar irradiation and large tracts of available land – to become a world leader in cutting-edge renewable technologies (including wind), to develop a new high-tech industry and to supply much-needed jobs.

42. In order to achieve these objectives and given RD 436/2004's failure to attract the desired level of investment, Spain revised its legal and economic framework to provide sufficient, stable and predictable economic incentives for renewable projects and ensure investors' confidence in the Spanish market. The basis of that framework was outlined in the IDAE's Plan for the Promotion of Renewable Energies in Spain 2005-2010 (the **2005 Renewable Plan**). In particular, the 2005 Renewable Plan recommended that the Government increase Spain's renewable energy installed capacity targets, while maintaining the economic incentives, through the system of regulated prices and premiums, for certain renewable installations (including wind).

43. One of the first key changes made to encourage further investment was set out in Royal Decree Law 7/2006 of 23 June 2006, which amended Article 30 of the 1997 Electricity Law to provide generators under the Special Regime priority access to the electricity transmission and distribution networks. This meant that the Ordinary Regime generators could not sell their electricity to the distribution network until the Special Regime generators had already sold all of their supply. This constituted recognition on Spain's part that renewable energy power installations generally need to dispatch their entire electricity output when produced, as they cannot store the electricity they generate. The amendment to Article 30 guaranteed that the qualifying Special Regime generators would be able to sell all of their electricity output on a priority basis, providing further incentives for investment.

4.4 The economic regime under RD 661/2007

44. In May 2007, Spain implemented the recommendations of the 2005 Renewable Plan by introducing RD 661/2007. RD 661/2007 replaced the previous regime under RD 436/2004 and set out specific, long-term and predictable economic incentives for the qualifying Special Regime generators producing energy from renewable sources.

45. Article 2 of RD 661/2007 set out the electricity generation installations that were eligible for the Special Regime, and classified them into various categories, groups and subgroups according to their primary energy use, the generation technologies used and energy yields obtained.[30] The wind installations were classified as follows:

Category	Group	Subgroup	Description
B	b.2		Facilities that only use wind energy as their primary energy source (i.e. wind installations)
		b.2.1	- land-based wind farms
		b.2.2	- territorial water-based wind farms

46. In addition to retaining the priority of access to the transmission and distribution networks for qualifying Special Regime generators, RD 661/2007 also established an economic regime with three elements that were specifically designed to encourage investments in, and to enable project financing of, renewable energy installations (including wind installations), namely:

(i) a fixed minimum remuneration – either in the form of a Regulated Tariff or a Premium, at the generator's choice – in an amount pre-established by law (and published in the Spanish Official Gazette) for all electricity produced by a qualifying installation;

(ii) the provision of such remuneration for the entire operational life of the installation; and

(iii) an annual update of such remuneration to reflect increases in the Spanish consumer price index (the **CPI**).

47. Each of these elements is addressed in turn below.

(a) **A fixed minimum remuneration for all electricity produced**

48. Pursuant to RD 661/2007, both the Regulated Tariff and the Premium were, by design, higher than the market prices.[31] Qualifying installations could choose between these two options – the Regulated Tariff or the market price plus Premium – as was best suited to them, on an annual basis.[32]

49. RD 661/2007 contemplated adjustments to the Regulated Tariff and the cap and floor of the Premium option every four years after 2010. However, Article 44(3) explicitly provided that any such adjustments would be prospective only and, thus, would not affect existing installations. Thus, Spain expressly promised to protect existing installations against future adjustments to the economic regime. RD 661/2007 was designed to encourage efficiency amongst renewable generators.

[30] RD 661/2007, Article 2.

[31] Further, the market price plus Premium had historically been higher, and was expected to remain higher in the future, than the Regulated Tariff.

[32] RD 661/2007, Article 24(4).

Because renewable generators were entitled to receive the Regulated Tariff or the Premium for their entire electricity output, they were encouraged to invest in more sophisticated installations, and also incentivised to introduce efficiencies and to maximise their output by modernising them.

50. In order to obtain legal entitlement to these economic incentives provided under RD 661/2007, qualifying generators were required to register with the "Registro de Instalaciones de Producción en Régimen Especial" (the **RAIPRE**).[33]

(b) **An economic regime for the lifetime of the installation**

51. RD 661/2007 granted qualifying installations the right to receive the Special Regime benefits for the entire operational life of the installation.[34]

52. RD 661/2007 contemplated adjustments to the Regulated Tariff and the Premium in 2010 and every four years thereafter. However, Article 44(3) explicitly provided that any such adjustments would be prospective only and, thus, would not affect existing installations that had obtained a commissioning certificate prior to 1 January of the second year following the year in which the revision was implemented (for instance, if a review was conducted in 2010, it would not affect installations that had obtained a commissioning certificate prior to 1 January 2012).[35] Thus, Spain expressly promised to protect existing installations against future adjustments to the economic regime.

53. The provision of these guarantees was a further recognition on Spain's part that large-scale investments in, and project financing of, wind installations were dependent on the predictability of long-term revenue streams.

(c) **Inflation adjustments**

54. RD 661/2007 provided for an inflation adjustment mechanism pursuant to which the Regulated Tariff and the Premium were to be updated on an annual basis. For the installations in category "b" (including wind), this was to be done by reference to the increase in the CPI, less 25 basis points up to 31 December 2012 and 50 basis points thereafter.[36]

55. Therefore, RD 661/2007 guaranteed that the real economic value of the Regulated Tariff and the Premium would largely remain constant in the future, and those incentives would not suffer more than a predefined depreciation in real terms over time. Considering that qualifying installations were entitled to the economic regime during their entire operational lifetime, such a provision, designed to

[33] RD 661/2007, Articles 9 to 15.

[34] Qualifying installations were entitled to receive the Regulated Tariff or the Premium at a particular rate during the first 25 years of their operation (in the case of wind installations). In the case of wind installations, after the expiration of the first 25-year period, the Regulated Tariff and the Premium would continue for the lifetime of the installations but at a lower rate.

[35] RD 661/2007, Article 44(3).

[36] RD 661/2007, Article 44(1) and First Additional Provision.

account for the effects of inflation over the Regulated Tariff and the Premium, was critical to further incentivise investments.

56. As Spain had hoped, RD 661/2007 generated a significant influx of investment in the renewable energy sector, including the Claimants' investments subject of this Request. Indeed, absent this regime, the Claimants would not have made the investments at issue in this arbitration.

4.5 RDL 6/2009

57. In order to allow for the better monitoring of Spain's actual installed capacity in relation to its targets, and to structure the volume of registrations for installations that intended to qualify for the economic regime under RD 661/2007, the Government passed Royal Decree Law 6/2009 of 30 April 2009 (**RDL 6/2009**). In the preamble of RDL 6/2009, the Government acknowledged the lack of oversight mechanisms of renewable energy facilities under the Special Regime, and acknowledged that a new Registry was necessary to keep track of both planned and existing installations and to significantly protect the legitimate expectations and rights of the owners of existing installations.

58. To achieve this objective, RDL 6/2009 created a new subsection in the RAIPRE in the form of the "Registro de Pre-asignación de Retribución" (the Pre-assignment Register), in which every existing or new installation that intended to receive, or continue to enjoy, the RD 661/2007 economic regime needed to get listed, by satisfying certain technical and administrative requirements. Once listed in the Pre-assignment Register, an installation was entitled to obtain the definitive registration with the RAIPRE.

59. RDL 6/2009 strengthened investors' expectations that the RD 661/2007 economic regime would remain applicable in the future to existing installations that had satisfied the prescribed registration requirements.

4.6 RD 1614/2010

60. On 7 December 2010, the Government passed Royal Decree No. 1614/2010 (**RD 1614/2010**) in relation to certain aspects of the RD 661/2007 regime for wind technologies. RD 1614/2010 established a certain number of "*equivalent reference hours*"[37] during which wind installations were entitled to receive the Regulated Tariff or the Premium for the electricity they sold. These "*equivalent reference hours*" were specified not to be reviewable during the operational life of existing facilities that satisfied the prescribed registration requirements.[38] RD 1614/2010 also

[37] For this purpose, the number of equivalent operating hours of electricity production for each installation was calculated by dividing the installation's net annual production of electricity (in kWh) by that installation's nominal power (measured in kW) (RD 1614/2010, Article 2(1)).

[38] *Ibid*., Articles 2(3) and 2(4).

expressly reiterated the guarantee that any revisions to the Regulated Tariff and the Premium pursuant to Article 44(3) of RD 661/2007 would not affect duly registered, existing installations.[39]

61. The above legal and economic framework was successful in attracting significant investments to renewable energy projects, and enabled Spain to develop one of the largest renewable energy sectors in the world.

5. THE CLAIMANTS' INVESTMENTS

62. In reliance upon, and pursuant to, the legal and economic framework set out in the Special Regime described above, in 2011 the Claimants bought eight wind plants with a total installed production capacity of 329.99 MW. These investments are described below.

5.1 The Claimants' investments in power generation facilities in Spain

63. On 8 May 2012 the Third Claimant, the Fourth Claimant and the Fifth Claimant acquired the entire share capital of the Sixth Claimant (ie Parque Eólico Marmellar, S.L.) and the Seventh Claimant (ie Parque Eólico La Boga, S.L.). Parque Eólico Marmellar, S.L. owns the Wind Farm "Marmellar" (Burgos, 49,50 MW), and Parque Eólico La Boga, S.L. owns the following Wind Farms: "El Perul" (Burgos, 49,60 MW), "La Lastra" (Burgos, 11,69 MW), "Lodoso" (Burgos, 49,50 MW), "Lora I" (Burgos, 49,60 MW), "Lora II" (Burgos, 49,60 MW), "Sargentes" (Burgos, 24 MW) and "Arroyal" (Burgos, 46,50 MW).

64. All of these installations had been duly registered with the RAIPRE.

5.2 The destruction of the Special Regime in which the Claimants invested

65. The Claimants made their investments in Spain in reliance on and pursuant to the legal and economic framework set out in the Special Regime described above, and in particular:

(i) the right to receive, at the generator's choice, economic incentives in the form of a Regulated Tariff or a market price plus Premium, for the entire operational life of the installation under the Special Regime;

(ii) the right to receive a legally-guaranteed and stable revenue stream, relying upon Spain's express promises that any revisions to the Regulated Tariff or the Premium would not affect existing installations that had satisfied the prescribed registration requirements;

(iii) priority access and dispatch to the Spanish electricity transmission and distribution networks; and

[39] RD 1614/2010, Articles 4 and 5(3).

(iv) the right to an annual update of the applicable Regulated Tariff and Premium to take account of consumer price inflation.

66. The above rights provided the framework for long-term, predictable cash flows, which were necessary to attract substantial capital investments in the wind sector. These rights were expressly guaranteed in the relevant legislation and were essential to the Claimants' decision to invest in the Wind Farms. Absent these express promises and representations enshrined in the law, the Claimants would have not made the investments at issue in this arbitration.

67. However, once the Claimants had made significant investments in the above-mentioned projects, Spain reneged on its commitments and adopted a series of measures aimed at curtailing – and ultimately repealing altogether – the Special Regime in which the Claimants had made their investments. These measures are unreasonable, arbitrary and represent the very antithesis of stable and favourable investment conditions. These measures have entirely frustrated the Claimants' reasonable and legitimate expectations and have resulted, and will continue to result, in substantial harm to their investments.

6. SPAIN'S WRONGFUL MEASURES

6.1 Spain dramatically alters the applicable legal and economic regime

68. Far from providing the guaranteed economic regime, Spain wrongfully subjected the Claimants' investments to a "roller-coaster" of constant and drastic changes in the applicable legal and regulatory framework. First, between 2012 and 2013, Spain enacted a series of legislative measures eroding the benefits promised under RD 661/2007. Then, in July 2013, Spain completely dismantled the Special Regime, thus eradicating all the benefits that had been offered to the Claimants and reneging on its promise not to subject existing installations to a revised economic regime. These unlawful measures are without any discernibly legitimate purpose and have almost entirely deprived the Claimants of the benefit and enjoyment of their investments as reasonably expected. Each of these measures is discussed in turn below.

(a) Law 15/2012

69. On 27 December 2012, Spain passed Law 15/2012, which introduced drastic changes to the economic framework applicable to existing installations under the Special Regime.[40] Pursuant to Law 15/2012, Spain imposed a levy of 7% on *all revenues* obtained by installations in Spain from

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[40] Even prior to Law 15/2012, Spain had made various changes to the applicable legal framework to the Claimants' detriment. For instance, on 30 March 2012, the Government passed Royal Decree Law 12/2012, which, *inter alia*, introduced, in relation to corporate income tax, a new general limitation on the deductibility of net financial expenses to a maximum amount of 30% of the company's adjusted operating profits of the year, regardless of whether such financial expenses relate to intra-group indebtedness or not. This has a significant detrimental effect on the value of renewable plants recently built and financed under project financing arrangements.

the production and injection of electricity into the Spanish electricity grid during a calendar year (the **7% Levy**).

70. While Spain sought to recast the 7% Levy as a so-called "tax"[41] applicable to both generators in the Ordinary Regime and Special Regime, it was, in essence, nothing more than a disguised, retroactive cut to the Regulated Tariff and Premium promised to the Special Regime generators under RD 661/2007.[42] As discussed above, the Ordinary Regime generators are required to sell electricity at the market price in the Spanish wholesale market. These generators are, therefore, able to pass through additional costs imposed by the 7% Levy to the price payable by the consumers. However, for the Special Regime installations, the 7% Levy constitutes a direct 7% cut in the revenues derived from the Regulated Tariff (for installations that chose to sell electricity at the Regulated Tariff) or the Premium component (for installations that chose to sell electricity at market price plus Premium).[43]

71. Thus, this 7% levy on revenues was not a *bona fide* levy but, effectively, a back-door tariff cut aimed at Special Regime generators. The 7% Levy therefore had a significantly disproportionate and discriminatory impact on the Special Regime installations (including those in which the Claimants have made investments) *vis-à-vis* the Ordinary Regime generators.

(b) **RDL 2/2013**

72. Just one month after passing Law 15/2012, the Government stripped away some of the core elements of the Special Regime when it enacted Royal Decree Law 2/2013 of 1 February 2013 (**RDL 2/2013**), which introduced some changes that applied retroactively, from 1 January 2013.

(i) Elimination of the Premium

73. Previously under the Special Regime, the owner of a qualifying installation could choose between selling its electricity output at the Regulated Tariff or at the market price plus Premium, as was best suited to it, on an annual basis. RDL 2/2013 eliminated this choice and effectively abolished the Premium.

74. First, RDL 2/2013 effectively eliminated the Premium by ascribing a value of €0.0/kWh to the applicable Premium payment.[44] The market price plus Premium had historically been higher than the Regulated Tariff and was expected to continue to be higher in the future. Therefore, by eliminating the Premium, Spain effectively eliminated the incentive for installations to choose the

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41 Law 15/2012, Article 1.

42 Indeed, various statements made by Spain's officials at the time of this measure acknowledged that the same result could have been achieved by Spain simply curtailing by 7% the Regulated Tariff and the Premium promised under the RD 661/2007 regime, rather than imposing the 7% Tariff Levy.

43 Under the Premium option, the Special Regime Installations could have partially passed through the 7% levy, at least for the market element, when that element exceeded 0.

44 RDL 2/2013, Article 2.

market price plus Premium option, and left them with no option other than to sell at the lower Regulated Tariff.

75. Secondly, any Special Regime installation that, after the entry into force of RDL 2/2013, chose to sell its electricity output on the market could not subsequently choose to sell its electricity output at the Regulated Tariff, and was forced to stick with its choice to sell electricity on the market during the rest of its useful life.[45]

76. RDL 2/2013 also mandated that those Special Regime installations that, as at 2 February 2013, were selling their electricity output on the market (pursuant to the market price plus Premium option) would automatically be subject to the Regulated Tariff option with effect from 1 January 2013. The owners of those installations had the option to notify the Spanish Directorate General of Energy Policy and Mines before 15 February 2013 that they wished to continue to sell on the market. If they so chose, they would not receive the Premium, and would no longer be entitled to subsequently change to the Regulated Tariff. Given that the Regulated Tariff was designed to be higher than the market rates, this effectively forced the Special Regime installations to choose the Regulated Tariff option.

77. Thus, the Claimants' Wind Farms are no longer entitled to sell electricity under the legal and economic regime on which the Claimants reasonably and legitimately relied at the time they made their substantial investments, and have consequently suffered a dramatic reduction in the revenues received from electricity output.

(ii) Replacement of the inflation adjustment index

78. RD 661/2007 had expressly provided that the remuneration, including the Regulated Tariff and Premium (and the lower and upper thresholds), payable to the Special Regime installations would be updated annually by reference to the CPI to take account of inflation. However, with effect from 1 January 2013, RDL 2/2013 replaced the CPI used in making those annual adjustments with "*CPI at constant tax rates, excluding unprocessed foods and energy products*".[46] As a result of this amendment, any annual adjustments for inflation would no longer reflect variations in the tax rates or inflation in relation to prices of unprocessed foods and energy products.

79. This, combined with the elimination of the Premium, resulted in a dramatic shift in the regulatory environment and had a drastic impact on the Claimants' investments in Spain, and was exactly what Spain had expressly promised not to do *vis-à-vis* existing, duly registered installations pursuant to RD 661/2007 and RD 1614/2010. In fact, the Claimants would not have made their investments in

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45 *Ibid*., Article 3.

46 RDL 2/2013, Article 1.

the Spanish renewable energy sector had the rights that Spain eventually stripped, by enacting Law 15/2012 and RDL 2/2013, not been part of the Special Regime.

80. The drastic changes brought by Law 15/2012 and RDL 2/2013, which by themselves caused substantial harm to the Claimants' investments, only foreshadowed a subsequent complete overhaul of the legal and economic framework for renewable energy installations in July 2013.

6.2 Spain's complete overhaul of the applicable legal and economic regime

81. On 12 July 2013, the Government abruptly dismantled the Special Regime framework by enacting Royal Decree Law 9/2013 (**RDL 9/2013**), which amended, *inter alia*, Article 30 of the 1997 Electricity Law. In essence, RDL 9/2013 repealed the economic regime under the Special Regime, and replaced it with an entirely different remuneration model for both existing and future renewable energy generators that is no longer based on energy production. The new regime introduced by RDL 9/2013 was confirmed by Law 24/2013 of 26 December 2013 (**Law 24/2013**), and further developed with Royal Decree 413/2014, of 6 June 2014 (**RD 413/2014**) and the Ministerial Order IET/1045/2014, of 26 June 2014 (**Ministerial Order**) (together, the **New Regime**).

82. As explained above, under RD 661/2007's economic regime applicable at the time of the Claimants' investments, the Special Regime generators had a right to choose between selling their electricity at the Regulated Tariff or the market price plus Premium option. However, as discussed in Section 6.1(b)(i) above, RDL 2/2013 took this choice away by effectively eliminating the market price plus Premium option. Under RDL 9/2013, Spain also eliminated the Special Regime generators' entitlement to the Regulated Tariff.

83. Contrary to all prior commitments and in direct contradiction to the fundamental underlying principles of the Special Regime, the New Regime eliminates the distinction between the Special Regime and the Ordinary Regime. The New Regime constitutes a breach of Spain's commitments under RD 661/2007 to compensate each kWh generated at a certain tariff or with a certain premium and forces renewable energy generators to sell their entire electricity output at market prices, with only the possibility, in some cases, of receiving a limited additional special payment (the **Special Payment**). The Special Payment is purportedly designed to cover: (i) hypothetical investment costs of a "*standard installation*" that cannot be recovered through the market price of electricity; and (ii) hypothetical operational costs to cover the difference between operating costs and income derived from the participation of such a "*standard installation*" in the market. In almost all cases, this Special Payment is far lower than the Regulated Tariff or the Premium. It also creates liquidity issues for investors as in practice only a portion of the Special Payment is paid when it is due.

84. The manner in which the Special Payment is to be calculated represents a complete departure from the economic regime that was in force at the time the Claimants made their investments. While the RD 661/2007 economic incentives were based on kWh of electricity produced and other project-specific variables (thus creating an incentive to build efficient facilities), the Special Payment is calculated by reference to standard or hypothetical values of a "*standard installation*", rather than real values. Thus, it directly contradicts the central rationale of the Special Regime which expressly abandoned the concept of calculating returns by reference to the investment costs of a standard installation. It is also an arbitrary form of remuneration, as it does not take into account the specific circumstances of each installation when calculating the applicable return due to it. Rather, it attributes funds according to a hypothetical model.

85. Further, the New Regime provides that only the costs relating exclusively to the activity of electricity generation will be considered for the purposes of the Special Payment. This is likely to foreclose the inclusion of administrative and other costs, which are a necessary expense to develop or acquire a project, as a cost basis for determinating of the value of the standard investment.

86. The New Regime also excludes from the Special Payment any costs and investments which are derived from laws or administrative regulations that do not apply in the entire country. This implies that the costs and investments made pursuant to laws or administrative regulations (which includes taxes for administrative licences and authorisations) issued by Spain's Autonomous Communities, provinces and municipalities will not be taken into consideration. It is irrational for the State to determine that taxes imposed on installations by its own organs are not costs considered when calculating the Special Payment.

87. Further, assuming that a generator qualifies to receive the Special Payment, there are also caps to ensure that the generator does not receive any payment beyond the Government's idiosyncratic notion of what is "*reasonable*". Under the New Regime, the remuneration will not be able to exceed a level necessary to cover the costs that allow installations to compete on an equal footing with the other technologies in the market and to obtain a "*reasonable return*" by reference to a standard installation. The New Regime provides that the maximum limit will be fixed based on "*reasonable return*",[47] defined by reference to the ten-year Spanish sovereign bonds plus a differential (300 basis points in the case of existing facilities), and fixed in the Ministerial Order at 7.398% before tax.

88. There is no apparent reason or underlying rationale why this precise return is considered "*reasonable*"; it was not referred to in the 1997 Electricity Law or any Special Regime legislation. Indeed, there is no explanation why a return for capital intensive and illiquid investments that carry a high technical risk, such as renewable energy installations, should be calculated with reference to

[47] RDL 9/2013, amending Article 30.4 of the 1997 Electricity Law.

low risk and easily traded sovereign bonds. This change represents a complete departure from the previous regime as it makes it unlikely for generators to obtain returns, if any, beyond this unknown and undefined limit, which is not stabilised but will constantly change according to the market of sovereign bonds.

89. Moreover, the cap on the return does not bear any relation to the actual investment made by investors. Once an *installation* has received a return up to or exceeding the stated cap, the premium will be discontinued. In many instances, investors such as the Claimants acquired installations represented by the value of the future returns that were promised under the Special Regime. These existing installations had already received incentives under the Special Regime prior to the acquisition which, of course, the Claimants did not receive the benefit of. Nevertheless, under the New Regime these incentives are taken into account when calculating the cap on the return on the Claimants' investment, even though these incentives were not received by the Claimants.

90. In addition, the New Regime is inherently unstable. For instance, it establishes review periods of six years and semi-periods of three years. Under the New Regime the parameters and the differential added to the sovereign bonds can be reviewed every six years. Additionally, at the end of each semi-period it is possible to review the revenue forecasts and the related parameters. This systemic uncertainty affords the Government an extremely wide margin of discretion to make further cuts to the Special Payment, creating considerable insecurity. This represents, once again, a complete departure from the RD 661/2007 legal and economic regime under which the Claimants made their investments, pursuant to which renewable generators were guaranteed long-term, stable and predictable revenue streams during the life of the installation. Now it appears that these returns will be subject to the whims of the government every three years.

91. The New Regime also provides that those installations with final operation authorisation prior to 2004 will no longer be entitled to receive *any* economic incentives. This is fundamentally contrary to the promises contained in the Special Regime and RD 661/2007.

92. By implementing the New Regime and applying it to the Claimants' investments, Spain has completely removed the foundation upon which those investments were made and arbitrarily introduced a new economic framework that is entirely unrecognisable from the previous one. In doing so, Spain has dramatically overhauled the applicable regulatory framework and frustrated the Claimants' reasonable and legitimate expectations pursuant to the Special Regime legislation. The cumulative impact of the above measures has destroyed the overall value of the Claimants' investments.

6.3 The Government's own failures created the predicament used to justify the unlawful measures

93. Spain's proffered rationale for its unlawful measures – the excessive growth of the so-called "tariff deficit" – is attributable solely to the Government's own failures and does not justify Spain's unlawful measures that affect the Claimants' investments.

94. Since the adoption of the 1997 Electricity Law, the Government has been required to ensure that end-user tariffs for electricity are set at levels which are sufficiently high to cover the officially acknowledged costs of Spain's electricity system, including the costs of all regulated activities such as those under the Special Regime. However, as will be demonstrated in this arbitration, the Government failed to comply with this obligation, which resulted in a revenue shortfall in the electricity system known as the "tariff deficit".

95. The Government's refusal to comply with Spanish law was undoubtedly illegal. It also caused the tariff deficit to grow even larger. Yet Spain remained unwilling to implement the increases to end-user prices necessary to address the tariff deficit. Instead, Spain chose to impose arbitrary and unlawful cuts to the Special Regime framework of incentives. Put another way, rather than remedying the dilemma it had created by not complying with its own laws, Spain instead chose to violate its obligations under international law, by dismantling the Special Regime incentives that formed the basis for the Claimants' decision to invest. Indeed, the Spanish Minister of Energy and Tourism has boasted of the reductions to electricity costs that Spanish voters will enjoy as a result of the drastic cuts to the guaranteed incentives.[48] Such measures may be popular and politically expedient, especially given that foreign investors are unable to vote. However, they represent an international wrong for which the Claimants are entitled to a remedy under the ECT.

7. JURISDICTION

96. In the sub-sections below, the Claimants describe the jurisdictional basis of their ECT claims and the existence of jurisdiction under the ICSID Convention.

7.1 The Claimants and their investments qualify for protection under the ECT

97. Article 26 of the ECT sets forth the rules governing the resolution of "[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*". Article 26(2) of the ECT provides that:

> "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…

[48] **Exhibit C-11**, Article in *Cinco Dias*, "Soria dice que el sistema no podía soportar el coste de las renovables", 9 April 2014.

(c) in accordance with the [provisions of Article 26 relating to international arbitration]".

98. Each of the requirements in Article 26 of the ECT has been satisfied in the present case. They are considered in turn below.

(a) **Spain is a "*Contracting Party*" to the ECT**

99. A "*Contracting Party*" to the ECT is a State that has consented to be bound by the ECT and for which the ECT is in force.[49] Spain signed the ECT on 17 December 1994 and ratified it on 11 December 1997.[50] The ECT entered into force with respect to Spain on 16 April 1998. Spain is therefore a "*Contracting Party*" to the ECT.

(b) **the First Claimant and the Second Claimant are both an "*Investor of another Contracting Party*"**

100. Pursuant to Article 1(7)(a)(ii) of the ECT, "*Investor*" (of a Contracting Party) means "*a company or other organization organized in accordance with the law applicable in that Contracting Party*".

101. As explained above, the First Claimant is a company incorporated under the laws of Luxembourg and the Second Claimant is a company incorporated under the laws of the Netherlands. Luxembourg and the Netherlands are both a "*Contracting Party*" to the ECT.[51] The First Claimant and the Second Claimant are both therefore an "*Investor of another Contracting Party*" for the purposes of Article 26 of the ECT.

(c) **The remaining Claimants shall each be treated as a "*national of another Contracting State*"**

102. Each of the Third Claimant, the Fourth Claimant, the Fifth Claimant, the Sixth Claimant, and the Seventh Claimant is a company incorporated under the laws of Spain. Pursuant to Article 26(7) of the ECT, "*an Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a* '*national of another Contracting State*' *and shall for the purpose of article 1(6) of the additional Facility Rules be treated as a* '*national of another State*'".

103. Each of the Third Claimant, the Fourth Claimant, the Fifth Claimant, the Sixth Claimant, and the Seventh Claimant is controlled by the Second Claimant which, in turn, is fully owned by the First

[49] **Exhibit C-1**, ECT, Article 1(2).

[50] **Exhibit C-2**, Instrument of Spain's ratification of the ECT, published in the Spanish Official Gazette on 17 March 1998.

[51] Luxembourg signed the ECT on 17 December 1994 and ratified it on 27 November 1997. The ECT entered into force with respect to Luxembourg on 16 April 1998. The Netherlands signed the ECT on 17 December 1994 and ratified it on 11 December 1997. The ECT entered into force with respect to the Netherlands on 16 April 1998.

Claimant. Consequently for the purposes of Article 26(7) of the ECT and Article 25(2)(b) of the ICSID Convention, each of the Third Claimant, the Fourth Claimant, the Fifth Claimant, the Sixth Claimant, and the Seventh Claimant shall be treated as a "*national of another Contracting State*" and can bring a claim as a Claimant in the present proceedings.

(d) **The dispute relates to an "*Investment*" in the "*Area*" of Spain**

104. Article 1(6) of the ECT defines an "*Investment*" broadly as follows:

> "'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
>
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
>
> (d) Intellectual Property;
>
> (e) Returns;[52]
>
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector".

105. Article 1(6) of the ECT also specifies that, to enjoy protection under the ECT, an investment must be "*associated with an Economic Activity in the Energy Sector*". Article 1(5) of the ECT defines "*Economic Activity in the Energy Sector*" as "*an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products …* ". Article 1(4) of the ECT defines "*Energy Materials and Products*" as the items included in Annex EM of the ECT, which include electrical energy.[53]

106. Article 1(6) of the ECT further provides that qualifying investments are "*all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date*".

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[52] **Exhibit C-1**, ECT, Article 1(9): "*Returns*" means "*the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind*".

[53] **Exhibit C-1**, ECT, Annex EM, Item 27.16.

107. As described in Section 5, the Claimants have made investments in the wind generation sector in Spain, which include, without limitation, the Wind Farms owned by the Claimants (Article 1(6)(a)); the Claimants' shareholding and debt interests in Spanish entities that also own such installations (Article 1(6)(b)); claims to money (Article 1(6)(c)); Returns (Article 1(6)(e)); and rights conferred by law (including those conferred by the Special Regime) (Article 1(6)(f)). The Claimants' investments thus fall within the ECT's definition of "*Investment*".

108. As the Claimants directly and indirectly own and operate power generation facilities in Spain, their investments are clearly associated with "*an Economic Activity in the Energy Sector*" within the meaning of Articles 1(4) and 1(5) of the ECT.

109. Further, the "*Effective Date*", based upon the entry into force of the ECT for Spain, Luxembourg and the Netherlands, is 16 April 1998. As discussed in Section 5, the Claimants made all their investments in Spain well after the Effective Date.

110. Finally, each and every one of the Claimants' investments is located within the territory of Spain. Thus, those investments are in the "*Area*"[54] of Spain.

(e) **The Parties have consented to the arbitration of this dispute under the ECT**

111. Pursuant to Article 26(3) ECT, Spain has given its "*unconditional consent to the submission of a dispute to international arbitration*". Spain's standing offer to foreign investors to settle disputes through international arbitration has been accepted by the Claimants by filing this Request, which also constitutes the Claimants' written consent for the submission of their disputes with Spain to the jurisdiction of the Centre pursuant to Article 26(4) and 26(7) of the ECT.

112. Moreover, as explained in Section 8, the dispute relates to breaches of Article 10 (Part III) of the ECT, and therefore meets the requirement of Article 26(1) of the ECT that the dispute concerns "*an alleged breach of an obligation of* [a Contracting Party] *under Part III*".

(f) **The Claimants have complied with the ECT's three-month negotiating requirement**

113. The Claimants have complied with the three-month negotiating period prescribed in Article 26(1) of the ECT, before exercising their right to pursue remedies through arbitration by serving this Request. In good faith, the Claimants have made several requests for negotiations to Spain in an attempt to reach an amicable settlement of the dispute. On 5 May 2015, the Claimants formally notified Spain of the dispute and requested negotiations pursuant to Article 26(1) of the ECT with a view to reaching an amicable settlement of the dispute.[55]

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54 **Exhibit C-1**, ECT, Article 1(10)(a): "*Area*" (of a Contracting Party) includes the "*territory under its sovereignty*".
55 **Exhibit C-3**, Letter from Allen & Overy to President Mariano Rajoy Brey on behalf of the Claimants dated 5 May 2015.

114. However, as at the date of this Request, Spain has not responded to the Claimants' request for negotiations.

7.2 The Claimants' claim satisfies the jurisdictional requirements of ICSID

115. The jurisdiction of the Centre is governed by Article 25 of the ICSID Convention, sub-paragraph (1) of which provides as follows:

> "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".

116. The requirements for the existence of the Centre's jurisdiction are satisfied in the present case. The Claimants submit to the jurisdiction of the Centre a legal dispute arising out of their investments in the renewable energy sector in Spain, which they and Spain have agreed in writing to submit to ICSID. Each element necessary to establish the jurisdiction of the Centre is addressed in turn.

(a) The legal dispute

117. The dispute being referred to the Centre in this Request is a legal dispute – that is, a difference of opinion as to law or fact – as it relates to Spain's breaches of its obligations under the ECT and international law with respect to the Claimants and their investments, and to the ensuring harm to those investments.

(b) The dispute arises directly out of an investment

118. The Claimants' investments in Spain constitute an investment for the purposes of both the ECT and the ICSID Convention. As discussed above, it is clear from the terms of Article 1(6) of the ECT that the Claimants' investments (as described in Section 5) constitute an "*Investment*" protected by the ECT.

119. In light of the Contracting Parties' agreement on the meaning of the term "*Investment*" set out in Article 1(6) of the ECT, and the offer to submit disputes arising out of such investments to ICSID set out in Article 26 of the ECT, it is clear that the Claimants' assets and interests which fall within the meaning of "*Investment*" in Article 1(6) of the ECT also amount to an "*investment*" as that term is used in Article 25(1) of the ICSID Convention.

(c) **The dispute is between a Contracting State and a national of another Contracting State**

(i) **Each of the Claimants is or shall be considered a "*national of another Contracting State*"**

120. The jurisdiction of the Centre extends to claims brought by investors that are nationals of another Contracting State. The ICSID Convention itself does not specify any particular test to determine the nationality of a legal person. The ICSID Convention can therefore accommodate the freedom of States to legislate which entities may be their nationals and to agree upon these criteria. The standard test to determine the nationality of a legal person applied in international law and in ICSID case law is the place of incorporation. Luxembourg and the Netherlands are Contracting States to the ICSID Convention.[56] Therefore, each of the Claimants is a "*national of another Contracting State*" for the purposes of Article 25 of the ICSID Convention.

(ii) **Spain is a "*Contracting State*"**

121. Spain signed the ICSID Convention on 21 March 1994, and deposited its instrument of ratification on 18 August 1994. The ICSID Convention entered into force for Spain on 17 September 1994. Spain is therefore a "*Contracting State*" for the purposes of Article 25 of the ICSID Convention.

(d) **Written consent of the Parties to submit the dispute to the Centre**

122. The ECT was signed by Spain, Luxembourg and the Netherlands on 17 December 1994, and entered into force between the parties on 16 April 1998. The ECT remains in force today between Spain, Luxembourg and the Netherlands.

123. Pursuant to Article 26(5)(a)(i) of the ECT, Spain's consent given in Article 26(3) of the ECT, together with the Claimants' written consent given in this Request pursuant to Article 26(4) of the ECT, expressly satisfies the requirement for written consent of the parties to a dispute for purposes of Article 25 of the ICSID Convention.

8. SPAIN'S BREACHES OF THE ECT

124. Unlawfully and without any regard to the obligations owed to the Claimants under the ECT, Spain has taken measures which have interfered with, and caused substantial losses to, the Claimants' investments in Spain. There is no justification for Spain's actions.

125. In particular, Spain's measures including, but not limited to, the issuance and implementation of Law 15/2012, RDL 2/2013, RDL 9/2013, Law 24/2013, RD 413/2014 and the Ministerial Order

[56] Luxembourg signed the ICSID Convention on 28 September 1965, deposited its instrument of ratification on 30 July 1970 and the ICSID Convention entered into force for Luxembourg on 29 August 1970. The Netherlands signed the ICSID Convention on 25 May 1966, deposited its instrument of ratification on 14 September 1966, and the ICSID Convention entered into force for the Netherlands on 14 October 1966.

fundamentally altered and then dismantled the applicable legal and regulatory framework in reliance upon which the Claimants' investments were made. In so doing, Spain breached several of its obligations to the Claimants as set forth in Articles 10 and 13 of the ECT.

126. In particular, Spain has violated Article 10(1) of the ECT by:

(i) failing to encourage or to create stable, equitable, favourable and transparent conditions for the Claimants' investments;

(ii) failing to accord the Claimants' investments fair and equitable treatment;

(iii) failing to accord the Claimants' investments constant protection and security;

(iv) impairing, by unreasonable and discriminatory measures, the management, maintenance, use, enjoyment and disposal of the Claimants' investments; and

(v) failing to accord the Claimants' investments treatment which is required by international law.

127. Finally, Spain has violated Article 13 of the ECT by subjecting the Claimants' investments to measures that have the equivalent effect of expropriation without the payment of adequate compensation and that do not serve any legitimate public purpose.

128. In light of these breaches of the ECT, Spain is obliged to wipe out the consequences of its unlawful measures and put the Claimants in the position they would have been in had Law 15/2012, RDL 2/2013 and the New Regime not been put in place.

9. THE IMPACT OF SPAIN'S MEASURES ON THE CLAIMANTS' INVESTMENTS

129. Spain's violations of the ECT, as described above, have caused substantial losses to the Claimants. However, given the constantly evolving nature of Spain's wrongful conduct, it is difficult at this time to quantify their full economic impact. The Claimants' losses and the damage caused to them resulting from Spain's illegal actions will be particularised and quantified in due course. The Claimants reserve their right to elaborate upon, and assert additional categories of losses resulting from Spain's ongoing violations of the ECT.

10. CLAIMANTS' PROCEDURAL PROPOSALS

10.1 Constitution of the Arbitral Tribunal

130. The Parties have not agreed upon the number of arbitrators to constitute the Arbitral Tribunal, nor have they agreed on the method of their appointment. Accordingly, pursuant to Article 37(2)(b) of the ICSID Convention and Rule 2 of the ICSID Rules of Procedure for Arbitration Proceedings, the

Claimants propose that a three-member Arbitral Tribunal be constituted. The Claimants also suggest the following method for the appointment of the three-member Arbitral Tribunal:

(i) the Claimants together and Spain shall each appoint one member of the Arbitral Tribunal within 15 days from the date of the Parties' agreement on the method for the constitution of the Arbitral Tribunal;

(ii) the two arbitrators so appointed shall jointly designate the President of the Arbitral Tribunal within 15 days of the appointment of the second arbitrator, or within such other period that may be jointly agreed by the Parties; and

(iii) failing an appointment by a party of its respective party-appointed arbitrator or agreement between the two party-appointed arbitrators on the President of the Arbitral Tribunal within the above time limits, the relevant appointment shall be made by the Chairman of the ICSID Administrative Council.

131. The above should be taken as the Claimants' proposal for the purposes of Arbitration Rule 2(1)(a). If no reply is received from Spain or if no agreement can be reached within 60 days of the date of registration of this Request, the Claimants hereby request in advance that the Secretary-General confirm that the Arbitral Tribunal should be constituted in accordance with the method set out in Article 37(2)(b) of the ICSID Convention.

10.2 Place of the proceedings and venue for hearings

132. Pursuant to Article 62 of the ICSID Convention, the place of the arbitration proceedings shall be Washington, D.C, as the seat of ICSID. However, subject to the approval of the Arbitral Tribunal and ICSID, the Claimants are willing to discuss with Spain whether there is a more appropriate alternative venue for the actual conduct of hearings, particularly taking into account that the Claimants and the Respondent are all located in Europe.

11. REQUEST FOR RELIEF

133. On the basis of the foregoing, without limitation and reserving the Claimants' right to supplement these prayers for relief in light of further actions which may be taken by Spain, the Claimants respectfully request that the Tribunal enter an Award in its favour and against Spain as follows:

(i) declaring that Spain has violated Articles 10 and 13 of the ECT, as well as its obligations under the applicable rules and principles of international law;

(ii) requiring that Spain make full reparation to the Claimants for the injury or loss to their investments arising out of Spain's violations of the ECT and international law, by way of: (1)

full restitution to the Claimants by reinstating the legal and regulatory framework in place at the time the Claimants made their investments in its territory of, including but not limited to, Law 15/2012, RDL 2/2013, RDL 9/2013, Law 24/2013, RD 413/2014 and the Ministerial Order and compensating the Claimants for their losses suffered prior to such reinstatement; or (2) full compensation to the Claimants for all losses suffered by them as a result of Spain's violations of the ECT and international law, in an amount to be determined in the course of these proceedings, including interest on all amounts awarded at a reasonable rate;

(iii) directing Spain to pay all costs incurred in connection with these arbitration proceedings, including the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Claimants, including but not limited to the fees of their legal counsel, experts and consultants and those of the Claimants' own employees, on a full indemnity basis, plus interest thereon at a reasonable rate;

(iv) directing Spain to pay post-award interest, compounded monthly, on the amounts awarded until full payment thereof; and

(v) any other relief the Arbitral Tribunal may deem appropriate in the circumstances.

Respectfully submitted

Allen & Overy LLP
Counsel to the Claimants

Dated: 26 October 2015

ANNEX 1

OWNERSHIP STRUCTURE OF THE CLAIMANTS' WIND FARMS