INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

CAVALUM SGPS, S.A.

Claimant

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/15/34

DISSENTING OPINION OF DAVID R. HAIGH Q.C.

Members of the Tribunal

Lord Collins of Mapesbury, LL.D., F.B.A., President of the Tribunal
Mr. David R. Haigh Q.C., Arbitrator
Sir Daniel Bethlehem Q.C., Arbitrator

Secretary of the Tribunal

Mr. Francisco Grob, ICSID

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I. INTRODUCTION

1. I have concluded that I must disagree with some of the basic determinations made by my esteemed colleagues in our Decision on Jurisdiction, Liability and Directions on Quantum (**Decision**). I submit this Dissenting Opinion in order to clarify the matters on which we agree and those on which we differ.

2. I will endeavour to focus my comments on the issue of Fair and Equitable Treatment (**FET**) pursuant to Article 10(1) of the Energy Charter Treaty (**ECT**).[1] In my opinion, as I will explain in more detail, below, Claimant has established that in making its investments in this case, it reasonably and legitimately relied on Spain's promises and guarantees set out in RD 661/2007 and RD 1578/2008 and re-enforced by press releases, Ministerial statements, the regulatory context and various other contemporary comments and promotional activities by governmental representatives.

3. Cavalum's plants were long-term, capital-intensive projects, requiring most of the expenditure at the time of their construction and commissioning. Cavalum's investments [2] in some five plants under RD 661/2007 were made between August 2007 and September 2008. Its investments under RD 1578/2008 were made in 2008 and 2009. Spain ultimately overturned the regimes on which these expectations were based and I have, accordingly, concluded that Spain thereby breached the FET standard of protection to which Claimant was entitled. I am satisfied that Spain's measures, in 2013 and 2014, under the New Regulatory Regime,[3] substantially reduced the value of Cavalum's investments for which damage Spain should be liable.

4. Before proceeding further, I should summarize the determinations with which I agree and those with which I disagree in our Decision, as follows:

(a) I agree with the determination of our tribunal's jurisdiction.[4] In particular, I agree with the finding that we do not have jurisdiction over the taxation issue arising from the TVPEE,[5] but that we do otherwise have jurisdiction pursuant to Article 26 of the ECT to hear and resolve this dispute;

(b) I agree that Claimant's expropriation claim must be dismissed;[6]

(c) I disagree that RD 661/2007 and RD 1578/2008 did not contain specific promises and guarantees on which Cavalum reasonably and legitimately relied when making its investments. In this regard, I do not question Spain's

[1] Unless otherwise noted, I will generally hereafter adopt the definitions and abbreviations used in the Decision.
[2] I concur with my colleagues that the critical dates for determining the date of investments is the date of actual investment or irrevocable commitment to invest, followed, of course, by the dates of final registration in the RAIPRE. Paragraphs 451 and 452 of our Decision.
[3] Defined in paragraph 152 of the Decision as the New Regulatory Regime.
[4] Decision, ¶¶ 371, 396.
[5] Tax on the value of the production of electrical energy, created with effect from 1 January 2013 by Act 15/2012 and regulated in articles 1 to 11 of that law (**TVPEE**).
[6] Decision, ¶¶ 652-654.

constitutional authority subsequently to regulate in the public interest, but when such authority was invoked to destroy the vested rights Cavalum acquired when it was induced to invest by the explicit promises and guarantees in RD 661/2007 and RD 1578/2008, then in my opinion the FET standard under the ECT was breached and Spain thereby became liable for damage caused to Cavalum;

(d) I disagree that Claimant should be denied recovery on the basis of either an alleged lack of due diligence or any decisions of the Spanish Supreme Court pre-dating Claimant's investments. I further disagree that registration in RAIPRE was merely an administrative step with no legal significance;

(e) I agree a distinction can reasonably be drawn between the Spanish regulator's 2010 changes and the subsequent changes in the form of RDL 1/2012 and the New Regulatory Regime, introduced in 2013 and 2014, and further agree that Claimant cannot recover for its claims in respect of the 2010 changes;

(f) I do not disagree that a reasonable rate of return was a "cornerstone" of the Law 54/1997 regime, but would find that the incentives offered to and relied upon by the investor in this case were explicitly those in RD 661/2007 and RD 1578/2008, that these were confirmed by Spain to provide a reasonable rate of return and that in relation to the feed-in tariffs set out in Article 36, Table 3, the second part of Article 44.3 expressly assured investors such as Claimant that these feed-in tariffs would not be revised. Moreover, the text of RD 661/2007 expressly confirmed that the incentives created by it conformed with Law 54/1997 and provided reasonable rates of return;

(g) I disagree with several of the basic findings in the *RREEF*[7] case and, contrary to the views of my colleagues, I would not follow that tribunal's conclusions;

(h) Instead, I am persuaded by the decision in the *Novenergia*[8] case that the New Regulatory Regime changes were radical and unexpected and fundamentally altered what the Claimant reasonably and legitimately expected based on RD 661/2007 and RD 1578/2008 and other conduct of Spain. Moreover, I am similarly persuaded by the reasoning and conclusions

[7] *RREEF v. Spain* (Decision on Responsibility and Principles of Quantum) .
[8] *Novenergia v. Spain* (Final Award).

set out in the *Eiser*[9] case, the *Antin*[10] case, the *Masdar*[11] case, the *9REN v. Spain*[12] *case*, and the *SolEs Badajoz*[13] case, to similar effect;

(i) I agree that the so-called "claw back" imbedded in the implementation of the target rate of return set out in MO IET/1045/2014, Annex III, is inconsistent with Spain's obligation of stability and therefore contrary to Article 10(1) of the ECT;

(j) I disagree that we should be embarking on assessing the reasonable rate of return under the New Regulatory Regime in order to determine whether, as measured against that standard, there has been an actual impact on Claimant and, if so, to what extent;

(k) Instead, I would award damages to Claimant based on the opinions offered by Claimant's experts pursuant to their DCF analysis, based on the difference in value of the investments under the RD 661/2007 and RD 1578/2008 regimes (as revised in 2010) and their value after the introduction of RDL 1/2012 and the New Regulatory Regime;

(l) I would also find in favour of the claim for wasted expenditure in the total amount of EUR 1.8 million, all in relation to the three Abandoned Projects (Fotovoltaica Lobon, Solar Lobon, and Solar Botoa) as a result of the suspension of the RD 1578/2007 regime under RDL 1/2012;[14]

(m) Out of regard for arbitral economy, I do not need to develop my views on other claims such as a lack of transparency, although I think there was arguably such a lack. I would agree, however, that there was no discrimination.

5. I will explain my reasons for those parts of the Decision with which I disagree.

II. RD 661/2007 AND RD 1578/2008 AND CLAIMANT'S LEGITIMATE EXPECTATIONS

6. These regulations are at the centre of this dispute. My colleagues have decided that they need not determine which of the differing interpretations of these regulations offered by Spain and Claimant is correct. They state:

> 523. In the view of the majority of the Tribunal, irrespective of the differing interpretations, RD 661/2007 (and RD 1578/2008) did not contain the type of

[9] *Eiser v. Spain* (Award). More recently, the *Eiser* Award has been set aside: *Eiser v. Spain* (Annulment Decision).
[10] *Antin v. Spain* (Award).
[11] *Masdar v. Spain* (Award).
[12] *9REN v. Spain* (Award).
[13] *SolEs Badajoz GMBH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 ("*SolEs Badajoz v. Spain* (Award)").
[14] Decision, ¶ 149.

> specific commitments (or, as it is sometimes put, a stabilisation clause) which gives rise to legitimate expectations under the FET standard that there will be no adverse change.[15]

7. I respectfully disagree with this conclusion. Accordingly, I will set out my construction of these regulations in order to demonstrate how they contained specific commitments for investors, like Cavalum, who were induced to invest in reliance, *inter alia*, on their plain and ordinary meaning.

8. I propose to focus first on RD 661/2007, which covered five different plants of the Claimant.[16] Based on a plain reading of this Royal Decree, I would construe it to include the following meanings and applications in this case:

(a) The economic framework established in "this decree develops the principles provided in Law 54/1997" and guarantees the owners of facilities under the special regime "a reasonable rate of return on their investments" (Recital).

(b) Incentives are provided and play a part in the electricity 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 costs of the system" (Recital).

(c) In order to safeguard the security and quality of the supply of electricity and to minimise the restrictions on production in those "technologies which are today considered not manageable", certain installed capacity targets are established. These coincide with the targets of the Renewable Energy Plan 2005-2010 and the Strategy for Energy Saving and Efficiency in Spain (E4). The compensation system in this Royal Decree shall apply to these targets (Recital).

(d) The purpose of this Royal Decree is to replace Royal Decree 436/2004 and establish a legal and financial framework for the business of producing electrical energy under the special regime (Article 1a).

(e) This Royal Decree applies to facilities classified pursuant to Article 27.1 of Law 54/1997, depending on the "primary energy employed, the production technologies employed and the energy yield obtained." Such facilities may avail themselves of the special regime established under this Royal Decree (Article 2.1).

(f) Sub-group b.1.1 covers facilities "which use solar radiation alone as their primary energy by means of photovoltaic technology" (Article 2.1b). All of Claimant's facilities fell into this sub-group.

[15] Decision, ¶ 548.
[16] Claimant's Opening Presentation, slide 142.

(g) Facilities for the production of electrical energy under the special regime "shall be subject to compulsory registration" in RAIPRE (part of the Ministry of Industry, Tourism and Trade), as provided in Article 21.4 of Law 54/1997. (Article 9.1). The registration procedure consists of an initial registration phase and a final registration phase (Article 9.2).

(h) The initial registration application authorizes the assignment of an identification number in RAIPRE. Notification of this information is given to the National Energy Commission and the competent Autonomous Community (Article 11.4).

(i) Final registration in RAIPRE contemplates compliance with various requirements set out in Article 12 and can be presented simultaneously with the application for the deed of entry into service of the facility (Article 12.1e).

(j) A facility has status under the Special Regime from the date of the decision to grant it such status by a competent authority. Even so ("notwithstanding"), the final registration of the facility in the RAIPRE "shall be a necessary requirement for the application of the economic regime regulated under this Royal Decree" (Article 14.1). Cavalum's first five facilities were finally and timely registered in RAIPRE before 28 September 2008.[17]

(k) Under Article 17, producers under the Special Regime were to enjoy certain rights, including:

  (i) the right to connect their generating unit in parallel with the grid and transfer to the system their net production of electrical energy (if technically possible to be absorbed by the grid);

  (ii) the further right 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.

(l) Once again, the regulator states that, "The right to receive the regulated tariff or if appropriate the premium, shall be subject to final registration of the facility" in RAIPRE by the date fixed under Article 22 (Article 17.c).

(m) The economic regime set up under this Royal Decree is further described and defined in Chapter IV. Article 24 provides that producers are permitted to elect to sell their net production either pursuant to a regulated tariff (Article 24.1.a) or sell in the electrical energy production market (Article 24.1.b). These options may be selected for periods of not less than one year, meaning, in practical terms, that a producer could make an annual election (Article 24.4).

[17] Decision, ¶¶ 453-455.

(n) The regulated tariff is a fixed sum which shall be the same for all scheduling periods and shall be determined according to whichever group or sub-group the facility belongs (Article 25).

(o) Pursuant to Article 36, the tariffs and premiums for category b).1.1, (covering Claimant's facilities,) "shall be as provided in Table 3, below". The portion of Table 3 applicable to Claimant's facilities shows as follows:

Article 36 – Table 3 – at 22862-63 BOE no. 126

Group	**Subgroup**	**Power**	**Duration First [--] years as from then**	**Regulated tariff c€/kWh**	**Premium of Reference c€/kWh**	**Upper limit c€/kWh**	**Lower limit c€/kWh**

Grupo	Subgrupo	Potencia	Plazo	Tarifa regulada c€/kWh	Prima de referencia c€/kWh	Límite Superior c€/kWh	Límite 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			

(p) A plain reading of this table shows that, depending on the sizes of its facilities in the b.1.1 subgroup, Cavalum was entitled to certain specific tariffs for the first 25 years and slightly reduced tariffs thereafter. In my opinion, this plain language contemplates that these tariffs would apply, effectively, for the operational lifetime of such plants.

(q) Due to its central importance in this case, I quote extensively from Article 44, as follows:

> Article 44. Updating and review of tariffs, premiums, and supplements.
>
> 1. . . .
>
> The values of the tariffs, premiums, supplements, and lower and upper limits to the hourly price of the market as defined in this Royal Decree, for Category b) … shall be updated on an annual basis using as a reference the increase in RPI (Consumer Price Index) less the value set out in this decree.
>
> . . .

> **3.** 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.
>
> **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** (bolding added).

(r) Broadly speaking, Article 44.3 contemplates the sort of four-year review that was typical of Spain's electricity regulations at that time. What was open to review in 2010 under this article were "tariffs, premiums, supplements and lower and upper limits", as defined in this decree, the degree of participation of the Special Regime in covering the demand and its impact on the technical and economic management of the system and a reasonable rate of profitability, which was always to be guaranteed with reference to the cost of money in the capital markets.

(s) The second part of Article 44.3 applies directly to Claimant's b.1.1 facilities which were registered in RAIPRE before 28 September 2008. In other words, those facilities obtained their deeds of commissioning prior to 1 January of the second year following the year in which the revision shall have been performed.

(t) The language in the second part of Article 44.3 is perfectly clear that the revisions arising from the four-year review "shall not affect" the regulated tariff and upper and lower limits of such facilities. It follows that there would be no revisions to the regulated tariff prescribed in Article 36, Table 3 for Cavalum's facilities. This language is an express promise of stability for the feed-in tariffs for these facilities.

(u) Before leaving the matter of construing RD 661/2007, I would note that what is *not* excluded from review in the language of Article 44.3 is the RPI (or consumer price index), taxes, access to the grid or the amount of production by a producer. In other words, in my opinion, this paragraph, in the case of

Claimant's facilities, to this extent did not expressly exclude Spain's right to further regulate such matters as long as that was done proportionally.

(v) Accordingly, I would find that Cavalum was entitled reasonably to act in full reliance on Spain's express promise in the second part of Article 44.3 that it would not revise the regulated feed-in tariffs for Claimant's facilities as prescribed in Article 36, Table 3.

9. When addressing the legal regime created by Spain for renewable energy, the *Novenergia* tribunal stated:

> 665. The Tribunal considers that Law 54/1997 and RD 661/2007 were clearly enacted with the objective of ensuring that the Kingdom of Spain achieved its emissions and RE targets. In order to achieve that objective the Kingdom of Spain created a very favourable investment climate for RE investors, and the nucleus of such investment climate was the Special Regime. The requirements placed on the PV plants to qualify for the Special Regime were limited to registration with the RAIPRE, a requirement which all of the PV Plants had met within the prescribed cut-off date [internal footnotes omitted].
>
> 666. In the Tribunal's view, a number of relevant statements or assurances were made by the Respondent with respect to the Special Regime, as initially introduced through Law 54/1997 and further developed by RD 661/2007 and legislation in-between:
>
> . . .
>
> (e) In Law 54/1997, it was stated that RE facilities admitted to the Special Regime would be authorized to incorporate "*all the energy produced by them into the system*" and would "*obtain reasonable rates of return*" as set by the government.
>
> (f) RD 436/2004 was enacted as expressly aiming at "*provid[ing] those who have decided or will decide in the near future to opt for the special regime with a durable, objective, and transparent framework*."
>
> (g) Under RD 436/2004, PV plants were entitled to incorporate into the grid all of the electric energy produced in exchange for a FIT or premium for the lifespan of the PV plants.
>
> (h) Under RD 661/2007, which replaced RD 436/2004, PV plants enrolled in the RAIPRE before the cut-off date would be entitled to (i) incorporate all of their net production into the grid; (ii) a FIT that would only be updated in accordance with the national CPI, and (iii) receive a fixed FIT for the lifespan of the PV plants.
>
> 667. These were the legal sources in force in the Kingdom of Spain when the Claimant made its investment and the Tribunal agrees with the Claimant that the above statements and assurances were indeed aimed at incentivising companies to invest heavily in the Spanish electricity sector and that the Claimant made its

> investment in reliance of (*sic*) the terms provided in RD 661/2007. The commitment from the Kingdom of Spain could not have been clearer. A considerable number of RE companies also invested in reliance on these statements and assurances.[18]

10. I would adopt these remarks. The regime that culminated in RD 661/2007 "could not have been clearer". In my view, Cavalum undoubtedly relied on the straightforward and plain reading of Article 36, Table 3, and Article 44.3 showing the specific terms of the feed-in tariffs for Sub-group b.1.1 facilities and their duration and the State's promise that those feed-in tariffs would be affected by any review of tariffs. The object and purpose of Articles 36 and 44(3) of RD 661/2007 clearly provided an incentive to specific PV investors, namely those in category b.1.1 which used solar radiation alone as their primary energy. The third column of Table 3 of Article 36 is entitled, "Duration" followed by the explanatory words, "First […] years as from then". It says, in Spanish, "primeros 25 años", followed by "a partir de entonces". The duration of the identified FIT is not mysterious or obscure in any sense. This language is as explicit as possible.

11. As the *Masdar* tribunal found:

> The State guaranteed the stability of the benefits, if the investors fulfilled a certain number of conditions, both procedural and substantial, during a certain window of time. Specifically, the State undertook that it would offer to investors the possibility to continue to enjoy the existing benefits, provided that within a certain window of time, they did everything necessary to enable them to register in the RAIPRE. This was a very specific unilateral offer from the State, which an investor would be deemed to have accepted, once it had fulfilled the substantial condition of construction of the plant and the formal condition of registration within the prescribed window.[19]

12. I agree with Claimant's submission that the offer and acceptance created an internationally protected obligation on Spain's part.[20] Relying on the plain language of RD 661/2007, Cavalum financed, developed, built, commissioned and registered its long-term facilities in a timely way in RAIPRE.

13. I wish to deal more summarily with RD 1578/2008. The preamble of that decree explains the background to its introduction, saying that RD 661/2007 set up a "new retributive framework" to be applied to renewable energy (along with other sectors), "with a view to achieving the targets set forth in the 2005-2010 Renewable Energy Plan and the Energy Saving and Efficiency Strategy in Spain (E4) in 2010." It also acknowledged that the growth of installed capacity for solar voltaic technology had been much higher than expected. According to CNE's published data, 85% of the target for PV installed capacity in 2010 was exceeded by August 2007 and 1,000 MW of installed capacity was achieved by May 2008. The decree continues:

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[18] *Novenergia v. Spain* (Award), ¶¶ 665-667 [all internal footnotes omitted].
[19] *Masdar v. Spain* (Award), ¶ 512.
[20] Claimant's Post-Hearing Brief, ¶ 25.

> This fast-track evolution has resulted in numerous industrial investments in the solarvoltaic technology, […] and, as a result, the entire elements of a solar photovoltaic installation can be currently produced in Spain.
>
> This makes it necessary to provide these investments with continuity and expectations, and also to determine a progressive pattern for the implementation of this technology, which can in addition contribute to the fulfillment of targets in the 2005-2010 Renewable Energy Plan, and of those to be fixed in the 2011-2020 Renewable Energy Plan, in accordance with targets set forth for Spain under the new Directive on Renewable Energy. Therefore, [it has been considered appropriate] to raise the current 371 MW target of installed capacity connected to the grid, provided in Royal Decree 661/2007 of May 25.

14. While acknowledging that RD 661/2007 had proven "successful/effective", the preamble of RD 1578/2008 introduced the need to adjust downwards the financial regime, stating:

> 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.

15. Among other things, the preamble to RD 1578/2008 refers to the need for legal certainty in these terms:

> 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 a registry of allocation of remuneration, at an early stage of the project development, in order to provide the necessary legal certainty for promoters in relation to the remuneration to be obtained by the facility, once it [will be] commissioned.

16. Articles 1 and 2 of Chapter 1 of RD 1578/2008 state the object and applicability of this decree. Its objective is "to establish an economic regime" for PV facilities to which "the regulated tariff rates provided in Article 36" of RD 661/2007 are not applicable because of the date of their registration in RAIPRE. RD 1578/2008 applies to "facilities in group b.1.1 [solar PV facilities]" "that obtained definitive registration after September 29, 2008" in RAIPRE. As was the case under RD 661/2007, pre-registration was mandatory.

17. Under the heading, "Article II –Tariffs", RD 1578/2008 prescribes that, “The rates of regulated tariffs for the sub-group b.1.1 facilities […] are fixed as follows:”

Type	Regulated Tariff ¢€/kWh

Type I	Subtype 1.1 Subtype 1.2	34.00 32.00
Type II		32.00

18. Article 11, paragraph 5, provides:

> 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 either the date of commissioning or the date of registration in RAIPRE. It adds, such compensation shall never be applicable prior to the date of such registration.

19. Article 12, entitled "Update of Tariffs" states:

> The rates provided in Article 11 shall be updated as provided in Article 44.1 of RD 661/2007 …for sub-group b.1.1, as from January 1, of the second year subsequent to the notice in which they are fixed.

20. This update refers specifically to the consumer price indexing set up under RD 661/2007. Finally, one further provision must be noted, as follows:

> Fifth Additional Provision Amendment to the Retribution of the Activity Electricity Generation from Photovoltaic Technology
>
> 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.

21. Spain contends that this amendment authorized the wholesale revamping of the regulatory regime for PV facilities that it created in 2013 and 2014. It argues that the Fifth Additional Provision contains an "express warning to the whole photovoltaic sector" that "the remuneration of photovoltaic solar technology facilities could be modified."[21] It says that the Fifth Additional Provision "expressly provided for a revision of the tariffs of existing PV facilities in 2012".[22] [23] Claimant rejects this position, arguing, instead, that RD 1578/2008 did not eliminate or otherwise affect the application of RD 661/2007 to existing projects.[24] Claimant says, among other things, both these royal decrees justify a finding of a specific commitment of stability from Spain to Cavalum, namely, (i) both decrees specifically address the b.1.1 subgroup which covered Claimant's investments, (ii) Spain confirmed upon final RAIPRE registration the remuneration available to each individual plant in accord with the applicable tariffs, and, (iii) finally, the objects and purposes of

[21] Respondent's Post-Hearing Brief, ¶ 149.
[22] Spain's Fundamental Fact Issues of the Arbitration, Opening Presentation, slide 78.
[23] Spain's oral opening statement by Sr. Santacruz Descartín, Transcript Day 1, page 246.
[24] Claimant's Opening Presentation, slide 56.

these two decrees were plainly to induce the very sort of investment made in this case by Claimant.[25]

22. Just as occurred in the case of RD 661/2007, the Ministry of Industry issued a press release in relation to RD 1578/2008, stating, among other things, "… the holders of facilities have twelve months to complete their installation and get it up and running in order to be entitled to this remuneration for a 25-year period." [26]

23. When viewed in the whole context of the renewable energy regimes, including not only the specific wording of RD 661/2007 and RD 1578/2008, but also the surrounding conditions and Spain's promotion of the benefits of these decrees,[27] I am more than satisfied that Claimant was objectively justified in making its investments with full confidence in the promises and guarantees of feed-in tariffs that would not be subject to retroactive meddling, let alone complete abandonment as ultimately occurred. These conclusions do not rest on merely a subjective reliance by Claimant, as Spain contends, but on the full objective panoply of inducements created by Spain in the form of these two decrees, press releases and Ministerial statements, statements by the CNE, IDAE and Invest In Spain.

24. My colleagues have cited principles from other cases to the effect that the state has no obligation to grant subsidies such as the feed-in tariffs and that an investor may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host state's legal and economic framework.[28] What I must observe, however, is that these principles are said to apply only in the absence of specific promises or representations. That critical exception is what should be applied in this case. There were specific promises in the form of the Royal Decrees in 2007 and 2008 and there were clear and robust representations by the state on which Claimant was entitled to rely. My colleagues do not say that these promises or representations were not made, but only that Claimant should not have relied on them because, if only it or its legal advisors had better understood the Spanish constitution and the decisions of the Spanish Supreme Court, they would have known that even when the state says it won't alter a regime such as the feed-in tariffs set out in RD 661/2007, it can and would do so, in the event of changed circumstances.[29] I respectfully disagree with such an analysis.

25. The FET protection set forth in Article 10(1) of the ECT required Spain to encourage and create stable and equitable conditions for investors such as Claimant. In my opinion, Spain did not act as it was required to act and it breached its solemn obligations in Article 10(1) of the ECT by failing to meet Claimant's reasonable and legitimate expectations that Spain would do what it promised and guaranteed it would do,

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[25] Claimant's Post-Hearing Brief, ¶¶ 21-24.
[26] Ministry of Industry, Trade and Tourism, Press Release of 23 April 2009, C-155.
[27] Press Release of Ministry of Industry accompanying publication of RD 1578/2008 stating that tariffs would apply for 25 years, C-138. CNE Report on RD 1578/2008, National Energy Commission Report 30/2008, C-111. Press Release of Ministry of Industry, Trade and Tourism, 1 July 2009, C-156; Ministry of Industry, Trade and Tourism, Press Release of 23 April 2009, C-155.
[28] *C.f.* Decision, ¶¶ 411, 427, and 432-435.
[29] Decision, ¶ 556.

namely, provide the feed-in tariffs set forth in Article 36, Table 3, of RD 661/2007 and Article 11 of RD 1578/2008 for at least 25 years, and would not do what it said in Article 44.3 of RD 661/2007 it would not do, namely, make any revisions to ("shall not affect") the regulated tariff and the upper and lower limits in relation to facilities such as those of the Claimant, or revise the tariffs as they applied to those facilities timely registered under RD 1578/2008 outside the framework of Article 12 of RD 1578/2008. As confirmed elsewhere in this Dissenting Opinion, it is my view that Spain should be liable in damages to Claimant for breaching its obligations under Article 10(1) of the ECT, such damages to be measured by the difference in value of Claimant's facilities between what that value was under the promised/guaranteed feed-in tariff (as revised in 2010) and what that value was upon the introduction of the New Regulatory Regime.

III. OTHER INDUCEMENTS

26. In its discussion of what is required to establish legitimate expectations, the tribunal in the *Micula* case[30] stated:

> 669. … 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.[31]

27. In my view, Spain's promises in RD 661/2007 and RD 1578/2008 were explicit. And, as already indicated, I would find that these promises to Sub-group b).1.1 facilities, in particular, objectively created an understanding of regulatory stability on which Claimant reasonably relied and which induced Claimant to invest as it did in Spain's renewable energy sector. Beyond these explicit promises, there were a number of surrounding circumstances which made that explicit language even more compelling.

28. Accompanying RD 661/2007 on the day of its enactment was a press release from the Spanish Council of Ministers. It stated, in part:

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

[30] *Micula v. Romania* (Award).
[31] *Ibid*, ¶ 669.

> **The revisions carried out in the future of the tariffs will not affect those installations already in operation. This guarantee provides legal safety for the producer, affording stability to the sector and fostering its development**[32] (bolding added).

29. To like effect, in speaking of RD 661/2007, the Director of Electricity for Spain's National Energy Regulator (CNE) addressed what he called "*Cuatro criterios básicos*", one of which was "*Estabilidad regulatoria*". Among other things, he said that Article 44 provided for reviews every four years, but added that there would be no retroactivity for existing facilities ("*Sin retroactividad para instalaciones existentes (solo a partir de 2008)*…").[33]

30. The *Novenergia* tribunal refers particularly to the IDAE's 2005 and 2007 "The Sun Can Be All Yours" prospectuses, and says these materials "… were also aimed at incentivising companies to invest heavily in the Spanish electricity sector and formed part of the basis for the Claimant's investment."[34] I would make the same observation in this case.

31. I am satisfied that Spain repeatedly promoted the stability of RD 661/2007 and later, RD 1578/2008, both at home and around the world.[35] The *Novenergia* tribunal also noted this type of activity, stating:

> 668. Moreover, the investors were provided with the following information:
>
> (a) In the prospectus 'The Sun Can Be All Yours', the IDAE, an organ of the Kingdom of Spain, wrote with respect to investments in the PV sector that "[t]he return on the investment is reasonable and can sometimes reach up to 15%" and offered "significant financing of the investment" [The Sun Can Be All Yours, Reply to all the Key Questions, 24 May 2005].
>
> (b) In [PER] 2005-2010, with respect to the Special Regime, the Kingdom of Spain declared that "the proper functioning of these mechanisms must be guaranteed […] to maintain investor's confidence" and that it should maintain "investors' confidence […] through a stable and predictable support scheme." [PER] 2005-2010.
>
> (c) In the new prospectus in the "The Sun Can Be All Yours" series in June 2007, the IDAE wrote that investors in the PV sector would "obtain [] a maximum return on the investment" throughout the lifespan of the facility, namely through the FIT in RD 661/2007. [IDAE, The Sun Can Be All Yours, Reply to all the Key Questions, June 2007].[36]

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[32] Council of Ministers Press Release in relation to RD 661/2007, C-99.
[33] Carlos Sole Martin, CNE Director of Electricity, *The New Regulatory Framework for Renewable Energy in Spain*, dated 18 June 2007, slide 8, C-130.
[34] *Novenergia v. Spain* (Award), ¶ 669.
[35] See, for example, Claimant's schematic depicting presentations by CNE, IDAE, and INVEST IN SPAIN, in various locations, including, Spain, Costa Rica, Columbia, Peru, Luxembourg, Israel, Austria, Belgium, Germany, and China. Claimant's Opening Presentation, slide 54.
[36] *Novenergia v. Spain* (Award), ¶ 668.

> 669. In the Tribunal's view, the above statements were also aimed at incentivising companies to invest heavily in the Spanish electricity sector and formed part of the basis for the Claimant's investment.

32. I would adopt these observations and concur in that tribunal's view.

33. I am satisfied that Claimant's expectations of stability for the feed-in tariffs fixed for its b.1.1 facilities under both RD 661/2007 and RD 1578/2008 were both reasonable and legitimate and arose directly from the express promises in those decrees. Even if Spain had not made these specific promises and guarantees, which of course it did, I would also hold that Claimant was reasonably entitled to rely on the implicit undertakings and assurances made by or on behalf of Spain. I refer to and agree with the *Novenergia* tribunal's conclusion in respect of these principles:

> The Claimant has argued that legitimate expectations arise naturally from undertakings and assurances made by, or on behalf of, the state and that such undertakings and assurances need not be specific. The arbitral tribunal in *Electrabel*, acknowledged that '[w]hile specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable'. The Tribunal agrees. A multitude of arbitral tribunals have established that undertakings or assurances can be explicit or implicit.[37]

34. In this case, there were both explicit and implicit promises and guarantees of stability with respect to the feed-in tariffs for Claimant's b.1.1 photovoltaic facilities.

IV. SPAIN'S DEFENCES

A. Relevant Spanish Supreme Court Jurisprudence and Claimant's Due Diligence

35. My colleagues have accepted Spain's position that the special regimes for renewable energy were subject to change so long as these changes complied with the objectives of Law 54/1997. Spain has said that any reasonably informed investor performing an "exhaustive due diligence" before investing as Claimant did, would have understood for a variety of reasons that there could be no immutability in the promises and guarantees set out in RD 661/2007 and RD 1578/2008. Those reasons include the broad authority of a sovereign state to regulate its affairs, pronouncements made by the Spanish Supreme Court, the hierarchy of authority under the Spanish constitution, particularly the superiority of an act, such as Act 54/1997 or a Royal Decree Law over a mere royal decree which is simply a regulation deriving its authority from the Act under which it is created. Spain says, "… Spanish legislation has never contained a commitment to investors that the specific regimes of RD 661/2007 and RD 1578/2008 would not be changed whatsoever for existing facilities over their whole operating life, as Claimant claims."[38]

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[37] *Novenergia v. Spain* (Award), ¶ 650.
[38] Respondent's Post-Hearing Brief, ¶¶ 130 and 132.

36. I do not accept Spain's submissions in this regard and will briefly set out my reasons.

37. In particular, my colleagues are persuaded that certain decisions of the Spanish Supreme Court should have forewarned Claimant or its advisors that regulations such as RD 661/2007 and, later, RD 1578/2008, were subject to change and that Cavalum's due diligence was open to question.

38. Firstly, let me consider the relevant Spanish Supreme Court jurisprudence. I do not doubt the legal validity of the Spanish Supreme Court's 2005 determination concerning RD 436/2004 that there "is no legal obstacle for the Government, exercising its regulatory authority and the broad empowerments it is endowed with in an area which is so strictly regulated as electricity, to modify a specific remuneration system provided that it remains within the framework stipulated by the LSE [Act 54/1997]."[39]

39. Similarly, when addressing RD 2351/2004, the Supreme Court determined in 2006 *inter alia* that, "… electricity producers do not have an 'unalterable right' to remain in an unchanged economic regime governing the collection of premiums."[40] Again, in 2007, in relation to amendments to RD 2828/1998 and a challenge to RD 1454/2005, the Supreme Court confirmed that companies could aspire to their premiums including "reasonable rates of return on their investments", but had no vested right to specific subsidies.[41] I will not deal with the many other cases cited by Respondent in this arbitration, as they all arose subsequently to the dates of Claimant's investments. For purposes of this arbitration, those later Supreme Court decisions are legally irrelevant to our determination of Claimant's legal due diligence or legitimate expectations at the time of its investments.

40. Thus, among the numerous Supreme Court cases cited by Spain, the only relevant ones are those preceding the implementation of RD 661/2007 and RD 1578/2008 and the dates of Claimant's investments. Those decisions broadly addressed either the non-immutability of regulations in the electricity sector or the general principle embedded in Law 54/1997, that a producer was entitled to expect a reasonable rate of return on its investment. It is important to note, however, these earlier judicial pronouncements were not dealing with the sort of stability provisions found in RD 661/2007 and RD 1578/2008 and, moreover, did not deal with these specific regulatory decrees.

41. As the evidence in this case plainly showed, around the time of these Supreme Court decisions, Spain's electricity regulators had come to recognize that earlier regimes were not even close to achieving their renewable energy objectives. Previous ways of inducing adequate investment in solar-powered generation facilities were not working. These circumstances formed the context for the explicit promises and guarantees in the royal decrees issued in 2007 and 2008. These promises created stability for regulated

[39] Decision, ¶ 510; Judgment of the Supreme Court, 15 December 2005, C-257 and/or R-117.
[40] Decision, ¶ 511; Judgment of the Spanish Supreme Court of 25 October 2006, rec. 12/2005 R-118.
[41] Decision, ¶¶ 512-513; Judgment of the Spanish Supreme Court of 20 March 2007, C-258/R-119 and Decision, ¶¶ 514-515; Judgment of the Spanish Supreme Court, 9 October 2007, R-120.

tariffs that, prior to RD 661/2007 and RD 1578/2008, had simply not been considered or reviewed by the Spanish Supreme Court.

42. Thus, in my view, prior to Claimant's investment, even a meticulously careful reading of the Spanish Supreme Court's decisions would not have forewarned any reasonable advisor or investor that when Spain elected to introduce stabilized feed-in tariffs for specific, qualified renewable energy facilities, such as Claimant's b.1.1 photovoltaic facilities, (thereby inducing Claimant to invest significant capital into these long-term facilities), the regime for such tariffs could eventually be destroyed and replaced by an entirely new and different regime, ostensibly on the grounds of applying another version of reasonable rates of return.

43. My colleagues conclude that Claimant and its advisors knew or should have known that under Spanish law, the Special Regime was not immune to change.[42] I acknowledge that lawful changes in regulatory regimes must generally be accepted as a proper exercise of a state's right to regulate in the public interest. But, any such general right cannot protect that state from liability in international law under the ECT for breaching vested rights arising from express promises and inducements on which Claimant relied in this case. I accept that Spain had a constitutional right to regulate the New Regulatory Regime but, that does not mean that it was acting according to its obligations under Article 10(1) of the ECT.[43] Having the constitutional authority to regulate, in other words, does not permit Spain to destroy fundamentally the regimes in RD 661/2007 and RD 1578/2008 without incurring liability. Here, the second part of Article 44.3 of RD 661/2007 expressly stated that the revisions otherwise contemplated from time to time, "shall not affect" the feed-tariffs applicable to facilities, such as Claimant's. Other governmental officials confirmed that promise. However broadly construed, the state's right to regulate did not, in my opinion, allow it to breach that express guarantee without legal consequences.

44. As in our case, the tribunal in the *Novenergia* Award likewise dealt with arguments by Spain that the claimant in that case did not perform an adequate due diligence prior to making its investment. That tribunal disagreed and found that the claimant did carry out a reasonable analysis of the Spanish regulatory framework prior to its investment, adding that "… also because RD 661/2007 was so adamantly clear that its understanding by common readers did not require a particularly sophisticated analysis." I agree with that observation and would also concur with the *Novenergia* tribunal's skepticism that the type of legal due diligence into the stability of the Spanish renewables regime called for by the Respondent would have revealed the kind of changes which were later implemented by the Respondent through its introduction of the New Regulatory Regime.[44]

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[42] Decision, ¶ 539.

[43] The Claimants in the *RREEF* case conceded that a state *can* change its law if it chooses to. They say, however, "The question is whether it was reasonable for RREEF to expect that Spain *would not* make severe and harmful changes to the FIT for existing investments in breach of the clear and repeated promises it made to RREEF. This is the notion of *could* versus *would* which Spain has failed to address in this arbitration." This submission makes a valid distinction in my view.

[44] *Novenergia v. Spain* (Award), ¶ 679.

45. The *Novenergia* tribunal held that, "… Claimant has convincingly established that its initial expectations were legitimate since there was nothing to contradict the guaranteed FIT in RD 661/2007 and the surrounding statements made by the Kingdom of Spain in *e.g*. 'The Sun Can Be All Yours'. In other words, the Tribunal concludes that the Claimant had a legitimate and reasonable expectation that there would not be any radical or fundamental changes to the Special Regime as set out in RD 661/2007."[45] I agree with that tribunal's opinion.

46. The due diligence performed by and on behalf of the Claimant in this case was reasonable in all the circumstances. There was no forewarning of a future in which, after receiving the benefit of enormous investments in photovoltaic facilities by the Claimant and many others, Spain would utterly destroy the express regime on which they had relied, claiming the legal right to do so.

47. The *Novenergia* tribunal cited favourably the interpretation of FET by the *Micula* tribunal that, "… where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation."[46]

48. The *Novenergia* tribunal also agreed with the submissions by claimant in that case that, "… legitimate expectations arise naturally from undertakings and assurances made by, or on behalf of the state and that such undertakings and assurances need not be specific."[47] That tribunal further agreed with the claimant that, "… an expectation that the regulatory framework will be stable can arise from, or be strengthened by, state conduct or statements."[48] The tribunal says that the standard by which it "… must measure the actions of the Respondent is, thus, whether the Respondent by virtue of its statements and conduct (including through RD 661/2007 itself) has given rise to a legitimate and reasonable expectation on the Claimant's part that the regulation implemented through RD 661/2007 would be stable." That tribunal says the relevant question is "… whether the statement or conduct *objectively* suffices to create legitimate expectations in the recipient."[49]

49. I concur in the *Novenergia* tribunal's observations and would find in our case that Cavalum has objectively demonstrated that the conduct of Spain created legitimate expectations that its promised stability for the regulated tariffs in these two royal decrees would remain stable for the durations shown in those decrees. Under the protections found in Article 10(1) of the ECT, investors who reasonably rely upon and are induced to invest pursuant to a state's explicit promises and guarantees (as well as implicit assurances) of stabilised incentives, are entitled to expect that these promises of stability will be kept and where they are not, a state will incur liability for not having kept such

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[45] *Ibid*, ¶ 681.
[46] *Micula v. Romania* (Award), ¶ 667 and *Novenergia v. Spain* (Award), ¶ 649.
[47] *Novenergia v. Spain* (Award), ¶ 650.
[48] *Ibid*, ¶ 651.
[49] *Ibid*, ¶ 653.

promises of stability. Those promises became, in my view, vested rights that the state was obliged to respect and honour. The Spanish Supreme Court's decisions rendered ahead of RD 661/2007 and RD 1578/2008 could not have warned anyone that Spain would not keep its word that future adjustments or revisions of these feed-in tariffs would not affect the feed-in tariffs for photovoltaic facilities already constructed and qualified through final registration in the RAIPRE.

B. Registration in RAIPRE

50. My colleagues have determined that they do not consider that registration in RAIPRE "amounted to a specific commitment or created vested rights because it was simply an administrative requirement, without creating any rights under Spanish law, and it could not be endowed with any greater rights under international law."[50]

51. Registration in the RAIPRE was no doubt, in one sense, merely an administrative requirement. It was also, however, the *sine qua non*, without which, entitlement to the feed-in tariffs in RD 661/2007 and RD 1578/2008 could not be enjoyed. RD 661/2007 says such registration "shall be a necessary requirement for the application of the economic regime regulated under this Royal Decree to such a facility" (Article 14). In case that "necessary requirement" was not perfectly clear, Article 17(c) adds that the right to receive the regulated tariff "shall be subject to final registration of the facility".

52. In my view, Claimant's vested right to receive what it was explicitly promised in Article 36, Table 3 and Article 44.3 was crystalized upon registration in RAIPRE. At that point, Claimant had performed all that was required of it in terms of planning, financing, constructing, commissioning and timely registering each plant. The registration in RAIPRE affirmed that all these pre-conditions were fulfilled and thus Spain's duty to carry out the promised inducements was fixed. In that context, registration in the RAIPRE had a significance beyond merely an administrative act; it changed the relationship from one that was executory to one that had become executed. That is the point at which Spain's obligations under Article 10(1) of the ECT took hold and became binding on the state.

C. The "Reasonable Rate of Return" Expectation

53. Spain has submitted that,

> Spanish legislation does contain a general commitment to investors investing in renewables in Spain, but it is not the commitment that Claimant claims.
>
> The Commitment that Spanish legislation contained at the time of Claimant's investment and that is maintained in the Spanish legislation currently in force, after the disputed measures, is that investors obtain a reasonable return to their investment in accordance with the cost of money in the capital markets.[51]

[50] Decision, ¶ 550.
[51] Respondent's Post-Hearing Brief, ¶¶ 125 and 126.

54. My colleagues are satisfied that Spain is right in contending that reasonable rate of return or reasonable profitability is "the cornerstone of the incentive regime".[52] My colleagues conclude that the only legitimate expectation of Claimant was to receive a reasonable rate of return for its investment, calculated by reference to the cost of money in the capital market, and they therefore agree with the tribunal in the *RREEF* Award that "… the guarantee of 'reasonable return' or 'reasonable profitability' was the main specific commitment of Spain *vis-à-vis* the investors in the Special Regime", and "[o]n the applicable legal standard, the tribunal concludes that the only legitimate expectation of the Claimants was to receive a reasonable return for its investment …." I disagree with these conclusions and with the opinion of the *RREEF* tribunal. I will endeavor to provide a brief explanation for this disagreement.

55. I begin my response by noting, with approval, the dissenting opinion of Professor Guido Tawil who sat on a couple of the early so-called Spanish cases. He provided dissenting opinions in both the *Charanne* and *Isolux* cases. In the latter, he said:

> The power of the host State to amend its legislation at any time is not under discussion, as no one has a vested right to the maintenance of laws and regulations. The host State can always modify a legal regime of general or specific scope for reasons of public interest. However, this does not prevent the recognition of the fact that if such legitimate action affects acquired rights or legitimate expectations, it is appropriate to compensate for the damages caused. This is a typical case of state liability for lawful activity, widely recognized in comparative doctrine and case law and in relation to which Spanish law has deservedly transformed, since at least the mid-twentieth century, into a source of knowledge of particular value.[53]

56. I would further endorse the *Novenergia* tribunal's conclusions in relation to the regulatory environment, including the PER for 2005-2010 and at least three Spanish Supreme Court cases, as follows:

> 674. … As regards these sources, the Tribunal is unpersuaded by the Respondent's arguments. Neither one of the documents could have given the Claimant the expectation that a 'reasonable rate of return' would be limited to 7%, that stability and predictability could not be expected in the SES, that the Special Regime could be abolished, or any of the other arguments that the Respondent appears to make. In fact, the sources referenced by the Respondent includes wording that gives investors the impression that the Spanish regulator was eager to incentivise investors to invest heavily in the RE sector and that it was committed to creating a stable and predictable framework for investors to attain such investment. The overwhelming impression created by these sources is rather the exact opposite of that claimed by the Respondent; they constitute a bait rather than a deterrent.[54]

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[52] Decision, ¶¶ 600-601, 612.
[53] *Isolux v. Spain*, Dissenting Opinion of Professor Guido Tawil, ¶ 9, CL-176 and Claimant's Opening Presentation Slide page 131.
[54] *Ibid*, ¶ 674.

57. With respect to Spain's arguments concerning reasonable rate of return and economic sustainability, I would instead adopt the conclusions drawn by the *Novenergia* tribunal, as follows:

> 673. As regards statements in relation to 'economic sustainability' and 'reasonable rate of return' the Tribunal finds the Respondent's arguments unconvincing, since these principles were still generally vague and insufficiently defined at the time of the Claimant's investment [internal foot note omitted]. Precise content was given to these principles through the introduction of Law 15/2012 and RDL9/2013, which were enacted long after the Claimant had already made its investment. Accordingly, they cannot be considered apposite for the assessment of the reasonability of the Claimant's expectations at the time of the investment, as the Respondent suggests.[55]

58. I appreciate that Article 30.4 of Law 54/1997 refers to a reasonable rate of return or profitability with reference to the cost of money on the capital markets and I also appreciate that this same phrasing is liberally sprinkled throughout the subsequent regulations, including RD 661/2007, RD 1578/2008 as well as the 2005-2010 PER. Spain buttresses its position on reasonable rate of return by referring as well to various decisions of the Supreme Court in which, it alleges, a prudent investor would have discerned that a reasonable rate of return was all that energy producers under the Special Regime were entitled to expect. I agree with the tribunal in the *SolEs Badajos* Award, which was not persuaded that the Supreme Court decisions circulating within the renewable energy sector established "… that a prudent investor could have had no legitimate expectation other than that of a reasonable return." [56]

59. It is worth noting that in Article 30.4 of Law 54/1997, the phrase "reasonable profitability rates with reference to the cost of money on capital markets" does not stand alone. In context, it is only one of several references which, it appears, are to be considered when setting remuneration arrangements for electric power generation installations operating under the special regime in relation to the payment of premiums. The objective, in setting premiums, was to take into account a number of matters, of which reasonable rates of profitability was only one such consideration.

60. In a stand-alone paragraph, the relevant language of Article 30.4 states,

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

61. In a very general sense, I would not fundamentally disagree that such reasonable rates of return or profitability rates can be charitably characterized as "a cornerstone" of the various regimes enacted under the *aegis* of Law 54/1997. But, the question for me is

[55] *Novenergia v. Spain* (Award), ¶ 673.
[56] *SolEs v. Spain* (Award), ¶ 432.

whether such a broad statement of policy can have any significance in the specific circumstances of this case. I do not accept that it does. In my view, the explicit promises and guarantees of RD 661/2007 and RD 1578/2008, were designed to provide stability and predictability to those who, like Cavalum, were considering making the sort of fixed, long-term investment entailed in setting up photovoltaic facilities in 2007-2009. As I have already noted, Spain's regulators had previously tried lesser promises which had, as it happened, not attracted the very large amounts of capital required to meet the targets set for it by the EU. Thus, having elected to induce this kind of investment with the additional promise of stability for the regulated tariffs for 25 years and, in the case of RD 661/2007, for a specific rate "thereafter" ("*a partir de entonces*"), Spain voluntarily limited its regulatory discretion for those investors like Cavalum who specifically relied on the promised stability.

62. Moreover, as I have already noted earlier in this dissenting opinion, RD 661/2007 itself, in the preamble, says that the economic framework established in that decree "develops the principles provided in Law 54/1997 …guaranteeing the owners of facilities under the special regime a reasonable return on their investments." Thus, to the extent that the general principle was to be followed, that regulation expressly says the rates established by it fulfilled that objective.

63. Once Cavalum had been induced to rely on the durability of the regulated tariffs in RD 661/2007 and RD 1578/2008, I do not agree its vested rights in those tariffs could be fundamentally taken away through applying an after-the-fact general principle of reasonable return. Spain's argument, it seems to me, would give it a perpetual, practically *ad hoc*, right of resetting those tariffs in the future that it explicitly said "shall not be affected". I therefore do not agree that the phrase "reasonable profitability rates" with reference to money on capital markets in some fashion permitted Spain to do retroactively what it said it at the time it would not do.

64. As my colleagues intend to follow certain reasoning in the *RREEF* Award,[57] I wish to explain my concerns with some of the analyses in that case.

65. Firstly, in my opinion, the *RREEF* Award is distinguishable on its facts from our case to the extent that the investments there were made in 2011, by which time certain trends in the Spanish regulatory regime were discernible that would not have been discernible when Claimant was making its investments in this case.[58]

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[57] This decision was only brought to the attention of the Tribunal in June 2019, well after the final hearing. Respondent commented on this case, but Claimant elected not to do so. As a result, we do not have the benefit of any submissions from Claimant on the *RREEF* Decision on Responsibility and Principles of Quantum.

[58] The *RREEF* tribunal refers favourably to the comparison by the *Novenergia* tribunal of the C*haranne*, *Isolux* and *Eiser* cases that highlighted the differences among these cases based on the date when the investment was made and the state of the Spanish regulatory regime at the time. The *RREEF* tribunal agrees with *Novenergia* that it was in order to distinguish between investments made in 2007 (which was the case in *Eiser* and *Novenergia*) on the one hand and those made in 2012 (*Isolux*) on the other hand. By then, the *Novenergia* tribunal found that the investment had been made, at a stage when it must have been

66. Next, the *RREEF* tribunal did not, in my view, analyze or fully consider the explicit language of Article 44.3. That tribunal introduced Article 44.3 in its award, as follows:

> 318. The crucial regulation in the present case, the legal text essentially invoked by the Claimants, is RD 661/2007. No more than the ECT itself, this document contains a stability clause guaranteeing the immutability of the conditions of the investments. Article 44(3) of RD 661/2007 provides as follows: ….[59]

67. Thus, the *RREEF* tribunal itself characterizes Article 44.3 as a "stability clause guaranteeing the immutability of the conditions of the investments". At the same time, it also qualifies this clause as being "no more than the ECT itself." I infer that this latter comment likely refers to that tribunal's preceding reasoning that Spain had an obligation to "encourage and create stable […] conditions for Investors", under the first part of Article 10(1) of the ECT, but investors must demonstrate that their allegedly frustrated expectations are legitimate by showing that they are "reasonable and objective in the circumstances". The tribunal says it had already ruled that Claimants "had no legitimate expectation that the regime provided for in RD 661/2007 would remain unchanged throughout the term of the investment." What is cross-referenced is paragraph 315 which simply stated:

> 315. Stability is not an absolute concept; absent a clear stabilization clause, it does not equate with immutability. In this respect the Tribunal notes that the Claimants do not take such an extreme view [internal footnote omitted]. However, the obligation to create a stable environment certainly excludes any unpredictable radical transformation in the conditions of the investments. The question therefore is whether the obligation of stability thus defined has been violated by the Respondent to the detriment of the Claimants.

68. The assertion by that tribunal that a duty to create stable conditions under Article 10(1) of the ECT is not equivalent to immutability requires some explanation. In any event, to state simply that the promise of stability in Article 44.3 of RD 661/2207 is "no more than" that obligation in Article 10(1) of the ECT, is not obvious to me.

69. I would further note that the *RREEF* tribunal's quotation of Article 44.3 in this particular part of the award is truncated, without any acknowledgement that that is the case. The tribunal quotes only the first paragraph of Article 44.3, omitting the critically important exception that says, in part:

> 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

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clear to the investor that changes were being made to the Special Regime. Even if such changes may not have reached the level of a breach of the FET standard, they certainly must have been an indication to the investor in *Isolux* that significant changes were being made to the Special Regime as set out in RD 661/2007.
The tribunal in *RREEF* finds, "This holds true as well in the present case where the Claimants' investments were made between February and August 2011."

[59] *Ibid*, ¶ 318.

been granted prior to 1 January of the second year following the year in which the revision shall have been performed.[60]

70. Immediately after the truncated quote of Article 44.3, the *RREEF* tribunal finds:

> 319. These provisions as well as those in Articles 4 and 5 of RD 1614/2010 show that adjustments were to be envisaged. The same holds true regarding the indications given in the name of the Respondent.

71. I am surprised by a determination that "adjustments were to be envisaged" in view of the omitted exception in the second part of Article 44.3. The tribunal acknowledges the Claimants' arguments that they were entitled to stability based on this provision[61] and the award certainly analyzes legitimate expectations, reasonable returns and sustainability of the system. With respect to the language in the second part of Article 44.3 stating that the revisions "indicated in this paragraph shall not apply", the *RREEF* tribunal later notes this wording and states:

> 395. However, as with all other advantages recognized in the Royal Decree, this did not imply an everlasting exemption of any revision of the regulated tariff. Simply (but importantly) the changes to be adopted in the future could not significantly modify the legal framework applicable to investors [internal foot note omitted] – including the pledge not to put into question the commitment concerning the reasonable return, a criterion which must be assessed globally, taking into account the object and purpose of RD 661/2007 as expressed in its Preamble [internal foot note omitted].[62]

72. By majority, the *RREEF* tribunal found that, "The only – but crucial – question is therefore whether the challenged modifications introduced after 2013 constitute a 'drastic and radical change' – as the Claimants put it – affecting unexpectedly the conditions of the investments."[63] [64]

73. As do my colleagues in this Award, the *RREEF* tribunal considers Article 30(4) of Law 54/1997 and concludes that, "… the guarantee of 'reasonable return' or 'reasonable

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[60] I have wondered whether this omission was merely inadvertent, but conclude that such an explanation is unlikely. Earlier in the award, as part of the tribunal's description of Spain's various measures, the tribunal quotes Article 44.3 in full, *viz*. ¶ 114 and, later in the award, the tribunal provides its view of the second part of Article 44.3. See the *RREEF* v. Spain (Decision on Responsibility and Principles of Quantum), ¶¶ 394-395.

[61] *RREEF v. Spain* (Decision on Responsibility and Principles of Quantum), ¶ 155 *ff* and *c.f.* ¶¶ 271-272, 292.

[62] *Ibid*, ¶ 395.

[63] *Ibid*, ¶ 379.

[64] I note, in passing, that in his Partially Dissenting Opinion, Professor Robert Volterra says that he agrees with this statement of the law, but disagrees with his colleagues that the challenged modifications did not constitute sufficient change to violate the legitimate expectations of the Claimants. And see Partially Dissenting Opinion of Professor Robert Volterra to the Decision on Responsibility and the Principles of Quantum, ¶ 38.

profitability' was the main specific commitment of Spain *vis-à-vis* the investors in the Special Regime."[65]

74. Based on this reasoning, the *RREEF* tribunal holds:

> 387. The Claimants cannot prevail (*sic*) themselves of a fixed rate of return for their investment. However, the Arbitral Tribunal is of the view that, whatever the means chosen by the Respondent, the Claimants could legitimately expect a return for their investment at a reasonable rate which implies significantly above a mere absence of financial loss, the precise average rate taking into account the actual cost of money on capital markets for such investments as well as other objectives.

75. That tribunal further summarizes its determination, as follows:

> 399… the Claimants had, when they made their investments, a legitimate expectation to get a reasonable return on their investments. Such expectation did not include a guarantee to have the legal regime in place unchanged until the end of the operation of the plants, but it did include to have any modifications reasonable and equitable. Whether such a legitimate expectation was violated can only be assessed by way of a global view of the situation that resulted from the modifications introduced by the Respondent after the date of the investment. It is only in case the answer to this question is in the affirmative that compensation is due to the Claimants under this head of claim.

76. The *RREEF* tribunal, by majority, determined what it considered to be a reasonable rate of return, namely 6.86%, post-tax,[66] concluding that in order to fairly reflect the damages arising from the retroactivity breach and the actual return on the Claimants' investments it would permit the parties a brief opportunity to consider the award and to resolve the correct amounts, failing which the tribunal proposed to appoint its own expert and make these determinations itself.[67]

77. I do not agree with that tribunal's approach to the whole issue of reasonable return nor with its determination of that specific rate of return. I likewise do not agree that our tribunal should follow that approach in this case. Specifically, I am not in favour of an exercise by which our tribunal would enter into an analysis of the reasonableness and proportionality of what the regulators did in order to determine whether and, if so, to what extent, the New Regulatory Regime may have fallen short of the objective of reasonable profitability or rate of return. In my view, this approach purportedly permits the tribunal to make an after-the-fact assessment of the regulator's actions in order to decide what a reasonable rate of return should have been and to substitute its judgment for that of the regulators. I especially disagree that this analysis should arise from a FET claim. Applying this approach in our case, in my view, would be improper. I cannot accept that our task is to determine what a reasonable rate of return is in the present case. That endeavor would, in my view, lead us far afield from assessing what the state explicitly promised and the investor relied upon. The damages to which Claimant is entitled, in my

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[65] *Ibid*, ¶ 384.
[66] *RREEF* v. Spain (Decision on Responsibility and Principles of Quantum), ¶ 589.
[67] *Ibid*, ¶¶ 597-598.

view, are shown in the difference between what was promised and what was ultimately done by the state in relation to Claimant's plants.

78. In the *Novenergia* case, the tribunal concluded, as follows:

> 695. Taking into account the Kingdom of Spain's statements and assurances prior to and in connection with the implementation of RD 661/2007, the legitimate expectations of the Claimant, and the changes introduced through RDL 9/2013, the Tribunal considers these challenged measures as radical and unexpected. The manner in which the Kingdom of Spain adopted the measures including and subsequent to RDL 9/2013 fell *'outside the acceptable range of legislative and regulatory behaviour'* and *'entirely transform[ed] and alter[ed] the legal and business environment under which the investment was decided and made.'* Moreover, the challenged measures adopted in 2013 and 2014 had a significant damaging economic effect on the Claimant's investments as evidenced by the Claimant's invoked expert reports and the Claimant's opening statement during the Hearing. […] Consequently, the Tribunal considers the Kingdom of Spain's actions as drastic and unexpected in a manner that is contrary to the Kingdom of Spain's obligation to provide FET to investors [internal footnotes omitted].[68]

79. I would make virtually identical findings in our case. Instead of embarking on an exercise of attempting to determine what a reasonable return or reasonable rate of profitability should have been in 2013 and thereafter, I would hold Spain to the express promises and guarantees that induced Claimant, and many others at the time, to legitimately rely on the stability of the regulated tariffs provided for in RD 661/2007 and RD 1578/2008. I would, accordingly, award damages to the Claimant based on the DCF model developed by its experts in order to assess the harm done by the destruction of this regime.

D. Other Dissenting Opinions

80. Since preparing this Dissenting Opinion, I have received the Final Award together with the Concurring and Dissenting Opinion of Charles N. Brower in the case of *The PV Investors v. Kingdom of Spain.*[69] Both parties have made submissions to us in relation to the determinations in that case.

81. I do not agree with the majority view in the *PV Investors* case and would, instead, concur with the Brower Dissent. As fully developed in his dissenting opinion, Judge Brower considered prior decisions by some eleven other tribunals upholding claims made under the ECT in relation to Article 44.3 of RD 661. Judge Brower stated he could "see no reason to depart from such reasoning, repeatedly applied without exception by eleven predecessor tribunals confronting the same problem...." Neither do I.

[68] *Novenergia* v. Spain (Award), ¶ 695.
[69] *PV Investors* v. Spain (Award) and Brower Dissent.

82. With respect to a further sub-category of four of those eleven cases, he observes that they "specifically involved PV installations and timely RAIPRE registration…."[70] In summing up his views, Judge Brower says:

> In other words, *PV Investors*, *Novenergia*, *Cube*, *9Ren*, and *OperaFund* all have involved the same technology, close timing of investments, the same incentives, the same compliance with the RAIPRE registration deadline, the same assurances, the same regulations, the same investment treaty, the same host State, and the same measures in dispute.

83. Based on these virtually identical circumstances, Judge Brower concluded that logic dictated that the investors in his case would "harbour the same expectations and that this sub-category of the eleven cases be followed absent compelling contrary reasons." I agree. It is well understood that in the application of international law in a case such as this, we are not subject to binding authority in the sense of *stare decisis.* We are, however, part of a larger scheme of international law in which we should reasonably pay due consideration to earlier decisions of international tribunals. I would adopt the majority view in the *PV Investors* case that, "subject to compelling contrary grounds", we have "a duty to adopt principles established in a series of consistent cases." And likewise, we have a duty to contribute "to the harmonious development of international investment law in furtherance of the certainty of the rule of law."[71]

84. For the reasons I have already given, I strongly concur with the Brower Dissent.

85. Finally, I note with approval, the Dissenting Opinion of Professor Kaj Hobér in the case of *Stadtwerke München et al v. Spain*.[72] In relation to RD 661/2007, he expressed his view that, "A legitimate expectation is not a hope. It is more than a hope…."[73] I concur in his observations in relation to RD 661/2007:

> 11. The Claimants made their investment based on the regulatory regime launched by RD 661/2007. The legal and financial analyses performed by Claimants, and by financial institutions and investors involved in the project, as well as by retained consultants, were based on this regulatory regime. In addition to the expectations created by the RD 661/2007 regime itself, representatives of Spain made statements and presentations which explained the benefits of investing in the Spanish renewable sector at the time. Such statements and representations form part of the Claimants' legitimate expectations.

86. After reviewing a press release by the Ministry of Industry, Energy and Tourism, reports from the CNE emphasizing the stability and predictability of the RD 661/2007 regime, and various presentations by the Invest in Spain agency in 2008, Professor Hobér (after also referring to a separate resolution of the Ministry of Industry, Tourism and Commerce applicable to claimant's facility), concluded:

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[70] *PV Investors v. Spain* (Dissenting Opinion), ¶ 16.
[71] *PV Investors v. Spain* (Award), ¶ 521.
[72] *Stadtwerke v. Spain* (Award), Dissenting Opinion of Professor Kaj Hobér, dated 20 November 2019.
[73] *Stadtwerke v. Spain* (Award), Dissenting Opinion, ¶ 10

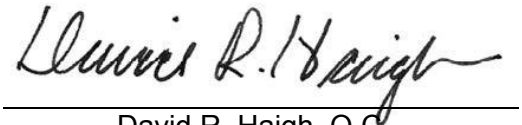
> 14. Based on the foregoing, *i.e.* the RD 661/2007 regime itself and the statements of and conduct by representatives of Spain, I find that the Claimants' reasonable expectations at the time of their investment were that there would not be any fundamental and radical changes to the RD 661/2007 regime and that Claimants relied on these expectations when making their investments.[74]

87. As my Dissenting Opinion makes clear, I respectfully agree with Professor Hobér's opinion in this respect.

88. Wherever I have expressed views that diverge from those of my colleagues in relation to how damages could be calculated in this case, I should make clear that I have expressed those views on the basis only of my opinions on the issues of liability and how the case could have been otherwise decided, as set out in this Dissenting Opinion. In the present circumstances, I accept that I am in a minority on such matters and, accordingly, with respect to the next steps in this arbitration, I will participate fully with my colleagues in the determination of the reasonable rate of return issues as directed in the Decision.

89. Subject to this explanation and my Dissenting Opinion, I concur in our Decision and affix my signature accordingly.

DATED this 31st day of August, 2020.



David R. Haigh, Q.C.

[74] *Stadtwerke v. Spain* (Award), Dissenting Opinion, ¶ 14.