**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**

**AND**

**THE KINGDOM OF SPAIN**

**Respondent**

---

# CLAIMANTS' REPLY MEMORIAL

---

**28 September 2017**

ALLEN & OVERY
Allen & Overy LLP
Pedro de Valdivia, 10
28006 Madrid
Spain
Tel: + 34 917 82 98 00

**CONTENTS**

**Page**

PART I –EXECUTIVE SUMMARY ..... 1
1. INTRODUCTION ..... 1
2. SUMMARY OF THE CLAIMANTS' CASE ..... 3
2.1 Overview ..... 3
2.2 The claims before the Tribunal ..... 6
2.3 Summary of the Claimants' claims ..... 7
3. SUMMARY OF REPLY TO SPAIN'S DEFENCE ..... 10
3.1 Spain's jurisdictional objections should be dismissed ..... 10
3.2 Spain's primary defence on the reasonableness of the Claimants' expectation that future changes would not affect the Wind Farms is unsupported by the facts ..... 11
3.3 Spain's excuses precluding wrongfulness are unavailing and do violence to the substance of Article 10(1) ECT ..... 12
PART II – THE FACTS IN DISPUTE ..... 15
4. THE CLAIMANTS REASONABLY RELIED ON THE RD 661/2007 FIT REGIME ..... 16
4.1 International practice for FIT schemes supports the Claimants' understanding ..... 16
4.2 Spain implemented the RD 661/2007 FIT scheme fully in line with international standard practice ..... 19
4.3 RD 661/2007 protected registered installations against retroactive changes ..... 23
4.4 RD 661/2007's status as a "Royal Decree" is irrelevant ..... 28
4.5 Registration in the RAIPRE crystallised the economic right to the RD 661/2007 FIT ..... 29
4.6 The July 2010 Agreement and RD 1614/2010 guaranteed the stability of the RD 661/2007 regime ..... 31
5. THAT SPAIN WOULD MAKE MATERIAL RETROACTIVE CHANGES TO THE RULES GOVERNING THE CLAIMANTS' INVESTMENT WAS UNFORESEEABLE AT THE TIME OF INVESTING ..... 36
5.1 The "*reasonable return*" defence is a fallacy ..... 37
5.2 The Tariff Deficit is a problem of Spain's own making ..... 43
5.3 Previous changes to the regulatory regime are consistent with the Claimants' understanding of RD 661/2007 ..... 51
5.4 The decision to invest was made in August 2011 ..... 57
5.5 Domestic court judgments could not have enabled the Claimants to anticipate the Disputed Measures ..... 58
5.6 The PER 2005-2010 says nothing on retroactive changes ..... 64
5.7 The alleged warning of regulatory change set out in the SPA ..... 65
6. THE DISPUTED MEASURES FRUSTRATED THE CLAIMANTS' INVESTMENT ..... 67
6.1 The Initial Measures ..... 67
6.2 The New Regime: the culmination of the harm caused by the Disputed Measures ..... 70
6.3 The New Regime does not even provide a "*reasonable return*" ..... 79
6.4 The Claimants do not acknowledge the need to implement the Disputed Measures ..... 81
6.5 The EC's criticisms of Spain's retroactive changes ..... 82
7. SPAIN'S CRITICISM CONCERNING THE NATURE OF THE CLAIMANTS' INVESTMENT ..... 85
8. STATE AID IS IRRELEVANT ..... 87
PART III – THE CLAIMANTS' FURTHER COMMENTS ON INTERNATIONAL LEGAL STANDARDS ..... 90
9. OVERVIEW ..... 90

10. PRELIMINARY MATTERS ON THE LAW ....... 90
10.1 Attribution ....... 90
10.2 The majority award in *Charanne* is inapposite ....... 90
10.3 The unanimous award in *Eiser* ....... 94
10.4 Spain's attempt to rework the defence of necessity into the test for legitimate expectations ....... 96
11. THE OBJECT AND PURPOSE OF THE ECT ....... 99
11.1 The ECT provides a high level of investor protection ....... 100
11.2 The FET standard is broader than the minimum standard of protection ....... 102
11.3 State-regulation is significantly restricted under the ECT ....... 105
12. THE DISPUTE MUST BE EXAMINED UNDER THE LENS OF INTERNATIONAL LAW ....... 108
12.1 Spain gives inappropriate primacy to the role of Spanish law ....... 108
12.2 The FET standard minimises non-commercial risk ....... 109
13. SPAIN HAS BREACHED THE FIRST SENTENCE OF ARTICLE 10(1) ....... 112
13.1 The meaning of the first sentence of Article 10(1) ....... 113
13.2 The New Regime is a complete overhaul ....... 114
13.3 The New Regime is retroactive ....... 116
14. THE CLAIMANTS' LEGITIMATE EXPECTATIONS ....... 119
14.1 Legal test for legitimate expectations ....... 119
14.2 The Claimants' expectations were reasonable ....... 123
14.3 Frustration of legitimate expectations ....... 130
15. SPAIN'S CONDUCT HAS NOT BEEN TRANSPARENT ....... 131
15.1 The Disputed Measures had not been announced and there was no participative consultation ....... 131
15.2 The New Regime is opaque and unpredictable ....... 134
15.3 Decisions cited by Spain in support of its arguments are unavailing ....... 135
16. THE DISPUTED MEASURES ARE UNREASONABLE, ARBITRARY, DISPROPORTIONATE AND DISCRIMINATORY ....... 137
16.1 The stated policy aim of the Disputed Measures was to address the Tariff Deficit ....... 139
16.2 There is no reasonable correlation between the repeal of RD 661/2007 and the Tariff Deficit ....... 141
16.3 The Disputed Measures were not necessary in light of available alternatives ....... 145
16.4 (Non-impairment) Discrimination ....... 146
17. SPAIN'S BREACH OF THE UMBRELLA CLAUSE ....... 146
17.1 Spain misrepresents the authorities it cites ....... 147
17.2 The July 2010 Agreement (and RD 1614/2010) amounts to a commitment by Spain ....... 153
17.3 Spain entered into a specific and binding obligation vis-à-vis the Claimants ....... 154
PART IV – COUNTER-MEMORIAL ON JURISDICTION ....... 156
18. THE INTRA-EU OBJECTION ....... 156
18.1 Introduction ....... 156
18.2 Preliminary remarks on the relevance of previous awards and other authorities ....... 157
18.3 The ordinary meaning of the ECT expresses Spain's unconditional consent to arbitrate disputes with Investors from Luxembourg and The Netherlands ....... 161
18.4 The subjective intention of the EU and its Member States concerning the provisions of EU law cannot alter the ordinary meaning of Article 26 ....... 165
18.5 The ECT contains no disconnection clause; to construe an implicit disconnection clause is irreconcilable with the ordinary meaning of the ECT ....... 169
19. THE TAX OBJECTION ....... 173
19.1 Introduction ....... 173
19.2 Article 21 only applies to *bona fide* Taxation Measures ....... 173
19.3 The 7% Levy is not a *bona fide* measure ....... 180

19.4 A State's characterisation of a measure as a tax under its domestic law is not dispositive ..... 192

PART V: REPARATION ..... 196

20. INTRODUCTION AND OVERVIEW ..... 196

21. SPAIN'S CONTINUED DENIAL OF LIABILITY AND OTHER PRELIMINARY MATTERS .. 198

21.1 Denial of liability ..... 198

21.2 Reliance on unparticularised arguments ..... 199

22. THE DCF METHOD IS THE APPROPRIATE VALUATION METHOD ..... 201

22.1 Spain and its expert's arguments ..... 202

22.2 Investment-treaty jurisprudence generally favours a DCF approach in ascertaining fair market value ..... 204

22.3 Future cash flows are sufficiently certain ..... 208

22.4 DCF methodology is appropriate in a regulated market ..... 214

22.5 Questions of "disproportion" between the amount invested and the amount claimed are irrelevant ..... 215

22.6 The DCF method is an appropriate valuation methodology for the case at hand ..... 217

23. THE CLAIMANTS' CLAIM IS NOT SPECULATIVE ..... 218

23.1 Preliminary observations in respect of IRR ..... 219

23.2 Accuracy's and Spain's calculations and assertions are erroneous ..... 220

23.3 The returns computed by Brattle are consistent with the Claimants' expectations and Spain's promises ..... 223

24. THE ASSET-BASED METHOD IS INAPPROPRIATE ..... 226

24.1 The ABV method is inappropriate ..... 227

24.2 Accuracy's ABV amounts to a denial of liability ..... 228

24.3 Accuracy's ABV is filled with errors ..... 229

25. BRATTLE'S DCF VALUATION IS TO BE PREFERRED ..... 231

25.1 Brattle's DCF calculation is conservative ..... 231

25.2 Brattle's DCF calculation is consistent with recent market transactions ..... 232

25.3 Mistakes and inaccuracies in Accuracy's DCF calculation ..... 233

26. THE CLAIMANTS' ALTERNATIVE DAMAGES CALCULATION ..... 238

26.1 Introduction and Overview ..... 238

26.2 The Principles underlying the Alternative Claim ..... 239

26.3 Brattle's Valuation Methodology ..... 242

26.4 Combined effect of the three principles ..... 242

27. APPLICABLE RATE OF INTEREST ..... 243

27.1 Pre-award interest ..... 244

27.2 Post-award interest ..... 244

28. TAX GROSS-UP ..... 245

PART VI – PRAYER FOR RELIEF ..... 248

# PART I –EXECUTIVE SUMMARY

## 1. INTRODUCTION

1. This Reply Memorial on the Merits and Counter-Memorial on Jurisdiction (the **Reply Memorial**) is submitted by the Claimants pursuant to Rule 31 of the ICSID Arbitration Rules, the Parties' Proposed Timetable and Procedural Order No. 1 dated 26 May 2016. It is submitted in response to Spain's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 10 February 2017 (the **Counter-Memorial**). Capitalised terms used in this Reply Memorial but not defined herein have the same meaning as given to them in the Memorial (the **Memorial**).

2. The structure of this Reply Memorial is as follows:

   (a) **Part I** sets out an executive summary of the Claimants' claims (section 2) and of the Reply to Spain's main lines of defence (section 3).

   (b) **Part II** sets out the Claimants' comments on the factual background as described in section IV of the Counter-Memorial.[1]

   (c) **Part III** sets out the Claimants' response to Spain's submissions on the merits of the claim as described in section IV of the Counter-Memorial.[2]

   (d) **Part IV** sets out the Claimants' responses to Spain's objections to the Tribunal's jurisdiction as set out in section III of the Counter-Memorial and Memorial on Jurisdiction.

   (e) **Part V** sets out the Claimants' response to the Respondent's submissions in section V of the Counter-Memorial on the quantum and relief sought by the Claimants.

   (f) **Part VI** sets out the Claimants' prayer for relief.

3. This Reply Memorial is accompanied by six appendices: **Appendix 1** is a consolidated table of the defined terms used within the Memorial and this Reply Memorial; **Appendix 2** is a consolidated list of the Claimants' exhibits; **Appendix 3** is a consolidated list of the Claimants' authorities; **Appendix 4** is a chronology of the Spanish regulatory measures from 2012 to 2014 at issue in this case; **Appendix 5** is a table analysing the Supreme Court judgments to which Spain refers; and **Appendix**

---

[1] Spain makes no distinction in its Counter-Memorial between facts and merits. This Part III is mainly a response to Spain's submissions at Part IV (A)-(E).

[2] This Part IV is mainly a response to Spain's submissions at Part IV (K).

**6** is a comparison between the New Regime and the original regulatory regime under which the Claimants invested (the **Original Regulatory Regime**).

4. This Reply Memorial is also accompanied by a number of exhibits referred to as "**Exhibit C-●**". New exhibits produced with this Reply Memorial are numbered consecutively, continuing from the exhibits previously produced by the Claimants. This Reply Memorial is also supported by a number of authorities referred to as "**Authority CL-●**". New authorities produced with this Reply Memorial are numbered consecutively, continuing from the authorities previously produced by the Claimants. Produced with this Reply Memorial are the following factual and expert witness statements:

    (a) The Second Witness Statement of Mr Felipe Moreno dated 28 September 2017 (the **Second Moreno Statement**).

    (b) The Expert Rebuttal Report of Mr Carlos Lapuerta and Dr José Antonio García of the Brattle Group, on "*Changes to the Regulation of Wind Installations in Spain Since December 2012*" dated 28 September 2017 (the **Brattle Rebuttal Regulatory Report**).

    (c) The Expert Rebuttal Report of Messrs Carlos Lapuerta and Richard Caldwell of the Brattle Group, on "*Financial Damages to Investors*" dated 28 September 2017 (the **Brattle Rebuttal Quantum Report**).

5. Translations into Spanish of this Reply Memorial, the Second Moreno Statement, the Brattle Rebuttal Regulatory Report and Brattle Rebuttal Quantum Reports have been prepared by an external translator in accordance with sections 11.4 to 11.6 of Procedural Order No. 1. Supporting documentation originally in the Spanish language has been translated into English by an external translator. All translations will be provided as required by the Tribunal. To the extent there are any discrepancies between the original versions and the translations, the original versions shall prevail.

6. The Claimants have relied on the English translation of Spain's Counter-Memorial. Therefore, to the extent that it becomes apparent that there are discrepancies between the English and Spanish versions, the Claimants reserve the right to address such discrepancies in writing.

## 2. SUMMARY OF THE CLAIMANTS' CASE

### 2.1 Overview

7. This case concerns a classic "bait and switch". First, Spain implemented a guaranteed feed-in-tariff (**FIT**) system under the RD 661/2007 economic regime. This FIT system explicitly promised registered renewable energy (**RE**) installations a fixed sum specified in euros per kWh for all of the electricity they produced during their operational life and exempted those installations from future changes to the FIT.[3] This was clearly stated in the applicable regulation itself, as well as in contemporaneous statements made by Spain and its agencies. Spain also insulated these installations from "demand risk", by granting them priority of despatch. Again, there was no doubt about this important feature in the regulation. Spain's FIT was designed (as all other FIT systems were) to pay back over the life of the installations the high up-front costs of constructing the installations, the costs of operating the installations and to provide a profit.[4] Spain sought to attract this investment to reduce its dependence on foreign supplies of energy, boost its economy and meet its internationally-binding carbon emissions targets.[5] The FIT implemented by RD 661/2007 drew considerable investment and made Spain – in its own words – a "*world leader*" in the RE sector.[6]

8. It is in reliance on that regime that the Claimants decided to invest in a portfolio of wind farms located in Castilla y León, with a total installed capacity of 332.99 MW: the **Wind Farms**.[7]

9. Spain was fully aware that the RD 661/2007 economic rights on offer to qualifying investors would entice the up-front capital investment needed in its RE sector. That is, in fact, precisely why Spain put that regime in place. Despite that, once the investment decision was taken and the Claimants had committed substantial resources to the Wind Farms, Spain fundamentally changed the economic regime applicable to the investment, in clear breach of its international obligations.

10. After imposing a 7% direct levy on the Wind Farms' electricity production and removing the Claimants' right to opt for the Premium,[8] Spain then repealed the economic rights granted by the RD

---

[3] **Exhibit C-44**, Royal Decree 661/2007 of 25 May 2007, Articles 36 and 44.3. This economic regime stated plainly that: (a) the entire production of electrical energy by the Claimants' installations would receive a specific €/kWh remuneration; (b) for the entire useful life of the installations; (c) would not be subject to future tariff reviews; and (d) Spain had assumed the so-called "demand risk" inherent to the electrical energy market.

[4] Brattle Regulatory Report, paras. 59-71.

[5] Memorial, paras. 15-16 and 79-81.

[6] See **Exhibit C-12**, Government of Spain, Ministry of Foreign Affairs, Marca España, "*Spain's Positioning: Leadership Key Factors*", July 2013, pp. 7(PDF p. 5) and 14-19 (PDF 12-17); **Exhibit R-120**, Spain's National Renewable Energy Action Plan (PANER) 2011-2020, p. 12; **Exhibit C-174**, Ministry of Industry, Energy and Tourism and IDAE, "*Renewable Energies within the Channel of National Parks*", 24 November 2014, p. 3; and **Exhibit C-175**, Ministry of Industry, Energy and Tourism and IDAE, "*Wind Energy*", Centro Nacional de Tecnologías de Regadíos – CENTER, Madrid, 22 October 2014, p. 17.

[7] Bridgepoint made the decision to invest in August 2011, and the Claimants were incorporated as a necessary consequence of that decision in September and October 2011.

661/2007 (and RD 1614/2010) regime altogether. After an 11-month period during which Parque Eólico Marmellar, S.L. and Parque Eólico La Boga, S.L., the project companies that held the Wind Farms (the **Project Companies**), were left in limbo as to the parameters of the new remuneration they were going to receive, Spain finally issued those new parameters without any regard for the advice it had received from consultants it had specifically hired for that task. The baseline for remuneration was a newly-defined value for "*reasonable return*", a concept that had not been articulated in any applicable norm since its appearance in Article 30.4 of the 1997 Electricity Law but which the Government represented was complied with when setting the RD 661/2007 FIT.[9]

11. Spain asserts that "*reasonable return*" is a dynamic concept, implying that whatever return is reasonable at any given time varies with the cost of money on the capital markets. On Spain's case, the RD 661/2007 FIT was always subject to change to reflect such fluctuations. This is wrong for two reasons.

(a) First, interest rates are the same in 2013 when Spain approved the New Regime as they were in 2007, when Spain implemented RD 661/2007. This is confirmed by Brattle ("[t]*he First Brattle Regulatory Report showed that the average ten-year bond yields were about 4.6% in May 2007 when Spain passed RD 661/2007 (Exhibit BRR-5), and were about 4.4% when Spain introduced the New Regulatory Regime in July 2013*").[10]

(b) Secondly, this is not how FIT schemes work. FITs are fixed revenue streams that are guaranteed for a fixed period of time, usually between 15 and 20 years.[11] While the level of FITs may be (and should be) reviewed over time to reflect reductions in the costs of RE, such reviews <u>only</u> affect <u>new</u> installations coming online <u>after</u> the review. This is also how RD 661/2007 worked. Notably, the <u>only</u> reference in this regulation to the cost of money on the capital markets is in Article 44.3.[12] This is the provision which regulates FIT modifications for <u>new</u> installations and expressly reassures investors that such revisions shall <u>not</u> affect existing installations.

---

8 The Claimants valued being able to opt between the Fixed Tariff or market plus Premium. Whichever option they chose on a yearly basis would have depended on their pool-price projections for the following year.

9 See **Exhibit C-44**, RD 661/2007 of 25 May 2007, Preamble. The 1997 Electricity Law did not explain what "*reasonable return*" meant. Rather, it tasked the Government with issuing regulations that would set the remuneration of RE producers, enabling them to earn a "*reasonable return*". See Memorial, para. 87. See also **Exhibit C-39**, Law 54/1997 of 27 November 1997, Article 30.4. In relevant part, Article 30.4 reads as follows: "*The payment regime for electricity production facilities under the special regime shall be supplemented by the earning of a premium, under the terms set by regulation… To determine the premiums, the voltage level of electricity delivered to the network must be considered, along with the actual contribution to improvement of the environment, primary energy savings, and energy efficiency, the economically justifiable production of usable heat, and the investment costs that have been incurred, for the purpose of achieving reasonable rates of return with respect to the cost of money on the capital market.*"

10 Brattle Rebuttal Regulatory Report, para. 93.

11 **Authority RL-62**, Miguel Mendonca *et al*., "*Powering the Green Economy*" in The Feed-In Tariff Handbook, 2010, p. 27.

12 **Exhibit C-44**, RD 661/2007 of 25 May 2007, Article 44.3.

12. The New Regime enacted by Spain was declared applicable for the entire operational life of the installations and thus even clawed back amounts previously paid out to the Project Companies. The changes in the regulation drastically reduced the value of the Claimants' investment and have led to numerous other, international and domestic claims by aggrieved investors, some of which have had to face bankruptcy.

13. Importantly, the Claimants are relying on the ECT to bring their claim. As a result, the Arbitral Tribunal is called upon to decide whether international law and the ECT (which contains stronger investor protections than any other investment treaty) countenance Spain's completely dismantling the economic regime used to attract the Claimants' investment.

14. The Tribunal's task is much narrower than Spain pretends. This Tribunal is only called upon to decide whether Spain may dramatically alter the investment-inducing rules on which the Claimants relied in making their investment, having promised not to do so, without running afoul of its international obligations, in particular the ECT.

15. Equally importantly, the Tribunal is not called upon to decide whether Spain in the exercise of its sovereign power may substantially change its energy regulation; the Claimants have never argued that it cannot. The Tribunal is also not called upon to decide, as Spain contends, that its regulation must forever remain "petrified";[13] the Claimants have never argued that it must. This is important as Spain seeks to draw the Tribunal into a debate on what the State can or cannot do as a matter of Spanish law. That is, however, irrelevant to the Tribunal's task: the question is not whether Spain could change its laws and regulations as a matter of Spanish law (which no one denies) but rather whether it promised it would not do so and has to be held accountable for breaching its promise. The answer to that question is clearly and emphatically "no". In many ways, Spain's own statements at the time it introduced both the Original Regulatory Regime and the New Regime leave no doubt as to liability.

16. As explained in this Reply Memorial, these statements consist of contemporaneous memoranda, official reports and public presentations by the Spanish energy regulator (the **CNE**) and high-ranking government officials. This documentation was prepared by Spain over the course of many years prior to this case being filed and before the commencement of the more than 30 ECT claims that Spain is facing. In other words, those documents, evidencing a very different story than the one

---

[13] Counter-Memorial, para. 1063. See also, Counter-Memorial paras. 20, 25, 32, 392, 393, 454, 457, 461, 476, 489, 520, 523, 540, 557, 560, 591, 599, 783, 832, 909, 911, 912, 919, 956 and 1048.

now advanced by Spain, represent Spain's official contemporaneous views outside the context of litigation. They should be given particular weight by the Tribunal.

17. In addition to the support provided by Spain's own documents, the Claimants' case is fully supported by their own internal documentation and witness evidence. It is also fully supported by the detailed expert opinions of the Brattle Group. By contrast, Spain's case is not so supported. In fact, Spain's case theory consists almost entirely of convoluted *ex post* interpretations of RD 661/2007 that are directly contradicted by the contemporaneous evidence and that lack any credibility.

### 2.2 The claims before the Tribunal

18. Spain has breached Article 10(1) of the ECT in the following ways:

(a) Spain has failed to "*create stable, equitable, favourable and transparent conditions for Investors*".

(b) Spain has failed to provide "*fair and equitable treatment*" (**FET**). The Claimants' claim for breach of the FET provision rests on three non-cumulative and distinct breaches of that provision. If Spain has breached any one of these three requirements, then a breach of FET is established. More specifically:

(i) the Disputed Measures have frustrated the Claimants' legitimate expectations;

(ii) Spain has not been transparent in its conduct; and

(iii) Spain has taken measures that are unreasonable, arbitrary and disproportionate.

(c) Spain has impaired the Claimants' investments through "*unreasonable or discriminatory measures*".

(d) Spain has failed to observe the obligations entered into *vis-à-vis* the Claimants.

19. The Claimants have thus asserted separate and independent breaches of the ECT. The Parties' pleadings show that they are largely in agreement on the relevant legal standards that apply in this case. The limited areas of disagreement on the law are briefly addressed in section 5 below and in more detail at Part IV below.

### 2.3 Summary of the Claimants' claims

20. From a factual point of view, the Claimants' claims for breach of the ECT can be summarised as follows. First, Spain failed to provide a stable legal framework by repeatedly altering the regulatory regime for existing investments and, ultimately, repealing that regime in its entirety. Spain's own contemporaneous documents confirm that the New Regime was unprecedented in its form and thus entirely different from the RD 661/2007 FIT.[14] This is an admission, both that Spain failed to provide a stable legal framework and that the features of the New Regime were entirely unforeseeable at the time the Claimants decided to invest.

21. Secondly, with respect to the Claimants' legitimate expectations claim, the evidence clearly shows that no reasonable investor would objectively have expected the RD 661/2007 regime to be repealed and replaced with an entirely new and different regime for existing investments, with the features of that new regime unknown and impossible to anticipate at the time of making the investment.

22. The following elements are of particular relevance to the Claimants' claim for breach of legitimate expectations:

    (a) the nature, amount and duration of the FITs offered by Article 36 of RD 661/2007;

    (b) the assumption by Spain of the so-called demand risk, in granting renewable energy producers priority of despatch;

    (c) the July 2010 Agreement as codified by RD 1614/2010;[15] and

    (d) the stability commitments set out in these two Royal Decrees, namely Article 44.3 of RD 661/2007 and Article 5.3 of RD 1614/2010.[16]

23. These expectations withstand a robust, objective assessment against the Claimants' contemporaneous documents and Spain's own contemporaneous documents regarding the interpretation of the RD 661/2007 regime.

24. Spain's response to this claim is to purport to redefine those expectations. Spain does not suggest that the Claimants did not *rely* on RD 661/2007 when they invested. Reliance is not a matter in

---

[14] **Exhibit C-34**, CNE Report 18/2013 on the Proposal of Royal Decree to Regulate the Generation of Electricity by Renewable Projects, Cogeneration and Waste Plants, 4 September 2013, p. 19.

[15] Memorial, paras. 28-29, 134 and 422.

[16] Memorial, paras. 182-189, 379 and 420-422.

serious dispute between the Parties. Instead, Spain argues that the Claimants base their case on the *wrong* expectations. Spain advances the 'wrong expectations' point in two distinct ways, neither of which squarely engages with the evidence. In one approach, Spain submits that the Claimants had no basis to expect the FIT offered in RD 661/2007 for the entire useful life of the Wind Farms, but rather only a "*reasonable return*".[17] This is a wholesale, *ex post facto*, redefinition of what the Claimants submit, on the evidence, were their expectations at the time of investing and, indeed, what Spain itself understood it was offering at the time. Even if the Tribunal were to find that the Claimants only expected a so-called "*reasonable return*", the Claimants should prevail because the New Regime no longer offers such a return and the Claimants have suffered significant losses even under a "*reasonable return*" paradigm.

25. In the second approach, Spain argues that what the Claimants really expected was that the RD 661/2007 regime would be frozen or "*petrified*", which in Spain's view is unreasonable. That is not, however, what the Claimants are arguing.

26. By mischaracterising the Claimants' case on the stability of the RD 661/2007 regime, Spain is conflating two questions: whether the Claimants expected that Spain "*could*" change the economic regime as distinct from whether they expected Spain "*would*" change the regime. The Claimants have never argued that Spain could not change the law, a point they made at the outset.[18] The Claimants' claim is based on the clear promise by Spain that it <u>would not</u> change the regime. The Claimants were entitled to rely on that promise and Spain should be held to account for breaching that promise.

27. Thirdly, Spain has also failed to act transparently in its conduct in the implementation of the Disputed Measures. If Spain were correct that investors should have known that it always intended to make retroactive changes to (and ultimately withdraw) the RD 661/2007 FIT, then the evidentiary record establishes that Spain misled: (a) RE investors throughout 2007 to 2011 with its various promises of stability and non-retroactivity; and (b) the Claimants in particular with the July 2010 Agreement and RD 1614/2010. Moreover, Spain then implemented the New Regime in a non-transparent way.

28. Fourthly, Spain's repeal of the RD 661/2007 regime in 2013 and its replacement with the New Regime was unreasonable, arbitrary and disproportionate. Spain has experience in implementing

---

[17] Counter-Memorial, paras. 909 *et seq*.
[18] Memorial, para. 371. See above, paras. 13-15.

transitional provisions to protect existing installations from detrimental retroactive changes, for example when it moved from RD 436/2004 to RD 661/2007.[19] It also has experience in changing FITs for new plants only, as it did with RD 1578/2008.[20] Similarly, under RD 1614/2010, Spain offered a *quid pro quo* to alleviate any financial burden on affected wind installations due to minor constraints on production that Spain deemed desirable at that moment in time.[21] Despite the foregoing, in 2013, instead of opting for measures with transitory and compensatory provisions and that were transparent in their dealings with the sector, Spain chose completely to overhaul the RD 661/2007 economic regime. With the Disputed Measures, Spain made numerous harmful changes and applied them to existing investments with the purported policy aim of addressing the Tariff Deficit (a budgetary constraint that has dogged Spain since well before the enactment of RD 661/2007 and that, crucially, is of Spain's own making). Moreover, Spain ignored that it had alternative options available to it for addressing the Tariff Deficit without reneging on its commitments to RE installations that had qualified under RD 661/2007.[22] The Brattle Rebuttal Regulatory Report shows that there were alternative measures that were far more reasonable than the Disputed Measures and did not involve the repeal of the RD 661/2007 regime.[23] Such alternatives include an increase in regulated consumer tariffs, a fuel levy or a $CO_2$ tax,[24] or the profiling of FITs for RE installations. Indeed, the CNE[25] itself raised contemporaneous proposals that were more reasonable to address the issue, but Spain simply ignored those.[26]

29. Finally, Spain failed to honour the commitments it gave the Claimants through its regulation, RD 661/2007 and RD 1614/2010 in particular, and in the official resolution issued to each of the Project Companies, the RAIPRE certificates, which confirmed the entitlement of the Claimants to the RD 661/2007 FIT for each of the Wind Farms.

---

[19] RD 661/2007 expressly avoided detrimental retroactive changes to existing installations by implementing a transitory period whereby those installations could choose to continue under the same tariff scheme for up to nearly six more years, until 1 January 2013. See **Exhibit C-44**, RD 661/2007 of 25 May 2007. See e.g., Article 1(b) and Transitory Provision One.

[20] **Exhibit R-102**, RD 1578/2008 of 26 September.

[21] Spain placed temporary limits on the number of hours for which wind plants could operate under RD 661/2007 and temporarily reduced the Premium by 35%. However, crucially, it reiterated the stability of the RD 661/2007 economic regime for existing installations going forward and explicitly included the Premium in that protection.

[22] **Exhibit C-51**, Royal Decree-Law 9/2013 of 12 July 2013. Preamble ("[s]*imilarly, throughout 2012 and to date, urgent new measures have been adopted with an identical purpose, that of coping with the deviations which, due to the worsening of factors already referred to, became manifest in relation to initial estimates*").

[23] Brattle Rebuttal Regulatory Report, paras. 20-22 and 136-146.

[24] Brattle Regulatory Report, paras. 130-146 and Brattle Rebuttal Regulatory Report, paras. 136-146. For example, as Brattle points out, "*Spain could have implemented alternative measures* ", such as addressing half of the 2013 Tariff Deficit by raising electricity tariffs ("*that would have saved the system while continuing to honour the FITs for existing plants under RD 661/2007* " (para. 123 (b)).

[25] **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, 7 March 2012. This report identified numerous options, including the "profiling" of the premiums to be received by installations that were registered in the pre-allocation registry but had not received their definitive registration. This involved temporarily reducing the FIT in exchange for a promise to raise it later on. As Brattle explains, this option would have preserved the present value of existing FITs and, therefore, would not have led to undue harm to the Claimants' existing investments. See Brattle Rebuttal Regulatory Report, paras. 198 *t seq*.

[26] **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, 7 March 2012.

30. Whether domestic law may indeed allow Spain to repeal and replace the stability commitments inherent in the investment-inducing norm is immaterial: the FET standard prohibits Spain from taking measures, whether or not legitimate under domestic law, that frustrate the Claimants' legitimate expectations or constitute unreasonable or arbitrary interference with their investment. This is a basic principle of international law which Spain completely ignores. Spain also avoids addressing the elephant in the room: the New Regime is not a minor or incremental change, but a wholesale withdrawal of the RD 661/2007 regime, a fact that both the CNE and the Council of State expressly confirmed at the time,[27] and a dismantling of the entire basis on which the Claimants relied when they made their decision to invest. There can be no doubt that liability is incurred in the circumstances.

## 3. SUMMARY OF REPLY TO SPAIN'S DEFENCE

### 3.1 Spain's jurisdictional objections should be dismissed

31. Spain's Memorial on Jurisdiction addresses two objections: the Intra-EU Objection (the **Intra-EU Objection**) and the tax objection (the **Tax Objection**). The Intra-EU Objection is fatally flawed. Had the Contracting Parties wished to exclude Intra-EU disputes from the scope of Article 26 they originally would have included an exception to that effect or they subsequently would have amended the text. They have not.

32. The objection has been raised numerous times in various *fora* and has always been rejected. Indeed, although Spain seeks to ignore the relevant jurisprudence, it is fully aware that multiple ECT tribunals have specifically rejected its Intra-EU submissions. These include the recent *RREEF* decision and *Eiser* award that Spain has neglected to mention to the Tribunal.[28] The reasoning on which these jurisdictional decisions were based is sound and the same result must be applied in the present case.

33. The second jurisdictional objection concerns the Claimants' claims against the first of the Disputed Measures, Law 15/2012, the 7% levy on electrical energy production (the **7% Levy**). Spain relies

---

[27] **Exhibit C-34**, CNE Report 18/2013 of September 2013, pp. 15-16 and **Exhibit R-123**, Decision number 937/2013 from the Permanent Commission of the Council of State, 12 September 2013, on the Draft Bill on the Electricity Sector, published in the Official State Gazette, p. 15 (our translation).

[28] See **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016; **Exhibit C-176**, L E Peterson, "*Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors vs. Spain and Hungary*", available at https://www.iareporter.com/articles/intra-eu-treaty-claims-controversy-new-decisions-and-developments-in-claims-brought-by-eu-investors-vs-spain-and-hungary/ (last accessed on 10 September 2017); **Authority CL-154**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 and **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016.

on Article 21 of the ECT to contend that the 7% Levy is a taxation measure and is therefore carved out of the Tribunal's jurisdiction. This submission relies entirely on Spain's manipulation of its domestic law to present tariff cuts as taxes. The 7% Levy is not a *bona fide* taxation measure and as such Spain may not rely on the taxation carve-out to deprive the Tribunal of jurisdiction over this claim.

**3.2 Spain's primary defence on the reasonableness of the Claimants' expectation that future changes would not affect the Wind Farms is unsupported by the facts**

34. Spain's primary defence is directed at only one of the Claimants' claims – the claim that Spain's conduct frustrated their expectation that the Wind Farms be granted the RD 661/2007 economic regime as set forth in the legislation, without being subjected to future tariff reviews, much less a repeal of the entire regime. Put simply, Spain asserts that the Claimants' expectations were not objectively reasonable. This defence is premised on Spain's claim that the Claimants should have known that, as a matter of Spanish law, it was entitled to make retroactive changes to – and even repeal – the RD 661/2007 economic regime without the payment of compensation. Spain's claims regarding the Claimants' expectations are primarily based on an unsupported interpretation of Article 30.4 of the 1997 Electricity Law, which refers to the wholly indeterminate concept of "*reasonable return*".

35. Spain's "*reasonable return*" argument rests on the following assertions:

(a) First, Spain claims that the Claimants should have been aware that the RD 661/2007 economic regime was subject to change for existing investments based on the reference to "*reasonable return*" in the 1997 Electricity Law, if Spain determined that the Claimants were making so-called "windfall" or "excessive" profits.[29]

(b) Secondly, Spain claims that the Claimants failed to conduct a proper analysis of the regulatory regime prior to investing in the Wind Farms.[30] On Spain's view the Claimants' due diligence should have made them aware of various Spanish Supreme Court decisions which, according to Spain, would have put the Claimants on notice that retroactive changes to RD 661/2007 and its subsequent repeal were permissible under the "*reasonable return*" concept. Spain also argues that various previous changes to the regulatory regime should

[29] In essence, Spain claims that the Claimants' returns were subject to a cap of approximately 7% pre-tax. Spain claims that the Claimants should have been aware of the 7% cap based on statements made in the PER 2005-2010.

[30] Spain suggests that the Claimants' lawyers were either negligent in their advice or they were not requested to address the appropriate legal issues.

also have put the Claimants on notice that the RD 661/2007 regime was susceptible to repeal, even as regards existing investments.

36. As will be explained in section 4.3, Spain's assertions regarding the Claimants' expectations are unsupported by the plain meaning of Articles 36 and 44.3 of RD 661/2007 and ignore contemporaneous declarations by Spain about the purpose and effect of the norm. The Spanish Supreme Court decisions referred to were irrelevant to the Claimants' investment. As a result, Spain's suggestion that the Claimants did not have an objectively legitimate expectation that RD 661/2007 would not be changed retroactively, or ultimately repealed, has no basis in fact.

### 3.3 Spain's excuses precluding wrongfulness are unavailing and do violence to the substance of Article 10(1) ECT

37. In a tacit admission that its arguments regarding the Claimants' expectations are without merit, Spain looks to find an exonerating factor that might preclude the wrongfulness of its conduct. Spain raises various interrelated arguments which it claims provide an "*excuse*" to take measures that otherwise breach the ECT. Ultimately, Spain agrees that the policy aim for implementing the Disputed Measures was to address the Tariff Deficit.

38. Spain argues that the Disputed Measures were necessary to ensure "*the SES' technical sustainability*"[31] in light of the existence of the Tariff Deficit. Spain claims that system costs were too high and system revenues were too low and thus the Disputed Measures were required to restore "*economic sustainability*". Spain also argues that this Tariff Deficit was exacerbated because of the global financial crisis and a fall in electricity demand prompting the need for the Disputed Measures. Spain also links this argument at times to the Claimants' expectations by asserting that the Claimants knew or should have known that macroeconomic circumstances, including the pre-existence of a Tariff Deficit and/or fall in demand could cause Spain to change the regulatory framework.

39. Spain states that "*at the time the measures were adopted, Spain was suffering the impact of a profound international economic and financial crisis*".[32] According to Spain, this caused a drop in demand for electricity, which thus necessitated the repeal of the RD 661/2007 regime. In reality, Spain seeks to rely on the economic crisis (and the corresponding fall in demand) as giving rise to something akin to a state of necessity under international law. Notably, Spain does not expressly

---

31 Counter-Memorial, title (6.2)(b), p. 107.
32 Counter-Memorial, para. 613.

articulate this argument in these terms since it is well aware that it cannot meet the burden of proof to establish a state of necessity.[33]

40. Leaving aside Spain's backdoor attempt to plead a necessity defence, Spain's arguments regarding the economic crisis and the fall in demand make no sense (and, in any event, are subsumed with the overarching problem of the Tariff Deficit). Spain simply ignores the fact that, under RD 661/2007, Spain expressly assumed the risk of a fall in demand since it guaranteed RE installations priority of despatch (as required by EU law), assuring the Claimants' installations the right to sell all the electricity they produced regardless of any changes in demand.

41. Moreover, Spain ignores entirely one of the key facts of this case when making its "sustainability" arguments: Spain itself fully controls both the costs and income to the system. It was Spain's own regulatory failures that caused the Tariff Deficit in the first place. Spain failed for more than a decade to set consumer tariffs at the appropriate level to cover the full costs of the electricity system. Indeed, the Spanish Supreme Court has repeatedly found that Spain breached its own laws by not setting consumer tariffs at the appropriate level. The essence of Spain's argument as it relates to the Claimants' expectations (i.e., the Claimants knew or should have known that macroeconomic circumstances or fall in demand would result in an overhaul of the regulatory framework) in fact guts Article 10(1) of the ECT of all meaning.

42. Spain made the deliberate policy choice to incentivise RE investment on a significant scale and in circumstances where it had already caused a deficit between the revenues and costs of the Electricity System. This decision unavoidably was going to increase system costs. However, Spain chose, for reasons of its own, not to raise access tolls to the necessary level to pay for those new costs in disregard of its own laws.[34] It should have come as no surprise to Spain that an increase in costs without a corresponding increase in revenues could worsen a pre-existing deficit. Yet, Spain now wishes to use its own failures as an excuse for its breaches of the ECT. Unfortunately for the Claimants, their investment in the Spanish RE sector has already been made. Yet, Spain has decided that it no longer wants to pay for the investment it incentivised in the first place. It is plainly unreasonable for Spain to repeal the RD 661/2007 regime after it has induced the investment

[33] Similarly, Spain cannot properly qualify this argument as changed circumstances or *rebus sic stantibus* since the doctrine requires that the changed circumstance would have been unforeseeable and consequently not regulated by the terms governing the investment. On Spain's case, however, changes in macroeconomic circumstances, including fall in electricity demand, would have been perfectly foreseeable at the time of making the investment. But Spain conveniently forgets that this was indeed regulated by RD 661/2007: the priority of despatch given to renewable energy producers meant that it was the State that voluntarily assumed the "demand risk".

[34] See Section 5.2.

it wanted and needed. Indeed, this is exactly the type of inappropriate state conduct that the ECT was designed to protect against.

## PART II – THE FACTS IN DISPUTE

43. The decision to invest in the Wind Farms was taken in August 2011.[35] The regulatory framework which governed the remuneration of wind installations at that time, thus informing the Claimants' decision to invest, comprised (a) RD 661/2007 and (b) RD 1614/2010. Both of these contained a clear commitment by the Government that the €/kWh remuneration would apply for the entire useful life of the Wind Farms, with no limit on production and without the possibility of future changes to the remunerative regime applying to existing plants.

44. There can be little doubt that the regime on offer by Spain at the time was investment-inducing: this is the *raison d'être* of support schemes.[36] The contemporaneous evidence shows that Spain intended for investors to rely on the promises inherent in the two essential articles of RD 661/2007: Article 36 setting out the applicable FIT for the useful life of the installations; and Article 44.3 stating that any future changes to the FIT would not affect existing installations. Under the July 2010 Agreement, which was codified in RD 1614/2010, Spain reiterated (and strengthened) its commitment to maintain the incentives for existing installations.[37]

45. Despite the plain meaning of these provisions, and Spain's obvious interest in the Claimants' taking those provisions at their word, Spain advances various *ex post* constructions of the applicable legal and regulatory framework to suggest that the Claimants' expectation of a FIT regime for the operational lifetime of the Wind Farms was unreasonable. In effect, Spain argues that the Claimants knew or should have known that Spain could introduce retroactive changes to the regulation applicable to their investment, changes that would entirely overhaul the parameters for remuneration of the Wind Farms, as the Disputed Measures did, despite Spain having expressly promised it would not do so.

46. As explained below, Spain's position is indefensible. Spain argues that the Claimants should have ignored the plain meaning of the norms it promulgated to attract RE investment and its commitments and known that they were empty and meaningless. This is unpersuasive.

---

[35] **Exhibit C-35**, Share purchase agreement between Bridgepoint Europe IV Bidco 3 Limited, Bridgepoint Europe IV Bidco 6 Limited and Bridgepoint Europe IV Bidco 8 Limited and EYRA, Urbaenergia and Iverduero dated 12 August 2011; First Moreno Statement, para. 61; See also **Exhibit C-186**, Minutes of Investment Advisory Committee meeting,1 August 2011.

[36] Brattle Regulatory Report, paras. 109-110.

[37] **Exhibit C-46**, Royal Decree 1614/2010 of 7 December 2010, Article 5(3) (wind). See also First Moreno Statement, paras. 59-60 and Memorial, paras. 187-189.

## 4. THE CLAIMANTS REASONABLY RELIED ON THE RD 661/2007 FIT REGIME

47. Spain expressly promised, through its regulations, resolutions and the various public statements of the Government, that since the Wind Farms had qualified under RD 661/2007, their remunerative regime would not be subject to retroactive changes.[38] Despite clear contemporaneous evidence to that effect, Spain now advances a number of arguments, which are clear *ex-post* constructs. In particular, Spain argues that:

(a) The RD 661/2007 regime was not put in place to induce investments in the RE sector.[39]

(b) Spain always intended the RD 661/2007 FIT to be nothing more than a discretionary subsidy that it had the right to withdraw even after investments were made.[40]

(c) Article 44.3 of RD 661/2007 was not a stabilisation commitment to guarantee the FIT for existing installations, such as the Claimants'.[41]

(d) The "*reasonable return*" underpinning the RD 661/2007 FIT, is dynamic and justifies revisions of the FIT for existing installations.[42]

(e) Under the principle of hierarchy of norms, a "*Royal Decree*" such as RD 661/2007 is by nature subject to change by another law or regulation.[43]

(f) The RAIPRE resolutions issued for each of the Wind Farms did not confirm the installations' right to receive the RD 661/2007 FIT for their operational lifetime.[44]

48. As explained in the sections that follow, Spain's position is at odds with the facts and, in particular, its own contemporaneous documents. In addition, as explained immediately below, Spain's later day narration is also at odds with accepted international regulatory practice.

### 4.1 International practice for FIT schemes supports the Claimants' understanding

49. Spain's interpretation of RD 661/2007 makes no sense when viewed against the underlying economic and policy rationale of FITs.[45] It is important to remind the Tribunal of some of the

---

[38] Memorial, paras. 154-166.
[39] Counter-Memorial, para. 20.
[40] Counter-Memorial, para. 909.
[41] Counter-Memorial, paras. 909
[42] Counter-Memorial, paras. 315-318 ("*Therefore, the criterion used by the legislator to judge such reasonableness is not a static element, but rather is a fundamentally dynamic element. As dynamic as is the cost of money on the capital market*").
[43] Counter-Memorial, paras. 916(1), 916(2) and 931.
[44] Counter-Memorial, para. 358; Memorial, paras. 29, 34 and 128-137.

fundamental aspects of FIT regimes as they operate around the world, and the reason why Spain chose to implement FITs as the support scheme for its RE production with the specific commitments it chose to offer.

50. When Spain implemented the RD 661/2007 FIT regime, it knew that FITs were crucial to attracting investment into the RE sector. Indeed, this was Spain's reason for introducing FITs.

**(a) FIT schemes are meant to induce investment**

51. FIT schemes are currently in place in at least 103 countries worldwide, including 25 European Member States.[46] As repeatedly recognised by Spain,[47] FIT schemes seek to correct a market failure in order to induce investment in RE.

52. As explained in the Memorial,[48] that market failure arises because the cost of conventional electricity generation is *artificially low*; the market price does not reflect the externalities arising from the production of electricity from fossil fuels. Market prices alone are therefore insufficient to cover the costs of building and operating RE installations, at least at the time the Wind Farms were built and the Claimants made their investment (since then, certain technologies have achieved grid parity but that only applies to new plants). Conversely, if the market prices did reflect the environmental costs of traditional methods of electricity generation, then electricity prices would be considerably higher. Spain and many governments therefore consider RE support schemes to be necessary and desirable to correct this imbalance as, without them, investment in RE would never have happened in the first place (with the attendant environmental costs (and health costs) this would have caused).[49] Since 1997, nearly all new RE capacity in Europe has been installed under FIT systems.[50]

53. In its submissions to this Tribunal, Spain acknowledges that RE installations "*require subsidies to be profitable*" since the "*price in the competitive market…* [is] *insufficient to cover… costs of construction and operation*"[51] and that FITs must be set high enough "*to be attractive to*

---

45 Brattle Regulatory Report, paras. 7-11 and 35-90.

46 Brattle Regulatory Report, para. 88.

47 **Exhibit C-188**, Ministry of Industry, Tourism and Commerce, "Report on the draft of RD 661/2007 regulating the activity of electricity production under the special regime", 23 March 2007, p. 1. See also **Exhibit C-189,** CNMC, "*Report on the Proposal of Royal Decree that Regulates the Production of Electricity using Renewable Sources, Cogeneration and Waste*", 17 December 2013, p. 10 (PDF12).

48 Memorial, paras. 17, 66-67, 90 and 125.

49 **Exhibit C-188**, Ministry of Industry, Tourism and Commerce "Report on the draft of RD 661/2007 regulating the activity of electricity production under the special regime", 23 March 2007, p. 1 (emphasis in original). See also p. 1 fn. 2 ("*From an economic perspective, an externality is a cost resulting from an activity that is not being borne by the company carrying the said activity. In this case, externalities are the environmental damage resulting from polluting fossil fuel generation and assumed by society as a whole*").

50 Brattle Regulatory Report, para. 88.

51 Counter-Memorial, para. 284.

*investors*".[52] It therefore cannot be disputed that FIT schemes are put in place specifically to induce investment, as Spain did when introducing the RD 661/2007 FIT.[53]

**(b) FIT schemes are meant to provide a long-term guaranteed tariff payment**

54. Spain's *ex post* arguments regarding the interpretation of the RD 661/2007 FIT disregard the stated object and purpose behind the economic regime. Rather than describing the regime as specifically designed to induce investment through the provision of a stable regulatory framework, Spain now presents the RD 661/2007 regime as providing merely a discretionary subsidy that the Government was free to withdraw at any time for both new *and* existing installations.[54] Spain's current position is entirely at odds with the position of the Government at the time it put in place RD 661/2007. Spain's current position is also incompatible with the way that FITs work.

55. As previously explained,[55] FITs are designed to provide long-term certainty as to the price at which electricity from RE producers will be purchased. In essence, FITs provide a *guaranteed* tariff payment over the long-term in order to pay back the high up-front investment costs of building RE plants. As stated in the FIT Handbook relied on by Spain:

> "FITs around the world usually guarantee tariff payment for a period of 10-20 years, while a period of 15-20 years is the most common and successful approach. A payment of 20 years equals the average lifetime of many renewable energy plants."[56] (emphasis added)

56. The nature of a FIT support scheme is that the support is guaranteed for a certain time period.[57] The Court of Appeal in England and Wales has described the fundamental premise of a FIT scheme as follows:

> "An owner of an installation is entitled to payment at a rate fixed by reference to and from the year in which the installation becomes eligible. He is entitled to that fixed rate throughout the period of generation from the moment of commencement up to the maximum specified."[58]

---

52 **Exhibit C-86**, Summary PER 2005-2010, August 2005, p. 58.
53 Counter-Memorial, para. 284.
54 Counter-Memorial, paras. 453-462.
55 Memorial, para. 22.
56 **Authority RL-62**, Miguel Mendonca *et al*., "*Powering the Green Economy*" in The Feed-In Tariff Handbook, 2010, p. 27.
57 Brattle Regulatory Report, para. 61.
58 **Exhibit C-190**, *Secretary of State for Energy and Climate Change v Friends of the Earth and others*, Court of Appeal Judgment, CA, Civil Division, Lloyd, Moses, Richards, LJJ, 25 January 2012, p. 10, para. 48. See also **Exhibit C-191**, *R (on the application of Homesun Holdings Ltd and others) v Secretary of State for Energy and Climate Change, Administrative Court Judgment, QBD*, Administrative Court, Mitting, J, 21 December 2011; **Exhibit C-192**, Permission to Appeal Results – March 2012; **Exhibit C-193**, *Breyer Group plc and others v Department of Energy and Climate Change and associated claims*, Administrative Court Judgment QBD Coulson, J, 9 July 2014; and **Exhibit C-194**, *Breyer Group plc and others v Department of Energy and Climate Change and associated claims*, Court of Appeal Judgment, Lord Dyson M R, Richards, Ryder LJJ, 28 April 2015.

57. FIT schemes thus do not allow for a review process for the tariff applicable to already-commissioned plants.[59] Once the FIT is set, it is not subject to regulatory intervention.[60] FIT systems are, of course, expected to be adapted as levelised costs go down.[61] However, this is in respect of new investments only as only new investments can take advantage of a reduction in costs.[62] The cost of existing investments is crystallised when the investment is originally made.[63] RE installations that have been constructed and registered are protected against subsequent tariff revisions. It is therefore critical that FIT regimes remain stable throughout the life of an investment. As Brattle explains, stable FITs reduce costs for investors, resulting in a lower burden for consumers:

> "[S]table and predictable FITs reduce certain financial risks to investors in a manner that promotes more investment at lower total costs. Consumers ultimately benefit from reduced costs."[64] (emphasis added)

58. On the other hand, unstable FITs increase costs for investors at the expense of final consumers:

> "Once the Government has induced investments pursuant to a long-term FIT regime, it is counter-productive to change the economic regime governing those investments. The change in economic regime creates regulatory risk, which will raise costs significantly in the long-term, both for Spain and for Spanish consumers."[65] (emphasis added)

### 4.2 Spain implemented the RD 661/2007 FIT scheme fully in line with international standard practice

59. By implementing RD 661/2007, Spain enacted a FIT scheme fully in line with international standard practice, offering a long-term guarantee to qualifying investors.[66]

#### (a) The RD 661/2007 FIT scheme was devised to induce investment

60. Spain had a wide array of policy options at its disposal to achieve its RE installed capacity targets. By way of example, the FIT Handbook relied on by Spain provides an overview of the support schemes currently in use by States to support RE:

---

[59] Brattle Regulatory Report, para. 17 and section III. The same principle is expressed in Article 44.3 RD 661/2007.
[60] Brattle Regulatory Report, paras. 72-73 and section III.C. Once again, as contemplated in Article 44.3 RD 661/2007.
[61] Brattle Regulatory Report, section III.C.
[62] Brattle Regulatory Report, section III.C.
[63] Brattle Regulatory Report, section III.C.
[64] Brattle Regulatory Report, para. 10. See also Brattle Regulatory Report, para. 71 ("*Conversely, reducing risks permits investors to accept lower returns, which in the case of renewable energy reduces the levelised costs of new power stations, incentivising the construction of more projects for any given level of financial support*").
[65] Brattle Regulatory Report, para. 17.
[66] **Exhibit C-195**, PER 2011-2020, 2011 p. 14 (the FIT Spain implemented was "*basically the same system as countries such as Germany or Denmark*").

> "One recent study noted that 55 different types of policy mechanisms were currently in use for supporting renewables around the world (Tonn et al, 2009). Another study, after surveying hundreds of experts in Asia, Europe and North America, identified 30 favoured mechanisms (Sovacool, 2009). Yet another investigation of renewable energy subsidies found that policies can take the form of direct financial transfer (grants), preferential tax treatment (tax credits, exemptions, accelerated depreciation, and rebates), trade restrictions (quotas), financing (low-interest loans), and direct investment in energy infrastructure, research and development (Menz and Vachon, 2006). Feed-in tariffs (FITs) were not included in this last study because they were not considered a subsidy."[67]

61. Out of all these options, FIT support schemes have proven to be the most effective approach to achieve rapid renewables deployment.[68] As noted by the FIT Handbook, FITs attract considerable investment since they are straightforward instruments that are equivalent to a public offer to invest,[69] provide profitability and certainty to investors and do so at the least cost for consumers.[70]

62. No doubt aware of these benefits, Spain consciously chose to implement a FIT scheme in order to achieve the policy goals described at sub-section (d).[71] Spain specifically designed the RD 661/2007 FIT in a way to induce the level and type of investment it sought and required. As already explained elsewhere,[72] there were two key, interlocking representations in RD 661/2007: (a) the applicable FIT would be guaranteed for the operational life of the installation; and (b) any future changes would not affect existing installations.

63. Consistent with its policy and worldwide FIT practice, Spain designed RD 661/2007 to provide a long-term, stable and predictable economic regime. This was consistent not only with those policy goals, but also with best practice for FIT systems known worldwide. In short, with RD 661/2007, Spain achieved its goal of drawing massive investment into the Spanish RE sector.[73]

---

67 **Authority RL-62**, Miguel Mendonca *et al*., "*Powering the Green Economy*" in The Feed-In Tariff Handbook, 2010, p. 149.

68 Brattle Regulatory Report, paras. 7-11 and section III. See also **Authority RL-62**, Miguel Mendonca *et al*., "*Powering the Green Economy*" in The Feed-In Tariff Handbook, 2010, p. 150 ("[t]*he chapter explores the strengths and weaknesses of eight commonly used alternative policy mechanisms for harnessing the power of renewables…*[t]*he chapter also scrutinizes why empirical evidence (and perhaps common sense) shows that FITs ultimately have advantages over each of them.*")

69 **Authority RL-62**, Miguel Mendonca *et al*., "*Powering the Green Economy*" in The Feed-In Tariff Handbook, 2010, p. 15 ("*In countries with a relatively short history of renewable energy development, and those that are establishing a FIT scheme for the very first time, we recommend keeping the support mechanism simple at the start. It should be easy to understand as FITs 'invite' all parts of a society to become electricity producers, ranging from private households to large utilities. Therefore, the legislation should be comprehensible to anyone without the assistance of legal experts. At a later stage, the FIT might have to become more complex, but by then producers will have become experienced with this type of support scheme*.") (emphasis added).

70 **Authority RL-62**, Miguel Mendonca *et al*., "*Powering the Green Economy*" in The Feed-In Tariff Handbook, 2010, Introduction ("*These costs are then distributed among all the electricity consumers, minimising costs while delivering an ever-growing amount of renewable energy*").

71 See below, para. 67.

72 See paras. 10, 41 and 42.

73 Brattle Regulatory Report, paras. 109-110.

### (b) The RD 661/2007 FIT provided a long-term guaranteed tariff payment

64. As set forth in the Claimants' previous submission, Article 36 provided for payment for wind installations as follows: [74]

| Category | Group | Subgroup | Installed Production Capacity | Term | Fixed Tariff | Premium | Upper Threshold | Lower Threshold |
|---|---|---|---|---|---|---|---|---|
| B | b.2 | b.2.1 | Any | First 20 years | 7.3228 | 2.9291 | 8.4944 | 7.1275 |
| | | | | Thereafter | 6.1200 | 0.0000 | - | - |

65. An owner of a wind installation was entitled to receive these specific payments for each kWh of electricity produced by that installation. The FIT payable was specified for the first 20 years at one level and thereafter at a lower level. The provision of the FIT "thereafter" was not a necessary provision or indeed a common one. It meant that there was no temporal limit to the installation's right to receive the FIT (other than its useful life). In other words, as long as the installation was able to run, it would receive those incentives. Spain included this in RD 661/2007 in order to incentivise long-lasting RE installations that would produce as much electricity as possible.[75] The owner who invested in a long-lasting installation would receive the benefit of the FIT until the end of its operational life.[76] This is what the Claimants did, just as Spain desired and expected that they and other investors would do.[77]

66. Under this FIT system, the tariffs for registered installations were fixed for a specified period and tariff revisions only affected new installations.[78] Spain provided a transparent updating mechanism in Article 44.3 that foresaw changes to the FIT. Crucially, these changes to the FIT would apply to new investments only. There was no suggestion anywhere in Article 36 or Article 44.3 or indeed anywhere else in the regulation (or any other act, such as the 1997 Electricity Law) that this FIT could later be reduced during a plant's operational life. The contemporaneous evidence shows that Spain was well aware that the RD 661/2007 FITs were guaranteed and qualifying installations protected against harmful revisions (see section 4.3 below). Indeed, the Claimants' external advice and internal documents specifically referred to the RD 661/2007 FIT as guaranteed.[79]

---

[74] **Exhibit C-44**, RD 661/2007 of 25 May 2007, Article 36. See also Memorial, para. 139.

[75] Brattle Regulatory Report, para.116 ("*The Original Regulatory Regime promoted competition among potential project developers to identify and develop the most attractive sites quickly and efficiently, and to maximise the overall production of electricity for a given remuneration level*").

[76] Brattle Regulatory Report, para. 12 ("*The Original Regulatory Regime induced substantial investment in renewables in a typical way: by offering a minimum fixed financial support per* [MWh] *of electricity generated, indexed to inflation for all the electricity generated by wind farms over the entire lifetime of the investments*").

[77] First Moreno Statement, paras. 44-60.

[78] **Exhibit C-44**, RD 661/2007 of 25 May 2007, Articles 22 and 44.3.

[79] **Exhibit C-102**, Allen & Overy Memorandum on RD 661/2007 tariff risk with regards to retroactive effect of future regulations dated 24 February 2010, p. 3; First Moreno Statement, paras. 31-34; **Exhibit C-120**, Investment Advisory Committee Paper on Project Greco

### (c) The RD 661/2007 FIT was a production-based incentive

67. As already explained in the Memorial and by the Claimants' regulatory expert,[80] the RD 661/2007 FIT was designed to encourage RE installations to produce as much electricity as possible. This makes sense: the goal is, over time, to displace conventional generators and replace them with RE. This can only work if the incentive scheme is sufficiently attractive for investors to take the risk of investing in RE and then produce as much as possible. For this reason, FITs provide a fixed amount of remuneration per MWh of electricity generated: the more electricity is produced, the higher the remuneration. This of course also encourages efficiency and performing plants.[81] Conversely, sub-optimal performance or breakdowns lead to lower production and less remuneration.[82]

68. In addition, RE installations were assured the right to sell all of the electricity produced at the tariff established under the RD 661/2007 economic regime; they also had priority to the electricity grid.[83] This meant that irrespective of fluctuations in demand, RE investors would always be able to sell all the electricity they generated.[84] In other words, RE investors were protected against demand risk. This is key: in designing the regulatory framework for RE, Spain assumed demand risk.[85] Critically, this was also beneficial to Spain. Spain's goal was that by 2010, 29.4% of its electricity generation would come from renewables.[86] Spain thus incentivised production as part of a mutually-beneficial *quid pro quo* between the State and the investor.[87] In reliance on this, the Claimants invested in high-performing wind farms with above average production hours.[88]

### (d) The RD 661/2007 FIT was implemented in order to meet Spain's policy goals

69. Spain's own internal documents show that it understood the importance of RE support schemes to achieve its policy goals. The implementation of RE support schemes would help Spain to: (a) meet

---

dated 11 July 2011, p. 11 ("*no regulatory risk as the future feed-in tariff is guaranteed by the State*"); **Exhibit C-102**, Allen & Overy Memorandum on RD 661/2007 tariff risk with regards to retroactive effect of future regulations dated 24 February 2010, p. 3 ("[a]*ny new regulation to amend RD 661/2007 could not have a retroactive effect if it affects negatively the 661/2007 Tariff, as it would mean a deprivation of an acquired right.*") and **Exhibit C-115**, BCG Report on Project Greco dated 6 July 2011, p. 67 ("*preregistered wind farms, which are authorized to come online in 2011-2012 and have no regulatory risk as future feed-in-tariff scheme is guaranteed by the State*").

[80] Memorial, para. 141. See also Brattle Regulatory Report, para. 62 and Brattle Rebuttal Regulatory Report, paras 14, 41 and 103.

[81] Brattle Rebuttal Report, para. 14.

[82] Brattle Rebuttal Report, para. 14

[83] See above, para. 38.

[84] This was on the assumption that RE production capacity did not exceed total electricity demand. This has always been the case. The only exception to this was the rare circumstance (of no relevance to the present dispute) where this might jeopardise the technical operation of the grid.

[85] **Authority RL-62**, Miguel Mendonca *et al.*, "Powering the Green Economy" in The Feed-In Tariff Handbook, 2010, pp. 29-30 ("… *the purchase obligation is the second most important 'ingredient' for all FIT schemes as it assures investment security*" and "[i]*t obliges the nearest grid operator to purchase and distribute all electricity that is produced by renewable energy sources, independent of power demand*.").

[86] See Counter-Memorial, para. 406.

[87] **Exhibit C-95**, CNE Presentation, "*Legal and Regulatory Framework for the Renewable Energy Sector*",29 October 2008, slide 25.

[88] **Exhibit C-120**, Investment Advisory Committee Paper on Project Greco dated 11 July 2011, p. 20 ("[p]*articular attractions of the Greco asset are likely to include its concentrated portfolio (all in Castilla y Leon), given the lower operating costs that this allows, and its above average wind hours (2,310 hours vs. c2,200 average for Spain)*").

its RE objectives under European law[89] and satisfy its obligations under the Kyoto Protocol;[90] (b) meet its environmental goals;[91] (c) assist with the security of electricity supply by reducing Spain's dependence on the import of foreign fossil fuels;[92]and (d) provide a boost for the Spanish economy and employment.[93] Spain recognised (albeit before it faced 30 plus claims by international investors) that it achieved the environmental and economic benefits that it sought by inducing investment under the RD 661/2007 economic regime.[94]

### 4.3 RD 661/2007 protected registered installations against retroactive changes

70. As the Claimants noted in their Memorial,[95] Article 44.3 of RD 661/2007 contained an explicit grandfathering clause; it protected registered installations against retroactive changes. Tellingly, Spain presents no positive case as to what it considers Article 44.3 to have meant. Spain simply contends that Article 44.3 was not a stabilisation commitment or grandfathering provision because it did not say that an entirely new and different norm could not be passed.[96] In essence, Spain's case is that while "scheduled revisions" would not affect existing plants, it could always proceed with

---

89 See **Exhibit C-188**, Ministry of Industry, Tourism and Commerce, "Report on the draft of RD 661/2007 regulating the activity of electricity production under the special regime", 23 March 2007, p. 3: "*Directive 2001/77 / EC...compels Member States to take the necessary measures to increase the consumption of electricity generated by renewable energy, and in accordance with national indicative targets that must be made available*." Contemporary evidence also demonstrates that Spain implemented RD 661/2007 to improve RE incentives and to reach the RE targets set by the EU (see **Exhibit C-85**, CNE Report 3/2007 of 14 February 2007, p. 21; **Exhibit C-86**, Summary PER 2005-2010, August 2005, p. 48 (emphasis added) and **Exhibit C-96**, CNE Presentation, "*Renewable Energy Regulation in Spain*", February 2010, pp. 24-28).

90 Memorial, para. 15.

91 **Exhibit C-188**, Ministry of Industry, Tourism and Commerce, "Report on the draft of RD 661/2007 regulating the activity of electricity production under the special regime", 23 March 2007, p. 2.

92 **Exhibit C-75**, Ministry of Industry, Tourism and Commerce and IDAE, "*The Spanish Renewable Energy Plan 2005-2010*", August 2015. The PER 2005-2010 observed that the "*serious trade deficit on Spain's balance of payments*" arose because Spain had "*such a high degree of energy dependence*" and that: "[w]*hen assessing the benefits of increasing the share of domestic production, as in the case of using renewable energy sources, it is worth bearing in mind, along with other factors, the burden on the economy energy imports represent. Thus, according to customs statistics, Spain's trade balance in energy (exports minus imports) between 2000 and 2003 was a deficit of 15,000 million euros a year. In 2004 the deficit rose to 17,500 million euros. This accounts for 29% of the trade deficit in 2004 and is equal to 2.2% – but negative – of Spain's gross domestic product*", pp. 314 and 333-334. See also **Exhibit C-86**, Summary PER 2005-2010, pp. 67-68; **Exhibit C-196**, Endesa Websit, Main page as of 6 February 2017 (last accessed 6 February 2017), available at http://www.endesaeduca.com/Endesa_educa/recursos-interactivos/el-sector-electrico/consumo-energia-mundo (last accessed on 4 November 2016), Graph 3 ("Imports and self-supply in Spain, 2012" (Source: MINETUR)); **Exhibit C-197**, El Diario, Press Article, ""*The burning of coal is the main cause of the greenhouse effect*", available at http://www.eldiario.es/alternativaseconomicas/Futuro-sostenible-cuencas-carbon_6_525007512.html (last accessed on 4 November 2016), 9 June 2016 and **Exhibit C-198**, Decision of the European Council 2010/787/UE, on State Aid to facilitate the closure of uncompetitive coal mines, 10 December 2010.

93 **Exhibit C-75**, Ministry of Industry, Tourism and Commerce and IDAE, "*Renewable Energy Plan in Spain 2005 – 2010*", August 2005, p. 14. See also **Exhibit C-86**, Summary PER 2005-2010, August 2005, pp. 72-73.

94 **Exhibit R-120**, PANER 2011-2020, p. 10 ("*It is fair to say that the 2005-2010 Renewable Energy Plan has been an undisputed success in that it has not only transformed Spain's energy model as planned, but has also allowed for the development of an industry which has positioned itself as a leader in many segments of the value chain at international level*") and pp. 8-9 ("*The development of renewable energies is a priority for Spanish energy policy. Renewable energies have a number of positive effects on society at large including sustainability of their resources, reduction in polluting emissions, technological change, the opportunity to advance towards a more distributed forms of energy, reduction of energy dependence and the trade balance deficit and increase in rural employment and development. Naturally, these advantages imply greater economic hardship, which tends to diminish over time thanks to shifts in technology over the span of the learning curves.*"); **Exhibit C-195**, PER 2011-2020, 2011, p. xxxvii and pp. 630, 633, 635, 650, 652 and 572 ("[t]*he benefits* [of the Special Regime FIT] *amply exceed the costs, given that the savings derived from reduced imports of combustible fuels alone exceed 25.5 billion euros, more than the costs of the plan quantified at 24.784 billion euros. To these benefits must be added the savings derived from reduced CO2 emissions, estimated at 3.567 billion euros. Finally, there exist other series of benefits, equally important but more difficult to quantify*.").

95 Memorial, paras. 156-157, 162 and 428.

96 Counter-Memorial, para. 456.

"unscheduled" revisions without any constraints. This makes no sense. It also flatly contradicts Spain's contemporaneous assurances concerning Article 44.3 and the drafting process giving rise to the inclusion of Article 44.3, as further explained below.

**(a) Spain confirmed that Article 44.3 was a "*guarantee*" against tariff change**

71. The importance of creating, through RD 661/2007, a stable FIT regime that applied for the lifetime of an installation, i.e. that would not be affected by future changes to the tariff, was confirmed by Spain itself on repeated occasions. For convenience, the Claimants address Spain's statements in chronological order, commencing with the statements made when RD 661/2007 was being drafted and passed.

72. 2007 Statements. In February 2007, when commenting on the draft of RD 661/2007, the CNE stated as follows:

> "The regulation should offer sufficient guarantees in order to make the economic incentives stable and predictable throughout the life span of the installation..."[97] (emphasis added)
>
> "Ultimately, what the [CNE] proposes is regulatory stability to recover investments, maintaining regulated tariffs during the service life of existing facilities (with a transparent annual adjustment mechanism)."[98] (emphasis added)

73. Once RD 661/2007 became law, the Ministry's press release accompanying the issuance of RD 661/2007 advised that "[f]*uture tariff revisions shall not be applied to existing facilities. This guarantees legal certainty for the electricity producer and stability for the sector*".[99] Similarly, the CNE presentation of 25 October 2007 referred to RD 661/2007 as follows: "*Security and predictability of the economic supports. To eliminate the regulatory risk (warranty by law). Non retroactive – Less uncertainties to investors (and Banks) and less cost to the consumers*".[100]

74. The Ministry of Industry and InvestInSpain referred to the RD 661/2007 FIT as follows in four separate publications over the course of several years: "[p]*remium system guaranteed*" and "[t]*he subsequent revisions of the tariffs will not affect the installations which have already been*

97 **Exhibit C-85**, CNE Report 3/2007 of 14 February 2007, p. 16.
98 **Exhibit C-85**, CNE Report 3/2007 of 14 February 2007, p. 25.
99 **Exhibit C-93,** Government of Spain, Ministry of Industry, Energy and Tourism, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy*", 25 May 2007, p. 1 (emphasis added).
100 **Exhibit C-96**, CNE Presentation, "*Renewable Energy Regulation in Spain*", February 2010, p. 29 (emphasis added).

*commissioned. This guaranty provides legal certainty to the producer, ensuring the stability and development of the sector*".[101]

75. 2008 Statements. In a report from September 2008, the CNE stressed the importance of providing stable and predictable incentives – with stabilisation guarantees – to make it possible to obtain better financing:

> "The regulation of generation facilities under the special regime established in Royal Decree 661/2007 has tried to minimise regulatory risk for this group, offering security and predictability for economic incentives during the lifespan of the facilities, establishing transparent mechanisms for the annual updates of said incentives and [pursuant to Article 44.3] exempting existing facilities from revision every **four years** because the new incentives that are being put into place only affect new facilities.
>
> The guarantees provided for in this regulation make it possible to find better financing, lower costs for projects and less impact on the electrical tariff that consumers ultimately pay."[102] (emphasis added in underline)

76. Similarly, a CNE presentation of 29 October 2008 referred to RD 661/2007 as follows: "***Regulatory stability****: Predictability and certainty of economic incentives for the duration of the facility's life span (encourages investors and lower financial cost): no retroactive effect*".[103]

77. 2009 and 2010 Statements. Throughout 2009 and 2010, the CNE made additional representations on at least five separate occasions that any future changes to the RD 661/2007 regime would not be retroactive.[104] Similarly, the preamble to RDL 6/2009 noted that it "*guarantee*[d] *the necessary legal security for those who have made investments*".[105]

78. The Ministry's public announcement of the July 2010 Agreement confirmed that it: "*guarantee*[s] *the current subsidies and rates of RD 661/2007 for the facilities in operation (and for those included*

---

101 **Exhibit C-163**, Government of Spain, Ministry of Industry, Tourism and Commerce and InvestInSpain, Presentation, "*Legal Framework for Renewable Energies in Spain*", undated, p. 4; **Exhibit C-164**, InvestInSpain Presentation, "*Opportunities in Renewable Energy in Spain*" (Graz), dated 15 November 2007, p. 32; **Exhibit C-165**, InvestInSpain Presentation, "*Opportunities in Renewable Energy in Spain*", (Vienna), dated 16 November 2007, p. 32 and **Exhibit C-199**, InvestInSpain, Presentation, "*Opportunities in Renewable Energy in Spain*", undated, p. 16.

102 **Exhibit C-94**, CNE Report 30/2008 of 25 May, 29 July 2008, p. 20.

103 **Exhibit C-95**, CNE Presentation, "*Legal and Regulatory Framework for the Renewable Energy Sector*", 29 October 2008, p. 25. See also pp. 11 and 27 (emphasis in original and added in underline). See also **Exhibit C-200,** CNE, "2008 Model for the Determination of Prices of Renewable Generation: The International Experience", 22 April 2008, pp. 25 and 27; and Brattle Regulatory Report, para. 12.

104 **Exhibit C-95**, CNE Presentation, "*Legal and Regulatory Framework for the Renewable Energy Sector*", 29 October 2008, p. 25; **Exhibit C-97**, CNE Presentation, "*Las Energías Renovables: El Caso Español*" (Cartagena de Indias), 9-13 February 2009, pp. 67, 69 and 71; **Exhibit C-98**, CNE Presentation, "*Las Energías Renovables: El Caso Español*" (Barcelona), February 2009, pp. 21, 23 and 25; and **Exhibit C-96**, CNE Presentation, "*Renewable Energy Regulation in Spain*", February 2010, p. 29.

105 **Exhibit C-100**, Royal Decree-Law 6/2009 of 30 April 2009, Preamble.

*in the pre-registration) starting in 2013*".[106] As explained further below,[107] the State Council Report on draft RD 1614/2010 also confirmed that it "*established the immutability* [inmodificabilidad] *of the premiums*" provided in RD 661/2007.[108]

79. The contemporaneous documents could not be clearer. Article 44.3 was a guarantee for investors that protected against retroactive revisions of the RD 661/2007 FIT. Spain had provided a "*warranty by law*", otherwise known as grandfathering.[109] That the RD 661/2007 FIT was "*guaranteed*" was confirmed by the Claimants' legal advice.[110]

80. Spain's present view that it was free to change the FIT at any time, even for existing investments, is irreconcilable with the statements by Spain at all times prior to the Claimants' investment.

**(b) The Article 44.3 drafting process confirms it was designed as a guarantee for investors**

81. The evolution of the draft regulation that would ultimately become RD 661/2007 also confirms that the inclusion of the stability commitment at Article 44.3 was deliberate to provide an important guarantee to investors.

82. On 29 November 2006, the Ministry sent the CNE a draft of RD 661/2007 for its review (**First Draft of RD 661/2007**).[111] The CNE issued its report (CNE Report 3/2007) on the First Draft of RD 661/2007 on 14 February 2007.[112]

83. Article 40.3 of the First Draft of RD 661/2007 is the earlier version of what would become Article 44.3 of the final draft. It is drafted along similar lines and, as with the final Article 44.3, refers to the tariff reviews to take place every four years.[113] Crucially, however, the final paragraph of Article 44.3, the commitment that registered installations would be exempted from future tariff revisions, was not present in the First Draft of RD 661/2007 that was transmitted to the CNE.

---

[106] **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010.

[107] See below, para. 327.

[108] **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010, p. 24 (PDF 27).

[109] **Exhibit C-96**, CNE Presentation, "*Renewable Energy Regulation in Spain*", February 2010, p. 29.

[110] **Exhibit C-102**, Allen & Overy Memorandum on RD 661/2007 tariff risk with regards to retroactive effect of future regulations dated 24 February 2010, p. 3.

[111] **Exhibit C-201**, First Draft of RD 661/2007 of the Ministry sent to the CNE for its review on 29 November 2006.

[112] The CNE Report 3/2007 states that it reviews a draft that it received on 29 November 2006 (see **Exhibit C-85**, CNE Report 3/2007 of 14 February 2007).

[113] See **Exhibit C-201**, First Draft of RD 661/2007 of the Ministry sent to the CNE for its review on 29 November 2006, Article 40.3, p. 24 which states as follows: "*In 2010, in view of the results of the monitoring reports on the degree of compliance with the Renewable Energy Plan (PER) 2005-2010, of the Strategy for Energy Saving and Efficiency in Spain (E4), and of the new targets to be included in the next Renewable Energy Plan for the period 2011-2020, there will be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree for implementation from January 2011 onwards. This revision will take into account the costs associated with each of these technologies, the degree of participation of the special regime in covering demand and its impact on the technical and economic management of the system. Every four years, a new revision will be conducted*".

84. The CNE noted this in its review of the Draft of RD 661/2007:

> "… In addition, all incentives will be reviewed every four years, not just for new facilities but also now for existing ones, starting from 2010".[114]

85. The CNE thus observed the change from RD 436/2004, which exempted registered installations from tariff reviews, to the First Draft RD 661/2007, which contemplated that applying such tariff reviews to existing installations would create considerable uncertainty. The CNE urged the Ministry to include a protection against tariff changes for existing installations in the new regulation. The CNE was aware that such a provision was an important step which the Government could not take lightly; it nevertheless stressed that this was necessary to provide the stability necessary to attract RE investment:

> "although it is difficult to defend the petrification of regulations, it is necessary to strive to achieve sufficient legal certainty which ensures, as far as possible that regulatory uncertainty and risk are removed; this is the only way in which there can be sufficient investment."[115]

86. The Ministry evidently accepted the CNE's position and included this special provision in the next draft of RD 661/2007 dated 19 March 2007.[116] This draft added a new paragraph to what, by this point, had become Article 44.3, expressly protecting existing installations against future revisions:

> "Revisions to the tariff and to upper and lower limits referred to in this section will not affect installations whose commissioning certificate has been granted within one year of the entry into force of the revision."[117]

87. This is the draft on the basis of which the *Memoria Económica*, dated 21 March 2007, was prepared. The *Memoria Económica* records the following, under a heading titled "*Economic regime*":

> "The regulated tariffs, premiums, supplements, and limits derived from any of these revisions will be applicable only to those facilities that have been registered definitively in the Administrative Registry of facilities for production in the special regime under the Ministry of Industry, Tourism and Commerce after 1 January of the year following the year in which the revision is made."[118]

88. There can be no doubt that Article 44.3 was specifically included as a protection to exempt registered installations against "*any*" revisions of the "*regulated tariffs, premiums, supplements, and limits*" contained in RD 661/2007.

---

114 **Exhibit C-85**, CNE Report 3/2007 of 14 February 2007, p. 6 (PDF 13).
115 **Exhibit C-85**, CNE Report 3/2007of 14 February 2007, p. 19 (PDF 22).
116 **Exhibit C-202**, Second Draft of RD 661/2007, 19 March 2007.
117 **Exhibit C-202**, Second Draft of RD 661/2007, pp. 24-25 (emphasis added).
118 **Exhibit C-203**, *Memoria Económica* for RD 661/2007, 21 March 2007, p. 10.

### (c) Spain's *ex post* interpretation of Article 44.3 is nonsensical and deprives it of any "*effet utile*"

89. Spain appears to argue that Article 44.3 only protected installations against tariff revisions made "*in the periodic reviews every four years*" and that Spain was therefore free to make wholesale changes to the incentive regime at any other time.[119] This is absurd. In RD 661/2007, Spain specified that the four-yearly tariff reviews (the first of which was planned for 2010) would not affect registered installations.[120] An investor, faced with the plain language of Article 44.3, could not have expected that the Government would apply tariff changes to existing facilities as long as those changes occurred outside the four-yearly review system. That is not what anyone reading RD 661/2007 could have expected. It is also not what the CNE and the Ministry represented when explaining the mechanism of RD 661/2007 and Article 44.3 specifically. The CNE repeatedly stressed the importance of stability in RE incentive systems and applauded the Government for the stable incentive scheme achieved by RD 661/2007 and, in particular, Article 44.3.[121]

## 4.4 RD 661/2007's status as a "Royal Decree" is irrelevant

90. Spain also suggests that a "*Royal Decree*" (such as RD 661/2007) is, by nature, subject to change by another law or regulation, so that the Claimants could not have reasonably relied on the continued application of the RD 661/2007 FIT.[122] Spain notes that, unlike a Royal Decree, a "*Royal Decree-Law*" is "*a regulation with force of law which the Constitution authorizes the government to approve in situations of extraordinary need or urgency…* [and] *is subject to… parliamentary validation*".[123] Spain seeks to portray a law as stable, while Royal Decrees are by their nature subject to change. In support of this argument, Spain relies on a publication which states that "*the Spanish FIT scheme has the legal Rank of a Royal Decree. Even though it is 'stronger' than for instance a Ministerial Order, the Spanish renewable associations have long called for a FIT law*".[124] Spain also refers to the preamble of a draft law that APPA proposed to the Government in 2009 regarding the "*need to strengthen legal certainty*", in which APPA clearly indicated that "*the rank*

---

[119] Counter-Memorial, para. 920(b).

[120] **Exhibit C-44**, Royal Decree 661/2007 of 25 May 2007, Article 44.3.

[121] See e.g., **Exhibit C-95**, CNE Presentation, "*Legal and Regulatory Framework for the Renewable Energy Sector*", 29 October 2008, pp. 25 and 27; **Exhibit C-79**, CNE Report 4/2004 on the proposal of Royal Decree regulating the methodology for updating and systematising the legal and economic framework of the production of electric energy under the special regime, 22 January 2004, p. 50; **Exhibit C-162**, CNE Report 83/2010 on the proposal of the Royal Decree regulating and modifying certain issues relating to the Special Regime, 14 September 2010, p. 24; **Exhibit C-85**, CNE Report 3/2007 of 14 February 2007, p. 19; and **Exhibit C-94**, CNE Report 30/2008 of 25 May, 29 July 2008, p. 20.

[122] Counter-Memorial, paras. 212-220 and 916.

[123] Counter-Memorial, para. 213.

[124] Counter-Memorial, para. 487 citing **Authority RL-62**, Miguel Mendonca *et al.*, "*Powering the Green Economy*" in The Feed-In Tariff Handbook, 2010.

*itself*" of the proposed draft Law was meant to enhance "*security and certainty required by investments*".[125]

91. Spain's argument misses the point. The question for the Tribunal is not whether Spanish law allowed a "*Royal Decree*" to be amended by subsequent legislation, but, rather, whether the Claimants had an expectation that Spain would not make retroactive changes to the RD 661/2007 FIT applicable to the Wind Farms, much less overhaul the remuneration regime altogether.

92. Any law or regulation in Spain (or, indeed, anywhere else) can, as a matter of domestic law, be changed or repealed by a subsequent act of equal or higher rank. The 1997 Electricity Law itself was modified 35 times during the 16 years it was in force.[126] This does not change the fact that a regulation can give rise to legitimate expectations. Spain accepts as much with respect to Article 30.4 of the 1997 Electricity Law, which itself changed many times. The question is thus whether it was legitimate for the Claimants to rely on the continued application of the regulatory regime created under RD 661/2007 and RD 1614/2010, both "Royal Decrees", and as set forth in those norms. There is simply no reason why their classification as "Royal Decree" should preclude reliance on the plain meaning of the content of the norms.

93. The fact that domestic players may have preferred the FIT to be set out in a law has no bearing on whether a regulation can give rise to legitimate expectations that are protected as a matter of international law (which they clearly are in this case).

### 4.5 Registration in the RAIPRE crystallised the economic right to the RD 661/2007 FIT

94. As explained in the Memorial,[127] registration in the RAIPRE confirmed that an RE installation had the right to receive the RD 661/2007 FIT.[128] Article 17 of RD 661/2007 titled "*<u>Rights of producers</u> under the special regime*", is unequivocal in setting one, and only one condition to the entitlement to Article 36 tariffs:

---

[125] Counter-Memorial, para. 488, citing **Exhibit R-187**, Presentation of the Draft Bill on Renewable Energy by the Association of Renewable Energy Producers (APPA) and Greenpeace on 21 May 2009 to the Ministry of Industry, Tourism and Trade, 21 May 2009, Preamble.

[126] **Exhibit C-204**, Aranzadi Westlaw, Modifications to Law 54/1997 as of 14 March 2017.

[127] Memorial, para. 141.

[128] Registration in the RAIPRE constitutes a declaration by an organ of the Public Administration which produces legal effects and in particular determines the legal economic regime applicable to the qualifying RE installation. All the declarations of intent of Public Administrations that produce legal effects are termed "administrative acts" in the Spanish legal order. Registration of an installation in the RAIPRE is an administrative act of the corresponding Autonomous Community. The RAIPRE is an act directed specifically at an individual RE installation for its benefit. See **Exhibit C-207**, Law 30/1992, of 26 November, on the Legal Regime of Public Administrations and Common Administrative Procedure, consolidated version as of 17 September 2014; and **Exhibit C-208**, Miguel Sánchez Morón, "Spanish Administrative Law", Editorial Tecnos, 12th ed.

> "[**t**]**he right to receive the regulated tariff**, or if appropriate the premium, shall be subject to final registration of the facility in the Register of production facilities under the special regime of the General Directorate of Energy Policy and Mines, prior to the final date set out in Article 22".[129]

95. This is corroborated in Spain's contemporaneous documents. A joint 2008 Ministry and IDAE publication confirmed that the RAIPRE carried the right to the tariff: "*the installations that achieve definitive inscription in the Special Regime Register (RIPRE) ... will have the right to those tariffs*".[130] Spain now alleges that the RAIPRE is just "*a way to control and know those involved in the S*[panish] *E*[lectricity] *S*[ystem]".[131] Spain does not present any contemporaneous evidence to support this contention; there simply is none.

96. In addition to RAIPRE registration, as explained in the Memorial[132] and elsewhere in this submission,[133] pursuant to RDL 6/2009, all new RE installations under the Special Regime had to register with the so-called Pre-Assignment Register.[134] This was a preliminary step prior to obtaining registration with RAIPRE and qualifying under the RD 661/2007 economic regime. Once pre-registered with the Pre-Assignment Register, the plant had a deadline of 36 months to obtain RAIPRE registration and thus benefit from the RD 661/2007 economic regime. Otherwise, as provided by Article 4.8 of RDL 6/2009:

> "**the economic right** [the RD 661/2007 FIT] associated with the inclusion in the remuneration Pre-Assignment Register will be withdrawn."[135]

97. The Wind Farms in which the Claimants invested had all been duly registered with RAIPRE by 9 December 2010.[136] Registration is achieved by means of a resolution which is issued to the installation in question. By way of example, the RAIPRE resolution issued for the Arroyal wind farm states that the installation is thereby "*REGISTER*[ed] *IN THE REGISTRY OF PRODUCTION*

---

129 **Exhibit C-44**, RD 661/2007 of 25 May 2007, Article 17(c) (emphasis added). Notably the chapeau of Article 17 states that the rights set out therein are subject only to Article 30.2 of the 1997 Electricity Law. This is important given that Spain's primary defence – that Claimants only should have expected a "reasonable return" – is derived from Article 30.4 of the 1997 Electricity Law. If Spain's intention was to put investors on notice that the "right" to the FIT granted by the RAIPRE was subject to change based on the "*reasonable return*" concept, one would have expected Spain to state this in the chapeau. It did not.

130 **Exhibit C-205**, IDAE Presentation, "*The sun can be yours*", February 2008, p. 34. See also **Exhibit C-206**, IDAE Presentation, "*The sun can be yours*", November 2007, p. 19.

131 Counter-Memorial, para. 386.

132 Memorial, paras. 173-178.

133 See section 5.3(c).

134 With the exception of PV installations whose separate pre-registration requirement was introduced by RD 1578/2008.

135 **Exhibit C-100**, Royal Decree-Law 6/2009 of 30 April 2009, Article 4.8.

136 **Exhibit C-105**, Certificate of Registration in the RAIPRE for Parque Marmellar dated 24 April 2007; **Exhibit C-106**, Certificate of Registration in the RAIPRE for Parque Lodoso dated 17 August 2007; **Exhibit C-107**, Certificate of Registration in the RAIPRE for Parque El Perul dated 20 June 2006; **Exhibit C-108**, Certificate of Registration in the RAIPRE for Parque La Lastra dated 19 September 2006; **Exhibit C-109**, Certificate of Registration in the RAIPRE for Parque Lora 1 dated 28 December 2007; **Exhibit C-110**, Certificate of Registration in the RAIPRE for Lora 2 dated 28 December 2007; **Exhibit C-111**, Certificate of Registration in the RAIPRE for Parque Sargentes dated 27 November 2009; and **Exhibit C-112**, Resolution registering in the RAIPRE for Parque Arroyal dated 9 December 2010.

*FACILITIES OF ELECTRIC ENERGY UNDER THE SPECIAL REGIME, AS FINAL*".[137] This resulted in the Regional Government of Castile and León declaring that "[t]*he economic regime applicable to the invoicing of power and energy supplied to the network will be established by the aforementioned Royal Decree 661/2007, of 25 May*".[138]

98. Consequently, once the Wind Farms achieved the RAIPRE registration, the Claimants were legally entitled to the RD 661/2007 economic regime for the entire useful lifetime of their plants and with no risk of future harmful changes.[139]

### 4.6 The July 2010 Agreement and RD 1614/2010 guaranteed the stability of the RD 661/2007 regime

99. As explained in the Memorial,[140] it is undisputed that in 2010 the Government announced a reform to the RE regulatory regime in Spain. It is also undisputed that the envisaged reform in 2010 led to direct discussions between the Ministry and CSP and wind industry associations in order to guarantee the long-term application of the RD 661/2007 FIT to those installations that had qualified to receive it.[141]

100. The Government aimed to address the concerns of CSP and wind investors in light of certain changes that had been imposed on the PV sector, including on existing plants, applicable to PV technology.[142] It was clear at the time that the Government's focus in scaling back the remuneration was not aimed at CSP or wind. The former Minister of Industry repeatedly explained that the adjustments would be decided through dialogue with the sectors and gave assurances that any reduction in premiums to renewable energy being contemplated by the Government would not be

137 **Exhibit C-112**, Resolution registering in the RAIPRE for Parque Arroyal dated 9 December 2010, p. 2.

138 **Exhibit C-112**, Resolution registering in the RAIPRE for Parque Arroyal dated 9 December 2010, p. 2.

139 **Exhibit C-44**, Royal Decree 661/2007 of 25 May 20017, Articles 14-15. Article 15 of RD 661/2007 specified the grounds upon which a RAIPRE registration could be revoked. Revocation of a RAIPRE registration would be permissible in the event of "[t]*ermination of activity as a production facility under the Special Regime*" or if the revocation was "*in accordance with the applicable legislation*" of the relevant Autonomous Community. There were, therefore, very limited grounds to revoke or revise the RAIPRE registration that granted the right to receive the RD 661/2007 FIT. Neither of these grounds is relevant to the Wind Farms: they have always produced electricity under the Special Regime and have never fallen foul of any regional legislation that would allow the RAIPRE registration to be revoked. The RAIPRE registrations have not been revoked or revised.

140 Memorial, paras. 179-181.

141 Memorial, para. 181 and **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Rate Structures*", 2 July 2010, p. 2.

142 **Exhibit R-104**, Royal Decree 1565/2010 of 19 November, which regulates and modifies certain aspects pertaining to the activity of electrical energy generation under the special scheme; and **Exhibit R-90**, Royal Decree-Act 14/2010, of 23 December, establishing urgent measures for the correction of the tariff deficit in the electricity sector.

applied retroactively.[143] He further stated that "*we* [the Government] *have never talked about retroactivity*".[144]

101. These discussions resulted in the July 2010 Agreement, recorded in the Ministry's July 2010 press release titled "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Rate Structures*".[145] Although certain temporary limitations to the RD 661/2007 economic regime were applied, specifically a cap on the number of hours that would benefit from the tariffs of RD 661/2007 and a reduction of the Premium until 2013,[146] the Government in turn "*guarantee[d] the current subsidies and rates of RD 661/2007 for the facilities in operation (and for those included in the pre-registration) starting in 2013*".[147] Indeed, Spain championed the July 2010 Agreement as a "short-term" measure that would have the advantage of "guaranteeing" the conditions of RD 661/2007 in the long-term.[148]

102. Spain contends that "[t]*he Claimant's arguments aimed at turning Royal Decree 1614/2010 into some kind of contract resulting from negotiations are, simply, nonsense*" and that "[t]*here are multiple examples that can be given about dialogues with associations carried out by the Government of Spain for the purpose of implementing a regulation*".[149] If what Spain is suggesting is that there was no agreement with the CSP and wind sectors, that argument is entirely at odds with the Government's representation in July 2010 that "*this agreement furthermore assumes the reinforcement of the visibility and stability of the regulation*".[150]

103. Thus, in December 2010, the Government introduced RD 1614/2010 for CSP and wind producers; it included and codified all the elements of the July 2010 Agreement. That RD 1614/2010 is a codification of the July 2010 Agreement: (i) was explicitly confirmed by the Government;[151] and (ii) can be verified by comparing the identity between the terms of the latter with the provisions of

143 **Exhibit C-210**, Europa Press, Press Article "*Sebastian gives assurance that cuts to renewable premiums will not be retroactive*", 26 April 2010.

144 **Exhibit C-210**, Europa Press, Press Article "*Sebastian gives assurance that cuts to renewable premiums will not be retroactive*", 26 April 2010.

145 **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010.

146 Memorial, paras. 250-251.

147 **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010, p. 2.

148 **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010.

149 Counter-Memorial, para. 515.

150 **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010, p. 2 (emphasis added).

151 **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010, p. 1 ("[i]*ndustry will immediately start the proceedings for transferring the content of the agreements into regulation*").

the former.[152] In particular, under Article 5.3 of RD 1614/2010, Spain confirmed its commitment as to the continued application of the FIT provided under RD 661/2007. Article 5.3 provides:

> "Without prejudice to that which is set forth in this Royal Decree, for wind technology facilities adhered to Royal Decree 661/2007, of 25 May, the revisions of the tariffs, premiums and upper and lower limits referred to in article 44.3 of the aforementioned Royal Decree, shall not affect facilities registered definitively in the [RAIPRE] that is maintained by the Directorate-General for Energy and Mining Policy as of 7 May 2009, nor to those that would have been registered in the Remuneration Pre-assignment Registry under the fourth transitional provision of Royal Decree-Law 6/2009, of 30 April, and that were to meet the obligation envisaged in article 4.8 thereof."[153] (emphasis added)

104. Therefore, pursuant to Article 5.3 of RD 1614/2010, no future tariff reviews would apply to wind farms that had obtained registration in the RAIPRE on or before 7 May 2009, nor to any installation that at the time of entry into force of RDL 6/2009 met the requirements for registration in the Pre-Assignment Register (and were effectively registered in the RAIPRE on or before 31 December 2013).[154] As explained above, the Wind Farms had all obtained registration in the RAIPRE prior to the Claimants' investment.[155]

105. Spain contends that "*Article 4* [sic] *of RD 1614/2010 allows us to see that all that article does is to extend the provisions of the second paragraph of Article 44 (3) paragraph 2 of RD 661/2007 to plants not covered by it*".[156] However, Spain's contemporaneous documents show that Article 5.3 goes further than that. Article 5.3 clarified that the stabilisation commitments were to apply to the Premium, in addition to the Fixed Tariff and the upper and lower limits (Article 44.3 of RD 661/2007 only referred expressly to the Fixed Tariff and the upper and lower limits).[157] In this

---

[152] See **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010, p. 2; and **Exhibit C-46**, Royal Decree 1614/2010 of 7 December 2010, Article 5.3. The July 2010 Agreement provided that: (i) "[t]*he premium for wind provided by RD 661/2007 will be reduced by 35% until 2013*"; (ii) "[i]*t is agreed to limit the number of hours with above-market remuneration rights for wind power and solar thermal plants*"; and (iii) "*stability and certainty for their future development*". These terms are reflected in Articles 5.1 (reduction of the premium), 2.4 (limitation of hours) and 5.3 (stability and certainty) of RD 1614/2010 respectively.

[153] **Exhibit C-46**, Royal Decree 1614/2010 of 7 December 2010, Article 5.3.

[154] See Memorial, paras. 134 *et seq.*

[155] **Exhibit C-105**, Certificate of Registration in the RAIPRE for Parque Marmellar dated 24 April 2007; **Exhibit C-106**, Certificate of Registration in the RAIPRE for Parque Lodoso dated 17 August 2007; **Exhibit C-107**, Certificate of Registration in the RAIPRE for Parque El Perul dated 20 June 2006; **Exhibit C-108**, Certificate of Registration in the RAIPRE for Parque La Lastra dated 19 September 2006; **Exhibit C-109**, Certificate of Registration in the RAIPRE for Parque Lora 1 dated 28 December 2007; **Exhibit C-110**, Certificate of Registration in the RAIPRE for Lora 2 dated 28 December 2007; **Exhibit C-111**, Certificate of Registration in the RAIPRE for Parque Sargentes dated 27 November 2009; and **Exhibit C-112**, Resolution registering in the RAIPRE for Parque Arroyal dated 9 December 2010.

[156] Counter-Memorial, para. 547.

[157] In practice, under Article 44.3 of RD 661/2007 the Premium was also subject to stabilisation commitments, given that the upper and lower limits of the Premium were subject to Article 44.3. Article 4 of RD 1614/2010 clarified this, by expressly referring to the Premium.

regard, the Ministry recognised that Article 5.3 of the draft RD 1614/2010 offered a "*guarantee… superior to the one provided by the current Article 44.3 of the Royal Decree 661/2007*".[158]

106. The Ministry also made clear that the additional protection provided by Articles 4 and 5.3 of RD 1614/2010 was part of the agreed bargain with the CSP and wind sectors as set out in the July 2010 Agreement. Indeed, the Ministry referred to the additional protections as "*compensation*" for the minor limitations placed on the FIT.[159] This "*compensation*" was offered even though Spain recognised that RD 1614/2010 had limited negative impact on owners of installations. In its report on the draft Royal Decree, the CNE stressed that with respect to CSP and wind technologies, "*the economic impact of the payment amendments contained in the proposal of the Royal Decree… is very limited*".[160] Similarly, the Ministry's report on RD 1614/2010 confirmed that "[t]*his measure does not represent any reduction in the profitability of the plants*".[161] Nevertheless, even with such a minor change, Spain considered it necessary to provide "*compensation*" to affected installations in the form of reiterated commitments to stability. This commitment was necessary to reassure investors in light of the measures that have been approved in 2010 with regards to PV installations.[162]

107. The State Council report on the draft RD 1614/2010 makes clear that Article 5.3 of RD 1614/2010 was a "*safeguard clause*", which provided that tariff revisions would not apply to wind installations. The State Council noted that this "*establishes the immutability* [inmodificabilidad] *of the premiums in the future*".[163] Given the significance of this provision, the State Council concluded that this was a "*self-binding*" [auto-vinculante] provision "*with respect to subsequent revisions to the law or the premiums*".[164] The State Council then provided a clear warning, querying whether it was appropriate given that changes might be required in the future.[165]

108. The Government noted this warning from the State Council but nevertheless resolved that the measure was appropriate "*compensation*" for the changes agreed with the wind and CSP sectors:

---

158 **Exhibit C-211**, Ministry of Industry, Tourism and Commerce, "Report on the Draft RD 1614/2010", 26 October 2010, fn. 9.

159 **Exhibit C-211**, Ministry of Industry, Tourism and Commerce, "Report on the Draft RD 1614/2010", 26 October 2010, p. 11.

160 **Exhibit C-162**, CNE Report 83/2010 on the proposal of the Royal Decree regulating and modifying certain issues relating to the Special Regime, p. 23 (our transaltion).

161 **Exhibit C-187**, *Memoria Económica* for RD 1614/2010, 1 December 2010, p. 8.

162 Second Moreno Statement, paras. 23-24. See also **Exhibit C-120**, Investment Advisory Committee Paper on Project Greco dated 11 July 2011, p. 2 ("*Having undergone a period of significant upheaval and uncertainty during 2010, the new renewable plan underlines the strong commitment of the Spanish government to wind energy as the key technology which will allow it to achieve its long term renewable energy goals*").

163 **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010, p. 24 (PDF 27).

164 **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010, p. 24 (PDF 27).

165 **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010, p. 24 (PDF 27).

> "The Council of State questions the provisions that ensure the invariability of the premium for wind and solar thermal plants. These provisions are considered appropriate as [compensation for] the modifications with financial effects that are implemented in this Royal Decree."[166] (emphasis added)

109. As such, the Government confirmed that it had tied its hands and had reiterated its commitment not to subject existing installations to future tariff changes and that it understood the extraordinary nature of its commitment. This makes it clear that: (a) RD 1614/2010 assured that the incentives for registered wind and CSP installations were not subject to future reviews; (b) the Government was satisfied that these provisions were appropriate; and (c) the Government was satisfied that these provisions were effective. As explained immediately below, the Government's subsequent behaviour confirms that it was committed to respecting the stability of the regime for wind and CSP installations going forward, in accordance with the July 2010 Agreement.

110. Finally, the Government's understanding was matched by the RE associations. Following the publication of RD 1614/2010, the Spanish Wind Energy Association (*Asociación Empresarial Eólica* or **AEE**), whose statements Spain has quoted more than eight times in its Counter-Memorial,[167] expressly stated that "[f]*or Installations which obtained the final registration with the RAIPRE before 7 May 2009 or installations which obtained Pre-Registration under RD-L 6/2009, that is to say, installations under* ***RD 661/2007, the revisions of the tariffs, the premiums and the cap and floor, stated by Article 44.3 RD 661/2007, WILL NOT AFFECT the afore mentioned installations***".[168]

111. All the foregoing facts confirm the objective reasonableness of the Claimants' expectations when they made their investment in reliance on the continued application of the economic rights granted to the Wind Farms under the RD 661/2007 and RD 1614/2010 regime. They also show why a complete overhaul of that regime was not foreseeable at the time of making their investment. It is somewhat extraordinary that, despite the wealth of clear and consistent contemporaneous evidence, Spain would now advance defences entirely incompatible with that evidence.

---

166 **Exhibit C-187**, *Memoria Económica* for RD 1614/2010, 1 December 2010, p. 11.

167 Counter-Memorial, paras. 326, 450, 451, 477; 600-601, 608, 613 and 617.

168 **Exhibit C-212**, Asociación de Energía Eólica, Work group meeting on prices, p. 67 (emphasis in the original).

## 5. THAT SPAIN WOULD MAKE MATERIAL RETROACTIVE CHANGES TO THE RULES GOVERNING THE CLAIMANTS' INVESTMENT WAS UNFORESEEABLE AT THE TIME OF INVESTING

112. Spain argues that the Claimants knew or should have known that Spain could introduce retroactive changes to the regulation applicable to their investment, changes that would entirely overhaul the parameters for remuneration of the Wind Farms, as the Disputed Measures did. Essentially, this argument is based on the following premises:

(a) Spain argues that the Claimants' only expectation was to receive a "*reasonable return*". In particular, Spain suggests that the reference to "*reasonable return*" in Article 30.4 of the 1997 Electricity Law should have put the Claimants on notice that retroactive changes would be made.[169]

(b) Related to this, Spain addresses the so-called principle of economic sustainability and suggests that this should also have put the Claimants on notice that retroactive changes would be made.[170]

(c) Spain refers to certain modifications to the regulatory regime introduced before (and after) the Claimants' investment that, in Spain's submission, were similar in nature to the Disputed Measures.[171]

(d) In an attempt to bolster argument referred to in (c), Spain also tries to set the Claimants' date of investment later in time, so as to impute them more knowledge than they had when they actually decided to invest.[172]

(e) Spain also refers to various Spanish Supreme Court judgments before (and after) the Claimants' investment that, or so it claims, validate the Disputed Measures.[173]

(f) Spain argues that the PER 2005-2010 (and other Renewable Energy Plans) put the Claimants on notice that retroactive changes to the RD 661/2007 regime would be made.[174]

(g) Spain relies on a boilerplate clause in the SPA to argue that the Claimants anticipated regulatory change.[175]

---

169 Counter-Memorial, para. 385.
170 Counter-Memorial, para. 351.
171 Counter-Memorial, para. 340.
172 Counter-Memorial, paras. 582-585.
173 Counter-Memorial, paras. 333-344.
174 See for example, Counter-Memorial, paras. 364-372 and 406-419.

113. None of these arguments has any merit. They are addressed in order immediately below.

## 5.1 The "*reasonable return*" defence is a fallacy

### (a) The concept of "*reasonable return*" was defined for the first time in 2013

114. The Counter-Memorial focuses in large part on the reference to "*reasonable return*" contained in Article 30.4 of the 1997 Electricity Law, with more than 100 references to the concept of "*reasonable return*" or "*reasonable profitability*" more than 100 times.[176] At no point prior to the Disputed Measures, however, did any legislation, regulation or other official statement by the Government specify that "*reasonable return*" meant a 7.398% pre-tax return. Spain's own documents confirm that RDL 9/2013 introduced "*innovations*" such as "*the concretion* [concreción] *of the concept 'reasonable return' by specifying that it would be based on, before taxes, the average returns in the secondary market of the State's ten-year bonds plus the adequate differential*".[177] The great importance Spain now places on the "*reasonable return*" or "*reasonable profitability*" concept (which it portrays as "*the cornerstone*"[178] of the RE system) is nothing more than a convenient *ex post* construct.

115. The evolution of the regulatory framework set out below shows that the permitted return was never before established in the law nor communicated to investors. There was, in fact, no such thing as a "permitted" return. The only variable that the Claimants could take account when determining their return expectations was the actual RD 661/2007 FIT set out in Article 36. This was what was known to the Claimants and, indeed, the only parameter they needed. As Spain expressly stated in the Preamble to the RD 661/2007: the FIT was the instrument that provided a "*reasonable return*".[179]

116. RD 2366/1994. Spain contends that RD 2366/1994 established the principles of the Special Regime.[180] If this is the case, the contemporaneous Government documents confirm that the concept of "*reasonable return*" was created with principles that flatly contradict the position now

---

175 Counter-Memorial, paras. 606-610.

176 Counter-Memorial, paras. 10, 15, 16, 17, 18, 19, 21, 22, 27, 29, 33, 38, 209, 281, 284, 295, 298, 299, 301, 302, 303, 304, 306, 309, 311, 316, 318, 319, 321, 322, 328, 330, 334, 338, 339, 340, 342, 344, 345, 347, 351, 352, 370, 374, 375, 376, 382, 383, 391, 394, 423, 425, 440, 441, 445, 452, 454, 459, 478, 482, 483, 486, 487, 489, 499, 507, 511, 520, 521, 522, 523, 525, 530, 531, 535, 538, 544, 553, 558, 591, 617, 621, 634, 651, 662, 672, 675, 677, 682, 686, 687, 688, 689, 690, 696, 701, 702, 703, 725, 728, 734, 736, 738, 740, 742, 744, 747, 753, 755, 756, 757, 758, 762, 766, 779, 788, 793, 798, 830, 845, 909, 916, 934, 935, 947, 959, 977, 978, 982, 988, 992, 1002, 1003, 1007, 1012, 1013, 1014, 1016, 1043, 1059, 1060, 1063, 1070, 1077 and 1079.

177 **Exhibit R-123**, Decision number 937/2013 from the Permanent Commission of the Council of State, 12 September 2013, on the Draft Bill on the Electricity Sector, published in the Official Gazette, p. 15 (our translation).

178 Counter-Memorial, para. 281.

179 **Exhibit C-44**, RD 661/2007 of 25 May 2007, Preamble.

180 Counter-Memorial, para. 305 ("*we must emphasize that the creation of the RE took place through Royal Decree 2366/1994, of 9 December*").

taken by Spain in its Counter-Memorial. The *Memoria Económica* for RD 2366/1994,[181] calculated that qualifying RE installations would receive a return of between 18.62% and 20.54%.[182] The Council of State reviewed the draft RD 2366/1994 legislation prior to its implementation[183] and noted that "*the new economic regime guarantees energy producers a profitability of 20%, which seems more reasonable*" given that RE installations make "*substantial investments on the basis of 'legitimate expectations' that the Administration would maintain the conditions under which they were granted authorization*".[184] Demonstrably therefore, since the origins of the Special Regime, two fundamental points were known and acknowledged by Spain. First, investors under the Special Regime had "*legitimate expectations*", based on the "*substantial investments*" involved, that the economic conditions under which they were authorised to invest would be maintained. Secondly, double digit profitability was considered "*more reasonable*".

117. The 1997 Electricity Law. The "*reasonable return*" notion comes quite literally from four words in Article 30.4 of the 1997 Electricity Law, which provides as follows:

> "To determine the [FITs] the voltage level of electricity delivered to the network must be considered, along with the actual contribution to improvement of the environment, primary energy savings and energy efficiency, the economically justifiable production of usable heat, and the investment costs that have been incurred, for the purpose of achieving reasonable rates of return with respect to the cost of money on the capital market."[185]

118. Article 30.4 simply provided the framework that would serve as the basis for Spain to set the specific remuneration that would provide a "*reasonable return*" through regulation. Spain recognises this.[186] Thus, when setting FITs through regulation (such as RD 661/2007), the regulator was to take into account a number of factors with the aim of achieving a "*reasonable return*". "*Reasonable return*" was not, therefore, aimed at investors. It is the basis upon which the regulator was to calculate the tariff. Once the remuneration under the relevant Royal Decree was set, there was no reason for qualifying RE producers to second-guess whether the Government's implementation of Article 30.4 (including the concept of "*reasonable return*") was correct or on what basis the Government had determined that the remuneration offered a "*reasonable return*". Rather, they were entitled to rely

---

[181] The *Memoria Económica* refers to the reports produced by each ministry when preparing the draft of legislation, setting out the justification for the proposed legislation, as well as opportunity reports regarding the timing, necessity and appropriateness of the proposed legislation.

[182] **Exhibit C-230**, *Memoria Económica* for RD 2366/1994, p. 45.

[183] Spain correctly notes that the Council of State is "*the Government's Supreme Consultive Body*" (Counter-Memorial, para. 783).

[184] **Exhibit C-214**, Council of State Report on RD 2366/1994, 10 November 1994, p. 15 (emphasis added).

[185] **Exhibit C-39**, Law 54/1997 of 27 November 1997, Article 30.4 (emphasis added).

[186] Counter-Memorial, para. 321 ("*Article 30.4 of Act 54/1997 does not establish the precise mechanism through which reasonable profitability must be granted*").

on the Government's complying with its own law. There is no suggestion by Spain that RD 661/2007 breached the 1997 Electricity Law, whether at the time or when it was repealed. This is what Spain did with RD 661/2007.

119. RD 661/2007. As noted in the Memorial,[187] the Preamble of RD 661/2007, states that "*the economic framework*" established in RD 661/2007 – in other words the FIT – guarantees "*owners of special regime installations… a reasonable return*".[188] As explained in section 6.3 below, Spain clearly contemplated the possibility of a return higher than 7% *post-tax* for wind farms. Consequently, any investor investing in reliance on RD 661/2007 had express confirmation from Spain that the FIT it would receive thereunder would provide it with a return that Spain considered to be "*reasonable*". No other interpretation is possible.

120. Furthermore, Spain accepts that the RD 661/2007 economic regime was not designed to "cap" an investor's return at a particular level. Rather, it was designed to achieve a target return. That is all the concept of "*reasonable return*" is, a target used by Spain to set the FIT.[189] An investor may do better or do worse than the target rate of return, depending on how efficient investors were when selecting their particular project.[190] Thus, Spain was well aware that, under its FIT regime, some projects would earn in excess of the target rate of return. That is, in fact (as explained above) how efficient FIT schemes work: they encourage investors to take operational and technological risks in the hope that they will beat the implicit cost target and be rewarded for their efficiency and risks. The idea that the "*reasonable return*" is the cornerstone of the entire regulation is a 2013 invention,[191] based on an entirely new reality, unknown to investors at the time they made their investment under the Original Regulatory Regime.

### (b) Spain's *ex post* emphasis on "*reasonable return*" is contrary to the facts and its own contemporaneous documents

121. According to Spain, the principle of "*reasonable return*" operates as a guarantee to RE investors: "*The reasonable return is a guarantee for the investor. By legally imposing that the subsidies must*

[187] Memorial, fn. 423.
[188] **Exhibit C-44**, RD 661/2007 of 25 May 2007, Preamble.
[189] Counter-Memorial, para. 307.
[190] As Brattle states: "*The Original Regulatory Regime set a common target for all wind investors: they could earn more than what Spain considered reasonable if they managed to build and operate wind farms while beating the efficiency levels that were implicit in the FIT. Wind investors beat the targets in part by choosing optimal locations and operating efficiently. It is reasonable for them to retain the benefits of beating Spain's targets; it is inappropriate to allege that the profits are excessive in hindsight*", Brattle Rebuttal Regulatory Report, para. 14.
[191] **Exhibit R-123**, Decision number 937/2013 from the Permanent Commission of the Council of State, 12 September 2013, on the Draft Bill on the Electricity Sector, published in the Official Gazette, (our translation).

*provide a reasonable return, the Law seeks to give security to investors*".[192] Similarly, Spain notes that "*the only guarantee that investors had was to achieve a reasonable return in the context of a technically and economically sustainable SES*".[193]

122. Both the Claimants and the Respondent therefore accept that, through legislation, Spain made a guaranteed commitment to RE investors under the Special Regime.[194] This is a fundamental point.[195] The parties disagree, however, on the terms of the guarantee. On the Claimants' view, as explained above,[196] the reference to "*reasonable return*" in the 1997 Electricity Law is undetermined and unquantified. It has no independent meaning in isolation. This is obvious from its wording.[197] As admitted by Spain, "*Act 54/1997 does not establish the precise mechanism through which reasonable profitability must be granted*".[198] "*Reasonable return*" is only meaningful when it is translated by a regulation into a specific tariff to which qualifying RE installations are entitled. This is what occurred with RD 2818/1998, RD 436/2004 and RD 661/2007. As noted above, investors were intended to rely on these tariffs as being guaranteed; this is inherent to any efficient FIT system and Spain expressly confirmed this.

123. Spain now takes the position that the guarantee it offered to RE investors: (a) "*requires a balance between the cost of the premiums for consumers and the profitability for the investor*";[199] (b) "*has a dynamic character*";[200] and (c) "*imposes on the regulator an obligation of a result*".[201] These are considered in turn.

*(i) The "balance between the cost of the premiums for consumers and the profitability for the investor"*

124. Spain's argues that the price of the consumption of electricity in Spain must reflect the cost of its generation and distribution.[202] This is not disputed nor does it assist Spain. As stated in the section 5.2 below, having opted to induce RE investment through guaranteed incentives, Spain was obliged to fix electricity charges to cover the cost of those incentives.[203] It simply failed to do so.

---

192 Counter-Memorial, para. 319 (emphasis added).
193 Counter-Memorial, para. 33.
194 Memorial, para. 29; Counter-Memorial, paras. 19, 525 and 917.
195 This provides the basis of the Claimants' alternative damages claim (see section 26).
196 See above, paras. 112 and 113.
197 **Exhibit C-39**, Law 54/1997 of 27 November 1997, Article 30.4.
198 Counter-Memorial, para. 321.
199 Counter-Memorial, paras. 309(a) and 311-314.
200 Counter-Memorial, paras. 315 *et seq*.
201 Counter-Memorial, paras. 321 *et seq*.
202 Counter-Memorial, paras. 224-228.
203 See section 5.2.

125. The text of RD 661/2007 stated that the tariffs it established provided "*reasonable return for their investments, and the consumers of electricity on assignment of the costs attributable to the electricity system which is also reasonable*".[204] Spain thus confirmed that RD 661/2007 provided reasonable profitability and reasonable prices for consumers. Spain cannot now disavow this assurance it made to investors.

*(ii) The "dynamic character" of reasonable return*

126. The principle of "dynamic reasonable return" allegedly empowers Spain to change the profitability that it considers reasonable.[205] On Spain's understanding, it can change the profitability of the Claimants' investment unilaterally and whenever it elects to do so, even when the applicable regulation says the opposite. Spain notes that Article 30.4 of the 1997 Electricity Law "*defines the reasonable return with reference to the cost of money on the capital market*".[206] Spain then claims that there is nothing "[a]*s dynamic as is the cost of money on the capital market*",[207] which apparently means that it can make retroactive changes to the RD 661/2007 economic regime. This does not work for a number of reasons.

127. First, a guarantee in which one party can unilaterally modify the key terms – including the return that the other party may earn – is clearly no guarantee at all. Spain may of course change the terms of its RE incentive scheme as it considers appropriate. It may not, however, change the terms once it has already induced the investor to sink its capital into the investment and promised the investor that its installations will be exempt from future tariff reviews. This is not how FITs work generally[208] nor is it consistent with the terms of RD 436/2004, RD 661/2007, or RD 1614/2010. These regulations expressly exempted registered installations from future tariff revisions.

128. Secondly, had Spain implemented a dynamic rate of return, it would not have been able to attract RE investment. This is because most of the investment in wind farms is made up front and can only be repaid after many years.[209] Investors will only sink this capital up front if they have long-term certainty as to the return the investment will provide.[210] Spain was conscious of this, which explains

[204] **Exhibit C-44**, Royal Decree 661/2007 of 25 May 2007, Preamble.
[205] Counter-Memorial, paras. 315-318.
[206] Counter-Memorial, para. 316.
[207] Counter-Memorial, para. 318.
[208] Brattle Regulatory Report, paras. 7-11 and 35-90.
[209] Brattle Regulatory Report, paras. 48, 55, 69-71.
[210] Brattle Regulatory Report, para. 9.

its inclusion of the tariff protection for existing installations at Article 40.3 of RD 436/2004, Article 44.3 of RD 661/2007 and Article 5.3 of RD 1614/2010. The CNE made all of this very clear.[211]

129. Thirdly, in essence, Spain claims that the reference in the 1997 Electricity Law to the cost of money on the capital markets (i.e. interest rates) should have put the Claimants on notice that retroactive changes could be made if there was a change in interest rates. In other words, what might be a "*reasonable return*" in 2007 (when RD 661/2007 was passed) might not be a "*reasonable return*" at some later date if interest rates go down. If Spain's dynamic interpretation were correct, then Spain should have *increased* the RD 661/2007 FIT when interest rates were at their historic high in 2009. That did not happen. The reason it did not happen is because it is not what the Spanish regulatory regime says nor what it was intended to provide. Equally, nothing in the regulatory regime suggests that the FIT would be reduced if interest rates went down. Spain does not and cannot point to a single document in support of this claim. Interestingly, the only reference to "*cost of money on the capital markets*" in RD 661/2007 is in Article 44.3, i.e. in relation to tariffs to be set for new plants. That was a clear confirmation by Spain that interest rates would play a role in the future, but that changes in interest rates would not affect existing plants.

130. Moreover, the proxy that Spain uses to judge the cost of money on the capital markets is the Spanish ten-year bond. The ten-year bond yield in 2007 (when RD 661/2007 was passed) was essentially identical to the ten-year bond yield in 2013 (when RD 661/2007 was repealed and replaced). In other words, there was no change in the cost of money on the capital markets justifying Spain's retroactive changes.[212]

131. Fourthly, the dynamic character allegedly "*makes it possible to determine whether profitability at a given time is reasonable or not*".[213] Not a single contemporaneous document supports this. Moreover, Spain never made any finding that the Wind Farms were being unreasonably profitable.[214] Therefore, even in Spain's case, there were no rational grounds to adjust the remuneration provided by RD 661/2007.

---

211 **Exhibit C-94**, CNE Report 30/2008 of 25 May, 14 February 2007, 5.2: "*Production facilities under the special regime usually are capital-intensive and have long recovery periods. The regulation of generation facilities under the special regime established in Royal Decree 661/2007 has tried to minimise regulatory risk for this group, offering security and predictability for economic incentives during the lifespan of the facilities, establishing transparent mechanisms for the annual updates of said incentives and exempting existing facilities from revision every four years because the new incentives that are being put into place only affect new facilities. The guarantees provided for in this regulation make it possible to find better financing, lower costs for projects and less impact on the electrical tariff that consumers ultimately pay.*"

212 See Brattle Rebuttal Regulatory Report, Figure 6 ("*Decline in the Ten-Year Bond Yield after Summer 2012*").

213 Counter-Memorial, para. 317.

214 See below, section 6.1.

*(iii) Reasonable return "imposes on the regulator an obligation of a result"*

132. No investor would invest in an RE installation solely in reliance on Article 30.4 of the 1997 Electricity Law. It provides no certainty and no detail of any kind as to the economic regime applicable to RE. It states little other than providing that the premiums for RE installations will be set by regulation. It provides that, in determining the premium, the regulator must consider various factors, including the environmental benefit derived from RE installations, for the purpose of providing a "*reasonable return*".

133. Article 30.4 does not specify what that return should be. On the contrary, it requires the regulator to determine a premium that provides a "*reasonable return*". Once the remuneration under the relevant Royal Decree was set there was no reason for qualifying RE producers to second guess whether the Government's implementation of Article 30.4 (including the concept of "*reasonable return*") was incorrect. This has no unique significance; other States use similar concepts to set FITs.[215] What makes Spain unique is that it is now using this concept as justification to alter FITs for existing installations. It would be absurd if the law stated otherwise and required the regulator to aim to provide an *un*reasonable return. The regulator followed this instruction and implemented a premium system through the regulations RD 2818/1998, RD 436/2004 and RD 661/2007. Thus, the regulator complied with its obligation of result by setting these remuneration systems, the text of which confirmed that the premiums they established were reasonable and provided a "*reasonable return*".[216] The "*reasonable return*" principle thus in no way affected the Claimants' entitlement to the guaranteed incentives that Spain committed to provide.

**5.2 The Tariff Deficit is a problem of Spain's own making**

134. The principle that the income of the electricity system should reflect its costs is known as the "cost-reflectivity" principle under EU law and the "income sufficiency" principle under Spanish law.[217] The principle holds that Spain is obliged to ensure that electricity prices are set in such a way that they cover the full costs of electricity generation.[218] This principle is binding on Spain as a matter of Spanish and EU law. Spain's systematic failure to adhere to this obligation – even amidst the repeated protestations of its own energy regulator – resulted in the income of the electricity system

215 **Exhibit RL-62**, "Powering the Green Economy. The feed in tariff handbook." Miguel Mendonça, David Jacobs and Benjamin Socacool. Editorial. Earthscan, 2010, table 6.1 Feed in Tariffs worldwide.

216 **Exhibit C-73**, RD 2818/1998 of 23 December 1998, Preamble; **Exhibit C-41**, RD 436/2004 of 12 March 2004, Preamble.

217 Brattle Rebuttal Regulatory Report, paras. 68, 137 and 202.

218 Brattle Rebuttal Regulatory Report, paras. 68, 137 and 202.

failing to cover its costs.[219] This failure, which is solely attributable to Spain, is what caused the Tariff Deficit.

**(a) Spain controls the income of the Electricity System and its regulated costs**

135. The CNMC manages the settlements made within the Spanish electricity system (**Spanish Electricity System** or **SES**).[220] All income received from the consumption of electricity in Spain flows to the CNMC.[221] The CNMC then distributes these funds to the different participants in the electricity sector (e.g. all electricity generation companies, distribution companies) in 14 separate payments during the calendar year known as "*liquidaciones*".[222] The income to the Spanish Electricity System is the sum of payments made for electricity consumed in Spain.[223]

*(i) The costs of the Spanish Electricity System*

136. The cost of electricity in Spain is made up of three components:

(a) The cost of electricity generation. Since the liberalisation of the market in 1997, this is set by the market according to the pool price.

(b) The cost of the regulated activities related to electricity transportation and distribution. These include the costs of the use of the high-voltage networks (transport activity) and low-voltage networks (distribution activity) but also incorporates many other costs that are unrelated to the cost of electricity supply, such as the incentives under the Special Regime,[224] the incentives for the local coal industry, compensation for the nuclear moratorium, costs for extra-peninsular activities, or payments for operators of the system, the market and CNE (together, the **Regulated Activities**). Spain controls this cost.

(c) The cost of taxes imposed on the electricity system by Spain.[225] Spain also controls this cost.

---

[219] Brattle Rebuttal Regulatory Report, paras. 68, 137 and 202.
[220] This is not in dispute; see Counter-Memorial, para. 231(d).
[221] **Exhibit C-231**, Royal Decree 2017/1997 of 26 December, organising and regulating the liquidation procedure of transport costs, distribution and tariff, regarding the permanent system costs and the costs of diversification and security of supply (published on 27 December 1997), p. 38042, Sole Additional Provision.
[222] Counter-Memorial, para. 231(d).
[223] Counter-Memorial, paras. 244-246.
[224] Strictly speaking, incentives under the Special Regime are the result of environmental policies.
[225] The taxes that Spain imposes on the electricity system are addressed at section 5.2(e).

*(ii) The income of the Spanish Electricity System*

137. The income of the electricity system is determined by electricity prices in Spain, which, as explained above, are controlled by Spain save for the pool price. The key issue to appreciate when considering electricity prices in Spain is the Government's legal obligations when fixing the Network Access Tolls. Article 15 of the 1997 Electricity Law, on the "*remuneration for activities*" provided that "*activities destined to the production of electricity shall be remunerated in accordance with the law, funded by tolls and the prices paid*"[226] by the "*consumers*".[227] This means that the costs of the Regulated Activities were ultimately to be covered by the Network Access Tolls that appear on the electricity bill.[228] In order to avoid any deficit, these Network Access Tolls were meant to be set at levels sufficiently high to cover the costs of the Regulated Activities (including the FITs).

138. Article 17 of the 1997 Electricity Law provided that it was the Ministry's responsibility to issue the necessary provisions for the establishment of network access tolls, based on the costs of regulated activities of the system in question.[229] Therefore, wholesale prices for electricity produced are fixed by the market and the cost of the Regulated Activities, including the RD 661/2007 FIT, are covered by the Network Access Tolls fixed by the Government. The CNE confirmed this: "*Total yearly amount of regulated tariffs and premiums are included in the Access tariffs paid for by consumers*".[230]

139. When setting the Network Access Tolls, the Government is therefore subject to the so-called "*principle of tariff sufficiency*", i.e. the obligation to establish the tolls at levels that are sufficient to cover the costs of the Regulated Activities. The principle of tariff sufficiency is reflected in Article 18.1 of the 1997 Electricity Law (as in force in 2008), which provides that the "*last resort tariffs*" (the price paid by the domestic consumer) "*will be calculated in such a way that they respect the principle of tariff sufficiency*".[231]

140. This is also a binding obligation under EU Law:

---

226 **Exhibit C-39**, Law 54/1997 of 27 November 1997, Article 15.1 (our translation).

227 **Exhibit C-39**, Law 54/1997 of 27 November 1997, Article 15.2 (our translation).

228 For convenience the Claimants continue to use the term Network Access Toll in this Reply Memorial when referring to the element of the electricity price that is fixed by the Government and which must take into account certain costs, such as *inter alia* the costs of the Special Regime. The Spanish Electricity Act 24/2013, 26 December 2013 (Preamble and Article 16) introduces a conceptual distinction between "access tolls" contributing towards covering the costs of the transmission and distribution grids, and "charges" covering the cost of other system regulated activities, including, among others: (a) the financial incentives to Special Regime units; (b) "capacity payments" that are made to power stations even if they do not despatch, as a reward for remaining available to generate electricity if needed; (c) the costs of providing electricity in the Balearic Islands, the Canary Islands, and in the cities of Ceuta and Melilla in northern Africa; and (d) the annual payments relating to the past Tariff Deficit of the electricity system accumulated over many years, including interest.

229 **Exhibit C-39**, Law 54/1997 of 27 November 1997, Article 17.1.

230 **Exhibit C-96**, CNE Presentation, "*Renewable Energy Regulation in Spain*", February 2010, p. 37.

231 **Exhibit C-39**, Law 54/1997 of 27 November 1997, Article 18.1.

> "National regulatory authorities should be able to fix or approve tariffs, or the methodologies underlying the calculation of the tariffs… [N]ational regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal, avoided network costs from distributed generation and demand-side management measures."[232]

141. On 15 February 2004, the Supreme Court confirmed that the principle of tariff or income sufficiency was a binding principle under Spanish law that the Government had to comply with when setting Network Access Tolls, "*taking into consideration the interest rates, electrical demand, and the appropriate distribution of efficiency for competition and to ensure that* [the toll or tariff] *is sufficient in any case*", in such a way "*that the sum of the supply and access tariffs is sufficient to satisfy all of the costs of the regulated electrical activities*".[233]

142. Despite this, the Government did not abide by the tariff sufficiency principle. Consequently, in October and November of 2011, the Supreme Court ordered the Government to raise the Network Access Tolls, finding that they had been kept artificially low.[234] Spain does not dispute this.

**(b) Spain failed to set electricity prices at a level sufficient to cover the costs of electricity**

143. Compliance by the Spanish authorities with the principle of tariff sufficiency is essential to avoid a situation where there is insufficient income to cover the costs of the Regulated Activities. This would inevitably result in a deficit, which is precisely what has happened.[235] Indeed, has maintained the tolls constant since 2011, notwithstanding the increase in costs of Regulated Activities. The CNE stressed in 2011 that the Network Access Tolls that the Ministry was fixing were "*clearly insufficient and will not cover the estimated access costs; nor will said access tariffs sufficiently comply with the sector's legally defined limits in terms of the 2011 deficit*".[236] The Government, however, continued to fail to comply with the 1997 Electricity Law by setting tolls at insufficient levels to cover the costs of the Regulated Activities. In essence, Spain provided a subsidy to consumers, who did not pay for the full cost of the electricity system as required by Spanish and EU law.

---

232 See **Exhibit C-136**, European Commission Directive 2009/72/EC on common rules for the internal market in electricity, Preamble, para. 36.

233 **Exhibit C-232**, Decision of the Spanish Supreme Court (Contentious-administrative Chamber), Appeal No. 34/2003, 15 February 2004, Legal Reasoning, Four (emphasis added).

234 Memorial, para. 285. See also **Exhibit C-55**, Spanish Supreme Court Decision (Contentious-Administrative Chamber), Appeal No 321/2010, 31 October 2011; and **Exhibit C-56**, Spanish Supreme Court Decision (Contentious-Administrative Chamber), Appeal No 348/2010, 4 November 2011.

235 Brattle Rebuttal Regulatory Report, paras. 68, 137 and 202.

236 **Exhibit C-233**, CNE, "*Report 39/2010 based on the draft ministerial mandate approving access tariff reform in the electrical energy sector as of 1 January 2011*", 16 December 2010, p. 1 (emphasis in original).

144. These governmental failures created the Tariff Deficit and the issue of sustainability to which Spain refers. This prompted the CNE to issue the following warning to the Government in March 2012:

> "The insufficiency of fees is endangering the economic-financial sustainability of gas and electrical systems. Significantly, the fundamental problem in the electrical sector is that the lack of convergence between revenues and costs for activities regulated in the electrical sector in these last 10 years has created a growing debt in the electrical system. This imbalance between revenue and costs in the system is unsustainable, due to the impact of the growing debt accumulated on access licences, present and future, for consumers, and the temporal impact on the indebtedness of the companies that are obligated to finance the system's deficit."[237] (emphasis added)

145. The power to fix the Network Access Tolls was exclusive to the Government; the Government has failed to comply with this obligation. This problem increased year on year since, after several years of accumulating the Tariff Deficit through setting artificially-low Network Access Tolls, Spain confronted a larger line item for interest accrued each year on the previous year's cumulative Tariff Deficit.[238]

**(c) Network Access Tolls are not set by an independent regulator**

146. Under EU law, the Network Access Tolls ought to be set by an independent regulator. The 2009 EC Directive on common rules for the internal market in electricity requires all Member States to "*designate a single national regulatory authority at national level*".[239] They must also "*guarantee the independence of th*[is] *regulatory authority*".[240] Moreover, the 2009 Directive requires that "[*i*]*n order to protect the independence of the regulatory authority, Member States shall in particular ensure that: (a) the regulatory authority can take autonomous decisions, independently from any political body*".[241]

147. The independence of the electricity regulator is particularly important given the powers that should be granted to it. The 2009 Directive provides that "[t]*he regulatory authority shall have the following duties: (a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies*".[242] In other words, the independent regulator must set the tariff (which in Spain is referred to as Network Access Tolls) that will cover the cost of the regulated

237 **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, Introduction and Executive Summary, 7 March 2012, p. 4.
238 Brattle Rebuttal Regulatory Report, paras. 68, 137 and 202.
239 **Exhibit C-136**, European Commission Directive 2009/72/EC on common rules for the internal market in electricity, Article 35(1).
240 **Exhibit C-136**, European Commission Directive 2009/72/EC on common rules for the internal market in electricity, Article 35(4).
241 **Exhibit C-136**, European Commission Directive 2009/72/EC on common rules for the internal market in electricity, Article 35(5)(a) (emphasis added).
242 **Exhibit C-136**, European Commission Directive 2009/72/EC on common rules for the internal market in electricity, Article 37(1)(a).

activities within the electricity sector in each Member State. Spain has not complied with any of these obligations. As Spain notes, the Ministry of Industry is the main regulator of the Spanish Electricity System, which sets the Network Access Tolls and thus electricity prices.[243]

148. The CNE stressed that having the regulator, rather than the Ministry, responsible for setting electricity prices is typical throughout Europe.[244] The CNE therefore specifically informed the Ministry in March 2012 that it was:

> "… fundamental to allocate to the CNE the function of establishing a complete, objective, and transparent methodology for establishing access tolls to networks that integrates both the calculation methodology for the payment of each of the regulated activities and the allocation of each cost element to the access tolls such that there are no cross-subsidies between activities or users, providing price signals that induce efficient behaviours in both costs and consumption."[245]

149. The Government ignored this recommendation and has always refused to delegate tariff-making authority to an independent regulator.

150. The EC has also flagged this problem, noting that the lack of independence in setting prices meant that the costs of producing electricity "*are not fully passed through to the consumers due to the price regulation*".[246] Spain's persistent refusal to comply with EU law prompted the European Commission (**EC**) in February 2015 to send a formal notice to Spain urging compliance with the EU rules concerning the independence of the national regulatory authority.[247] Spain failed to comply with this formal notice, forcing the EC to issue a reasoned opinion on 29 September 2016 for the continuing breach.[248] To date, Spain is still in breach of this provision of EU law.

151. This is a serious issue. EU law specifically notes that "[e]*nergy regulators need to be able to take decisions in relation to all regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests*".[249]

152. By keeping the tariff-making authority to itself, the successive Spanish Governments have been able to use electricity prices for political purposes.[250]

---

243 See Counter-Memorial, para. 230.

244 **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, Introduction and Executive Summary, 7 March 2012, part I, p. 4.

245 **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, Introduction and Executive Summary, 7 March 2012, part I, III.1, (PDF 84).

246 See **Exhibit C-234**, European Commission Report, "*Electricity Tariff Deficit: Temporary or Permanent Problem in the EU?*", by A. Johannesson Linden, F Kalantzis, E Maincert & J Pienkowski, EC Economic Papers, Vol. 534, October 2014, p. 44 (PDF 46).

247 See **Exhibit C-266**, European Commission Fact Sheet, "*September infringements package: key decisions*", 29 September 2016.

248 **Exhibit C-266**, European Commission Fact Sheet, "*September infringements package: key decisions*".

249 **Exhibit C-136**, European Commission Directive 2009/72/EC on common rules for the internal market in electricity, Preamble, para. 34.

### (d) Cost-reflectivity does not prevent the Government from protecting vulnerable consumers

153. The principle of cost-reflectivity does not prevent Spain from shielding vulnerable consumers from high electricity prices. Although EU law obliges Spain to adhere to the cost-reflectivity principle, it nevertheless provides that "*Member States should take the necessary measures to protect vulnerable customers in the context of the internal market in electricity*".[251] Spain implemented the *bono social* through RDL 6/2009, the purpose of which was precisely to protect vulnerable consumers from high electricity prices.[252]

154. Spain's claim that it sought to protect vulnerable consumers therefore does not advance its case. Spain was able to implement measures that protected vulnerable consumers and had in fact done so when the Claimants invested. It is quite another matter for Spain to abandon the Special Regime FIT to offer artificially-low electricity prices to its electorate. In addition, as set out below,[253] the Government has overburdened the consumer price of electricity with taxes and costs that are unrelated to electricity supply. Together these items comprise almost half of the consumer price of electricity. Had Spain really sought to protect consumers, it would not have burdened them with such costs.

### (e) The relationship between the Spanish Electricity System and the State Budget

155. Spain asserts at numerous points in its Counter-Memorial that the cost of RE incentives and indeed the revenues received by the Wind Farms are funded by the State budget.[254] Spain presents this alleged contribution from the general State Budget as being part of the reforms that accompanied the Disputed Measures and a demonstration of the reasonableness of its conduct.[255]

156. This is misleading. The only way that Spain could possibly argue that money goes from the State budget to the Spanish Electricity System is through Law 15/2012. This is nothing more than a façade. As noted above, the 'taxes' from Law 15/2012 are imposed on the production of

---

[250] **Exhibit C-236**, El Economista, Press Article, "*Soria announces a 7.5% decrease in the price of electricity this legislature*", dated 10 April 2015; **Exhibit C-237**, Cinco Días, Press Article, "*Electricity prices will be cheaper next January*" dated 17 November 2015.

[251] **Exhibit C-136**, European Commission Directive 2009/72/EC on common rules for the internal market in electricity, Recital 45.

[252] **Exhibit C-100**, Royal Decree-Law 6/2009 of 7 May 2009, Preamble and Second Transitory Provision. RDL 6/2009 provided that the reduced electricity bills that vulnerable consumers benefit from in Spain would be funded by 12 electricity companies in varying proportions. Since no justification was provided for the proportions, the Spanish Supreme Court ruled in 2012 that the provision was arbitrary. This meant that Spain had to implement a rational method for setting the proportions of the cost for which various entities would be responsible. Article 45 of Law 24/2013 provided that distribution companies ("*empresas comercializadoras*") would bear the costs in proportion to the size of their operation (i.e. the number of distribution points or the number of customers) which would be calculated annually.

[253] See below, section 5.2(e).

[254] Counter-Memorial, para. 632-634.

[255] Counter-Memorial, para. 34: "*In the same vein, in the years 2012 to 2014, the Kingdom of Spain adopted measures to reform the Electricity Sector… for the first time ever the promotion of renewable energies was charged to the State Budget*".

electricity.[256] The money taxed from RE producers goes to the State Budget. The same amount of money then goes back to cover the costs of the electricity system, including RE premiums.[257] Spain accepts this.[258] The tax reduces the income of electric generation installations and the collected amount is used to cover the Tariff Deficit. This is a clear tariff cut. The only difference is the intermediate step that the money is passed through the State Budget for no discernible reason (other than give it the appearance of a tax).

157. In fact, money goes *from* the electricity system *to* the State Budget. More than a quarter of the cost of electricity prices is collected by Spain. All electricity consumption is subject to: (a) value added tax (**VAT**) of 21%;[259] and (b) a 'special tax' (the **Special Tax**) of 5%.[260] Thus, a significant portion of the value of the electricity consumed in Spain goes to the State Budget.

158. Moreover, 25% of the electricity price comprises general policy objectives, such as the incentives under the Special Regime, the incentives for the local coal industry, compensation for the nuclear moratorium and costs for extra-peninsular activities that are unrelated to the cost of supplying electricity. The inclusion of such items within the costs of the Spanish Electricity System, and thus within the consumer price of electricity, is a policy decision.

159. Notably, Miguel Sebastián, former Minister of Industry, Tourism and Commerce, has recognised that it was a mistake to overburden electricity invoices with general policy objectives.[261] He now states that such policy objectives should have been borne by the General State Budget. In particular, he asserts it was a mistake to "*not having included the premiums to renewabl*[es]… *in the federal budget, instead of in the electrical tariff (charged to consumers)*".[262] According to Mr Sebastián, this is because "*if premiums are borne by the consumers (a good part of whom are workers ), competitiveness* [of the Spanish economy] *deteriorates, while if the premiums are in the budget, competitiveness is not affected or may even improve if the recipients of the premiums are the industry itself*".[263] Thus, the former Minister of Industry points out that the Government had a choice and that it made the wrong choice by including premiums to renewables in the electricity invoice.

---

[256] See above, section 3.1.
[257] See **Exhibit C-48**, Law 15/2012 of 27 December 2012, concerning tax measures to ensure energy sustainability (published on 28 December 2012, Additional Provision Two.
[258] Counter-Memorial, para. 190.
[259] **Exhibit C-239**, Law 37/1992 of 28 December 1992, on Value Added Tax (published on 29 December 1992).
[260] **Exhibit C-184**, Law 38/1992, of 28 December, of Special Taxes, Consolidated Text, as modified on 30 October 2015 (published on 30 October 2015).
[261] **Exhibit C-245**, Miguel Sebastián, "*Thoughts on the energy situation*" (2013) Cuadernos de Energía, ISSN 1698-3009, Nº. 41, p. 39.
[262] **Exhibit C-245**, Miguel Sebastián, "*Thoughts on the energy situation*" (2013) Cuadernos de Energía, ISSN 1698-3009, Nº. 41, p. 39.
[263] **Exhibit C-245**, Miguel Sebastián, "*Thoughts on the energy situation*" (2013) Cuadernos de Energía, ISSN 1698-3009, Nº. 41, p. 39.

This decision not only harmed consumers but also undermined the competitiveness of the Spanish industrial sector by raising the price of one of its main cost inputs: the price of electricity.

160. A State may always be tempted to implement or maintain popular measures (such as artificially suppressed Network Access Tolls) rather than assuming the political risks that raising electricity prices might entail. This is precisely why Spain provided the grandfathering clauses in RD 661/2007 and RD 1614/2010. It promised to investors that it would not succumb to the temptation to cut the guaranteed FITs. Despite this, Spain reneged on its commitment to RE investors by introducing the New Regime and abandoning altogether the guaranteed FIT in reliance on which the Claimants invested.

### 5.3 Previous changes to the regulatory regime are consistent with the Claimants' understanding of RD 661/2007

161. Spain points to certain changes in the regulatory regime applicable to RE to assert that the Claimants should have been aware that the regime was flexible and subject to change. In particular, Spain refers to: (a) RDL 6/2007; (b) the replacement of RD 436/2004 by RD 661/2007; (c) RDL 6/2009; and (d) RD 1565/2010 and RDL 14/2010. As explained below, none of these changes could have put the Claimants on notice that Spain would renege on its commitments to existing installations, abandon the FIT and completely dismantle the RD 661/2007 economic regime.

#### (a) RDL 7/2006 removed the inherent volatility created by RD 436/2004

162. Spain refers to the changes introduced by RDL 7/2006 to the RD 436/2004 regime to suggest that the Disputed Measures were foreseeable.[264] This ignores the purpose of RDL 7/2006, which was simply to remove the inherent volatility created by the TMR (the *tarifa eléctrica media o de referencia* or **TMR**) to which the RE 436/2004 tariff was linked.[265] The TMR is the total of the revenues received by the electricity system (excluding taxes) divided by the amount of electricity supplied.[266] As is explained in the paragraph below, this was only a temporary solution.

163. Through RDL 7/2006, the Government temporarily froze the tariff under RD 436/2004 – and thus removed that inherent volatility – but did so with a view to replacing it with a more stable reference mechanism.[267] As the CNE reported, RDL 7/2006 "*establishes the need to develop… provisions in a*

264 Counter-Memorial, paras. 25 and 400-405.

265 **Exhibit C-41**, RD 436/2004 of 12 March 2004, Articles 23-24.

266 See also Brattle Regulatory Report, para. 99, fn. 109. That the TMR was inherently volatile is common ground between the Parties. See for example, Counter-Memorial, para. 381.

267 This caused no harm: the short period during which RDL 7/2006 was in force meant that no annual update was lost.

*period of six months, and thus adop*[t] *an adjustment mechanism associated to one or several other indexes*".[268] This was of course done shortly thereafter through RD 661/2007, with annual adjustments introduced by reference to the CPI (the sole adjustment permitted for existing plants under RD 661/2007).[269]

**(b) RD 661/2007 improved the guarantee provided in RD 436/2004**

164. Spain's position in this arbitration is that RD 661/2007 was introduced to *scale back* the economic incentives for RE projects.[270] This is wrong. First, Spain's position is flatly contradicted by its own representations at the time RD 661/2007 was approved. Spain's own May 2007 Announcement accompanying RD 661/2007 states that "*the aim of this Royal Decree is to increase remuneration*".[271] It further describes the increased compensation that RD 661/2007 represented:

> "… [f]eed-in tariffs shall be increased in respect of those outlined under Royal Decree 436/2004, as follows: wind farms, 12%; hydro-electric facilities, between 7% and 13%; thermoelectric facilities, 17%; photovoltaic facilities (over 100 kW capacity), 82%; biomass, between 56% and 113% (except for industrial forest waste treatment facilities where a 6% increase shall apply); and biogas, between 16% and 40%."[272] (emphasis added)

165. This shows that RD 661/2007 put in place a remuneration scheme that increased FITs by 12% for wind farms in order to attract further investment.[273] If Spain's purpose was not to improve the incentive scheme to attract investment, which indeed was the consequence of RD 661/2007,[274] Spain has failed to provide any alternative explanation as to why it opted to increase incentives in RD 661/2007.

166. Secondly, Spain argues that the Claimants could not have understood Article 44.3 of RD 661/2007 to have been a grandfathering clause because it contains similar wording to Article 40.3 of

[268] **Exhibit R-128**, Report CNE 3/2007 of 14 February 2007, regarding the proposed Royal Decree regulating the activity of electricity production under the special regime and certain facilities under similar technology under the ordinary regime, p. 24.

[269] As explained in the Memorial, para. 143, RD 661/2007, Article 44.1 established a mechanism to update the FIT in line with the CPI less 25 basis points, or 50 basis points after 31 December 2012. This CPI formula applied to all installations, irrespective of the date on which the installation started to operate.

[270] Counter-Memorial, paras. 405, 432-433 and 436.

[271] **Exhibit C-93**, Government of Spain, Ministry of Industry, Tourism and Commerce, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power*", 25 May 2007, p. 1 (emphasis added).

[272] **Exhibit C-93**, Government of Spain, Ministry of Industry, Tourism and Commerce, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power*", 25 May 2007, p. 2 and **Exhibit C-163**, Government of Spain, Ministry of Industry, Tourism and Commerce and InvestInSpain, Presentation, "*Legal Framework for Renewable Energies in Spain*", undated, p. 6.

[273] **Exhibit C-93**, Government of Spain, Ministry of Industry, Tourism and Commerce, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power*", 25 May 2007, p. 2.

[274] See Brattle Regulatory Report, paras. 109-110.

RD 436/2004.[275] On Spain's case, since Article 40.3 of RD 436/2004 did not prevent the changes implemented by RDL 7/2006 and RD 661/2007, Article 44.3 of RD 661/2007 could not have been understood to prevent harmful changes to existing plants.[276] This submission is flawed since RD 661/2007 was not a harmful change and in many respects improved the RD 436/2004 economic regime.[277] Changes that are neutral or improve the conditions under which an investor originally invested obviously do not breach a grandfathering provision.[278] Spain's argument deliberately ignores the fact that RD 661/2007 was implemented in line with regulatory best practice, preserving the interests of existing investors by offering a lengthy transitory period, whereby installations could opt to continue under the same FIT scheme, of almost six years, until 1 January 2013.[279]

167. Thirdly, unlike RD 436/2004, RD 661/2007 was a self-contained remuneration scheme (i.e. with no reference to the TMR). RD 661/2007 changed the level of tariffs and premiums from a level correlating to the TMR, to a precise remuneration (in EUR cents per kilowatt/hour of electricity produced) that provided greater certainty for investors.[280] Thus, with RD 661/2007 Spain committed to remunerate qualifying plants with a FIT offered for every kWh of electricity produced. To ensure this FIT maintained its real value over that period, RD 661/2007 provided that it would be annually updated in line with the Spanish Consumer Price Index – a well-known index with a long track record that would guard against inflation erosion.[281] This process is very clearly set out by the

---

[275] Counter-Memorial, paras. 453-457.
[276] Counter-Memorial, paras. 453-454.
[277] Memorial, para. 161.
[278] First Moreno Statement, paras. 27 and 32-34.
[279] **Exhibit C-44**, RD 661/2007 of 25 May 2007, First Transitory Provision. See also Brattle Rebuttal Regulatory Report, paras. 166-174.
[280] This was an improvement on RD 436/2004 since it provided greater certainty of remuneration. Under RD 436/2004, remuneration was calculated by reference to the TMR and, consequently, linked to the average cost of electricity, which is obviously subject to fluctuation. This is common ground between the Parties.
[281] **Exhibit C-44**, RD 661/2007 of 25 May 2007, Article 44.1.

CNE in its report on the draft of RD 661/2007,[282] and in the *Memoria Económica* for RD 661/2007.[283]

168. Fourthly, RD 661/2007 introduced a cap and floor mechanism on the Premium option, providing greater stability for wind investors:

> "This new system protects the promoter when the revenues deriving from the market price falls excessively low, and eliminates the premium when the market price is sufficiently high to guarantee that their costs will be covered, thus eliminating irrationalities in the payment for the technologies the costs of which are not directly related to the prices of petroleum in the international markets."[284] (emphasis added)

169. The imposition of a cap and floor provided increased stability. The floor in particular was a further safeguard to protect investors from falling energy prices (a protection that did not exist under RD 436/2004).[285] As the CNE noted, "*the setting of a floor gives the producer greater stability with respect to the current situation, by protecting the producer from reduced market prices during the period in which the producer must remain on the market (up to one year)*".[286] In other words, it provided greater certainty for wind producers electing the Premium option.

170. Finally, Spain's own documents show the improvements in remuneration that RD 661/2007 represented, compared to the previous 2004 regime. In particular, the CNE highlighted that under the RD 661/2007 economic regime, the Fixed Tariff option represented an improvement to all RE technologies compared to the RD 436/2004 economic regime.[287]

---

282 **Exhibit R-128**, Report CNE 3/2007, of 14 February 2007, regarding the proposed Royal Decree regulating the activity of electricity production under the special regime and certain facilities under similar technology under the ordinary regime, pp. 23-24 ("*The production facilities in the special regime are capital-intensive and have long recovery periods. Royal Decree 436/2004 minimises the regulatory risk by granting stability and predictability to the economic incentives during the service life of the facilities. This is done by establishing a transparent annual adjustment mechanism, associating incentives to trends in a robust index such as the average or reference tariff (TMR), and by exempting existing facilities from the four-year review because only new incentives affect new facilities. The developers who have invested in special regime production facilities during the validity of Royal Decree 436/2004 have done so in stable regulatory conditions, fundamentally based on a secure and predictable regulated tariff during the entire service life of the facility. The guarantees covered in Royal Decree 436/2004 have allowed cheaper financing, with lower project costs and a lower impact on the electricity tariff ultimately paid by the consumer. Royal Decree-Law 7/2006, of 23 June, adopting urgent measures in the energy sector—and which, among others, modifies Law 54/1997 in order to allow transposition to the development Directive from cogeneration—disconnects the variation in economic incentives from the TMR variation. It establishes the need to develop the provisions in a period of six months, and thus adopts an adjustment mechanism associated to one or several other indexes. The cited proposed Royal Decree, in compliance with Royal Decree-Law 7/2006, establishes two adjustment mechanisms for the tariffs and premiums, with equally robust indexes, based on variation in the natural gas price and the consumer price index (CPI), applicable to the quarterly adjustment of cogeneration incentives, and the consumer price index minus one point (CPI - 1) applicable to other technologies (except group C2, as with cogeneration in 1.2). This is all positive, because it will restore the guarantees on the annual adjustment of tariffs and premiums which had temporarily become undefined*").

283 **Exhibit C-203**, *Memoria Económica* for RD 661/2007, 21 March 2007, pp. 9-10.

284 **Exhibit C-44**, RD 661/2007, 25 May 2007, Preamble.

285 **Exhibit C-44**, RD 661/2007, 25 May 2007, First transitory provision (1.1).

286 **Exhibit C-85** CNE Report 3/2007 of 14 February 2007, dated 14 February 2007, p. 26.

287 **Exhibit C-85** CNE Report 3/2007 of 14 February 2007, dated 14 February 2007, p. 35. See also **Exhibit R-128**, Report CNE 3/2007, of 14 February 2007, regarding the proposed Royal Decree regulating the activity of electricity production under the special regime and

### (c) The RDL 6/2009 Pre-Assignment Register emphasised the rights of existing installations

171. The Parties agree that the purpose of RDL 6/2009 was to address the Tariff Deficit.[288] The Parties also agree that, to achieve this result, RDL 6/2009: (a) introduced a pre-assignment register; and (b) aimed to stagger the connection of new RE installations.[289] Spain now considers that RDL 6/2009 should have put the Claimants on notice of potential further changes to the regulatory framework applicable to their investments.[290] This is a curious submission given the actual content of RDL 6/2009.

172. First, while RDL 6/2009 did note the need to address the Tariff Deficit, Spain expressly "*guarantee*[d] *the necessary legal security for those who have made investments*" and ensured that "*the rights and expectations of the owners of the facilities* [were] *respected*".[291] In fact, despite Spain's assertion that "*RD-Law 6/2009 introduced significant changes to RD 661/2007*", this norm did not affect plants that were already commissioned under RD 661/2007. Spain thus recognised the importance of honouring the legitimate expectations of investors that had already committed their capital.

173. Secondly, the preamble to RDL 6/2009 acknowledged that electricity prices had been set at artificially-low levels, thus "*leading to an erroneous belief with respect to the price of a scarce resource such as energy, which does not contribute to encouraging savings and energy efficiency*".[292] RDL 6/2009 is therefore the Government's own admission of its failure to ensure prices properly reflected the costs of the system. A Government internal document, the *Memoria Justificativa* prepared in the development of RDL 6/2009, confirmed that "*this means that if the deficit effectively generated exceeds the legally permitted limit, tolls must be raised by the amount necessary to cover the excess*".[293] As such, should there be an imbalance, RDL 6/2009 required an increase in tolls; it would not require a cut in the tariff of existing installations.

174. Finally, following the passage of RDL 6/2009, the Government continued to make specific representations as to the continued application of the RD 661/2007 regime which are inconsistent

---

certain facilities under similar technology under the ordinary regime, p. 21 ("[i]*n the cited proposed Royal Decree [661/2007], far from reducing the tariffs, the following increases are proposed*").

288 Memorial, para. 170; Counter-Memorial, paras. 467-469.

289 Memorial, paras. 170 *et seq*; Counter-Memorial, para. 469.

290 Counter-Memorial, paras. 25 and 468-476.

291 **Exhibit C-100**, Royal Decree-Law 6/2009 of 30 April 2009, Preamble. See also **Exhibit C-215**, Memoria Justificativa for RDL 6/2009 of 30 April 2009, s. 5, p. 26 ("*In any event, the rights and expectations of the owners of facilities are respected, with the necessary caution being exercise and the necessary transitional regime for adaption being envisage*").

292 **Exhibit C-100**, Royal Decree-Law 6/2009 of 30 April 2009, Preamble.

293 **Exhibit C-215**, Memoria Justificativa for RDL 6/2009 of 30 April 2009, s. 1, p. 22.

with Spain's position in this arbitration.[294] In fact, RDL 6/2009 is a clear statement from the Government that it would resolve the Tariff Deficit without retroactive tariff cuts.

**(d) The 2010 changes**

175. Spain alleges that the Claimants purposefully omit any mention of RD 1565/2010[295] and RDL 14/2010.[296] The reason these regulations were not mentioned in the Memorial is because they bear no relevance to this case.

176. With respect to RD 1565/2010, the only effect this had concerning the remuneration of RE installations was, according to Spain, that it "*included additional requirements for reactive power supplement*".[297] This, however, represents a negligible change to the regulatory regime.

177. With respect to RDL 14/2010, it is important to recall that this applied only to PV plants, not to any other technology. Even for PV installations, the Government confirmed that, after RDL 14/2010, future regulatory changes would not affect existing plants. Law 2/2011, which was introduced in March 2011 and amended RDL 14/2010, stated explicitly that:

> "[a]ny amendments [made to the regulatory regime for PV plants] shall only affect the facilities that are not in operation at the time said Royal Decree enters into force, which will be considered to be the date that they are enrolled in the register of preallocation of payment for photovoltaic facilities."[298]

178. This provision was patently introduced in order to reassure and re-establish investors' expectations that the regulatory regime in Spain was stable even if PV installations had been subject to certain measures limiting their production. Nothing about Spain's conduct in 2010 could have led investors in wind farms, such as the Claimants, to doubt that the Government intended to honour its stability commitments.

179. This was all the more the case as Spain had implemented RD 1614/2010 the same month as it had introduced cuts to PV plants. RD 1614/2010 implemented the July 2010 Agreement between the Government and the wind and CSP sectors, pursuant to which RE producers accepted temporary limitations to the Premium in exchange for the reiteration of Spain's commitment not to make retroactive cuts to the FIT and its long-term "guarantee" of the RD 661/2007 economic regime. In

294 See section 8.6 above.
295 Counter-Memorial, para. 544.
296 Counter-Memorial, para. 590.
297 Counter-Memorial, para. 502.
298 **Exhibit C-216**, Law 2/2011, on a sustainable economy, 4 March 2011 (published on 5 March 2011) (**Law 2/2011**), Forty-fourth Final Disposition (One).

many ways, the July 2010 Agreement and RD 1614/2010 were introduced specifically to reassure CSP and wind investors in the light of the changes that the Government was to implement in the PV sector. Spain's submission is akin to saying that investors should not have trusted the Government when it made its specific promise in RD 1614/2010. That makes no sense.

### 5.4 The decision to invest was made in August 2011

180. Spain asserts that the "*Claimants made their investment in the wind sector in Spain on 8 May 2012*".[299] This is misleading.[300] The date indicated by Spain is the date on which the conditions precedent of the sale and purchase agreement (the **SPA**) were satisfied,[301] not the date on which the decision to invest was taken. One cannot (and should not) equate the former with the latter.

181. In attempting to delay the date of the Claimants' investment, Spain seeks to establish that certain events in the months leading up to May 2012 are relevant to determining the legal regime under which the Claimants made their investment and hence their legitimate expectations.[302] These events are: (a) the announcement of future regulatory changes by the Prime Minister on 19 December 2011; (b) the CNE Press Release of 28 December 2011; (c) Royal Decree-Act 1/2012, of 27 January; (d) the report of the National Energy Commission on the Spanish Energy Sector of 7 March 2012; and (e) the National Reform Programme and the Memorandum of Understanding with the EU dated 27 April 2012. All these events took place after the Claimants' investment decision became firm and irrevocable, so they can have no bearing on the Claimants' expectations.

182. Bridgepoint entered into the SPA in August 2011 after: (a) the due diligence on the transaction had been finalised; and (b) the Investment Advisory Committee had approved the investment.[303] The formal decision to invest was taken in an Investment Advisory Committee meeting dated 1 August 2011.[304] When Bridgepoint signed the SPA on 12 August 2011, the decision to acquire the Project Companies became irrevocable.[305] It is that date that is relevant to assessing the Claimants' expectations and determining whether they were legitimate.

---

299 Counter-Memorial, para. 582. See also at para. 588.

300 Counter-Memorial, para. 585. Spain relies on para. 213 from the Claimants' Memorial, which is taken out of context: "[o]*n 8 May 2012, upon fulfilment of the conditions precedent applicable to the Wind Farms, the entire share capital of the Project Companies were transferred to Watkins Spain, Redpier and Northsea*".

301 **Exhibit C-35**, Share purchase agreement between Bridgepoint Europe IV Bidco 3 Limited, Bridgepoint Europe IV Bidco 6 Limited and Bridgepoint Europe IV Bidco 8 Limited and EYRA, Urbaenergía and Inverduero dated 12 August 2011, Clause 3.

302 Counter-Memorial, section IV.E.

303 First Moreno Statement, section 3.1.

304 **Exhibit C-186**, Minutes of Investment Advisory Committee meeting, 1 August 2011.

305 **Exhibit C-35**, Share purchase agreement between Bridgepoint Europe IV Bidco 3 Limited, Bridgepoint Europe IV Bidco 6 Limited and Bridgepoint Europe IV Bidco 8 Limited and EYRA, Urbaenergía and Inverduero dated 12 August 2011, Clause 6.2(a). See also First Moreno Statement, para. 61 and fn75. Pursuant to Clause 6.2(a) of the SPA, on 15 September 2017, Bridgepoint notified the sellers that Watkins Spain, Redpier and Northsea would be the final buyers of the Project Companies

183. As is common in this type of transactions, certain terms of the agreement, namely the payment of the price and the transfer of the shares, was to occur upon completion of certain conditions precedent.[306] The conditions precedent stipulated in the SPA ensured that the necessary regulatory approvals were secured and that the lenders approved the change of control of the Project Companies. They did not entitle any contracting party to withdraw from the SPA, not even if the regime applicable to RE installations changed substantially. The parties to the SPA could, on any view, not have introduced a condition precedent giving either the freedom to decide not to proceed with the transaction. Indeed, as a matter of Spanish law, the satisfaction of conditions precedent may not depend on the will of the contracting parties.[307] That the conditions precedent were satisfied on 8 May 2012 has no impact on the time at which the expectations need to be assessed.

184. This is confirmed by leading investment arbitration commentators,[308] who consider that the critical period for ascertaining the existence of an investor's legitimate expectations is the moment when an investor makes its decision to invest, not the events or transactions subsequent to such decisions: "[t]*he key issue is the actual reliance on expectations which existed at the particular point in time when the relevant decision was taken*".[309]

### 5.5 Domestic court judgments could not have enabled the Claimants to anticipate the Disputed Measures

185. Spain argues that the Claimants should have anticipated the Disputed Measures because the Spanish Supreme Court (**SCC** or the **Supreme Court**) "*since 2005, establishes the rights of investors in the event of changes in the remuneration models of the* [Special Regime]".[310] Spain errs since these cases could not have enabled the Claimants to anticipate the Disputed Measures nor did they indicate that there was any limitation on the "*guaranteed*" incentive regime Spain had committed to provide.

---

306 First Moreno Statement, para. 64.

307 **Exhibit R-96** Spanish Civil Code, Article 1,115 ("*Where the performance of the condition should depend on the exclusive will of the debtor, the conditional obligation shall be null and void. It should depend on chance or on the will of the third party, the obligation shall have full force and effect in accordance with the provisions of this Code*"); see also **Exhibit C-213**, Spanish Supreme Court Decision (Civil Chamber), Appeal No. 783/2007, 28 June, p. 5 ("*Thus, there is no infringement of article 1115 of the Civil Code (LEG 1889,27), and neither of 1117, as it was imposed a purely facultative condition precedent, as it has been stated and highlights the case law that advocates a restrictive interpretation (judgment of 13 February 1999 [RJ 1999, 1007]) and only occurs if it depends of the "mere discretion" of the obligor (judgment of 16 May 2005 [RJ 2005, 4002]). Nor there is an infringement of 1256, as that legal business does not depend of the discretion of one of the parties, but of the development of the events and of a double condition and such article prohibits the modification or extinction of one obligation by the sole will of one of the parties (this, judgments of 27 February 1997 [RJ 1997, 1333], 13 April 2004 [RJ 2004, 2619], 30 November 2005 [RJ 2005, 7742]). Nor there is an infringement of article 1288 as the literal interpretation of the legal business is quite clear and offers no doubt, nor 1128 as it does not consist on a term obligation, but it is conditional and that nobody has requested (whose necessity highlight the judgments of 11 April 1996 [RJ 1996,2917], 15 June 2004 [RJ 2004, 3845])*.").

308 **Exhibit CL-125**, Schreuer and Kriebaum , "At What Time Must Legitimate Expectations Exist?", in *A Liber Amicorum: Thomas Wälde. Law Beyond Conventional Though*t, 265-276, Jacques Werner & Arif H. Ali eds., 2009.

309 **Exhibit CL-125**, Schreuer and Kriebaum, "At What Time Must Legitimate Expectations Exist?", in *A Liber Amicorum: Thomas Wälde. Law Beyond Conventional Though*t, 265-276, Jacques Werner & Arif H. Ali eds., 2009, at p. 8.

310 Counter-Memorial, para. 352.

186. Spain refers to a number of judgments that post-date the Claimants' investment. These are clearly of no relevance (section a).

187. Secondly, the judgments that pre-date the Claimants' decision to invest, relate to incentives that were not part of the guaranteed RE regime and so cannot have informed the Claimants' expectations (section c).[311] In particular, there is no judicial interpretation of the meaning of the specific clauses in the legislation whereby the Government undertook to respect existing investors- rights, i.e., Article 40.3 of RD 436/2004, Article 44.3 of RD 661/2007 or Article 5.3 of RD 1614/2010. Indeed, Spain has not been able to provide any judicial support for its strained interpretation of these provisions. Equally, no Spanish judgment has ever held that the "*reasonable return*" concept is "dynamic". This is an *ex post* construction, proffered for the sole purpose of escaping liability.

188. This is also why the cases now invoked by Spain were not flagged by the Claimants' legal advisors despite the Claimants' thorough due diligence in the regulatory regime prior to investing.[312] Indeed, there is no evidence that they were mentioned by any law firm advising any RE investor. This is not because the Spanish legal profession suffered a collective bout of amnesia regarding key judgments; it is simply because these decisions were not relevant to the guaranteed tariff regime applicable to qualifying RE installations under RD 661/2007.

189. Importantly, none of these cases confirm that the Government could abandon wholesale the terms of the RD 661/2007 economic regime. This is for two reasons: first, the Supreme Court does not have the power to invalidate a regulation for failure to comply with a previous one. All it does is examining whether a regulation complies with a norm of higher rank (section b).

190. Finally, Spain also argues that the importance of the Supreme Court case law was recognised in *Charanne*.[313] According to Spain, the tribunal in Charanne has confirmed "*the value of this case law, as a determining factual element for setting the legitimate expectations of any investor*".[314] However, as mentioned above and in section (c) below, none of the judgments referred to in *Charanne* and in existence at the time the Claimants invested support the argument that a complete abandonment of the regime would be in accordance with Spanish law. In any case, whatever the findings of the *Charanne* tribunal, this Tribunal needs to look at the evidence before it. As explained, that evidence shows that the Supreme Court decisions do not support Spain's case.

[311] With the exception of the Supreme Court Judgment of 3 December 2009, which can be distinguished, as explained in section 5.5(c) below.
[312] See Memorial, section 5.2.
[313] Counter-Memorial, para. 346. The Charanne decision is addressed in greater detail in section 10.2 below.
[314] Counter-Memorial, para. 10.

### (a) Supreme Court judgments post-dating the investment should be disregarded

191. As a starting point, a number of the SSC judgments relied upon by Spain should be disregarded completely. Spain asserts that the SSC judgments are relevant facts that should have informed the Claimants' legitimate expectations at the time they made their investments.[315] Naturally, the Claimants could only have taken into account judgments issued prior to their investment. Judgments that post-date the Claimants' investment are thus irrelevant.[316]

192. The key issue when determining the present claim is the law as it appeared to exist at the time the investments were made. As explained by Dolzer and Schreuer:

> "Tribunals have emphasized the legitimate expectations of the investor will be grounded in the legal order of the host state as it stands at the time the investor acquires the investment… In *SD Myers v Canada* the Tribunal made the same point when it stated that the parties acted on the basis of the law as it appeared to exist at the time of the investments."[317] (emphasis added)

193. Consequently, where both the investor and the host State have the same understanding of the law at the time of the investment, subsequent court decisions concerning that law are not relevant. As held in *SD Myers v Canada*:

> "CANADA sought to establish in this arbitration that the Enforcement Discretion, which ultimately was set aside in U.S. court litigation, was not lawful. The Tribunal makes no determination on this issue because in this case the Disputing Parties acted on the basis of the law as it then appeared to exist."[318] (emphasis added)

---

[315] Spain asserts that"[t]*he aforementioned case law has determined, since 2005, the expectations that an investor might have in light of the various regulatory changes*" (Counter-Memorial, para. 13).

[316] Therefore, irrelevant to the Tribunal's task are, without limitation, the following: Judgements of the Spanish Supreme Court of 20 December 2011, rec. 16/2011 (**R-0143**); of 12 April 2012, rec. 50/11 (**R-0032**) and 112/11 (**R-0033**); of 19 April 2012, rec. 39/11 (**R-0046**) and 97/11 (**R- 0047**); of 23 April 2012, rec. 47/2011 (**R-0048**); of 03 May 2012, rec. 51/11 (**R-0049**) and 55/2011 (**R-0050**); of 10 May 2012, rec. 61/11 (**R-0051**) and 114/2011 (**R-0052**); of 14 May 2012, rec. 58/2011 (**R-0053**); of 16 May 2012, rec. 46/11(**R-0054**); of 18 May, rec. 70/11 (**R-0055**) and 74/11 (**R-0056**); of 22 May 2012, rec. 45/11 (**R-0057**) and 49/11 (**R-0058**); of 30 May 2012, rec. 59/2011 (**R-0059**); of 18 June 2012, rec. 54/11(**R-0060**), 56/11(**R-0061**), 57/11(**R-0061** Bis) and 63/11 (**R-0097**); of 25 June 2012, rec.109/11(**R-0100 bis**) and 121/11(**R-0106**); of 26 June 2012, rec. 566/10 (**R-0107**); of 09 July 2012, rec. 67/11(**R-0129**), 94/11 (**R-0130**) and 101/11 (**R-0135**); of 12 July 2012, rec. 52/11 (**R-0136**); of 16 July 2012, rec. 53/11(**R-0145**), 75/11 (**R-0149**) and 119/11 (**R-0158**); of 17 July 2012, rec. 19/11(**R-0165**) and 37/11(**R-0171**); 18 July 2012, Rec. 19/11(**R-0142**); of 19 July 2012, rec. 44/2011 (**R-0173**); of 25 July 2012, rec. 38/2011 (**R-0188**); of 26 July 2012, rec. 36/11 (**R-0191**); of 13 September 2012, rec. 48/11 (**R-0198**); of 17 September 2012, rec. 43/11(**R-0199**), 87/11(R-0210), 88/11(**R-0212**), 106/11(**R-0216**) and 120/11(**R-0217**); of 18 September 2012, rec. 41/11 (**R-0218**); of 25 September 2012, rec. 71/11 (**R-0219**); of 27 September 2012, rec. 72/2011 (**R-0220**); of 28 September 2012, rec. 68/2011 (**R-0221**); of 08 October 2012, rec. 78/11(**R-0225**), 79/11(R-0226), 100/11(**R-0227**) and 104/11(**R-0228**); of 10 October 2012, rec. 76/2011 (**R-0229**); of 11 October 2012, rec. 95/11(**R-0230**) and 117/11(**R-0231**); of 15 October 2012, rec.64/11(**R-0236**), 73/11(**R-0239**), 91/11(**R-0240**), 105/11(**R-0241**) and 124/11(**R-0244**); of 17 October 2012, rec. 102/2011 (**R-0245**); of 23 October 2012, rec. 92/2011 (**R-0246**); of 30 October 2012, rec. 96/2011 (**R-0247**); of 31 October 2012, rec. 77/11(**R-0248**) and 126/11 (**R-0031**); 26 November 2012, rec. 125/2011 (**R-0217**); of 05 November 2012, rec. 103/2011; of 09 November 2012, rec. 89/2011; of 12 November 2012, rec. 98 and 110/11, of 16 November 2012, rec. 116/11; of 21 November 2012, rec. 34/2011. R-0142; of 21 January 2016, rec. 627/2012.

[317] **Authority CL-85**, R Dolzer & C Schreuer, *Principles of International Investment Law* (2nd ed, Oxford University Press), pp. 145-146.

[318] **Authority CL-20**, *SD Myers, Inc. v The Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 191.

194. Thus, the Tribunal must look to the Parties' reasonable understanding of the law at the time the Claimants invested. The contemporaneous evidence is consistent on this point. It shows that Spain and the Claimants both had the same understanding of the RD 661/2007 FIT regime prior to the Disputed Measures, namely that harmful changes would not be made with respect to existing investments.

195. The documents from the CNE and InvestInSpain, the RD 1614/2010 *Memoria Económica*, the State Council decision of 29 November 2010 and the Ministry's 2007 press conference all confirm Spain's understanding that the FIT was guaranteed and would not be changed for existing investments.[319] There is not a single piece of contemporaneous documentary evidence contradicting this. The law as it appeared to exist when the Claimants made their investment decision (and as Spain represented it) was clear: the benefits of the RD 661/2007 economic regime, and in particular the protection against harmful changes to existing investments, were guaranteed.

**(b) The Supreme Court's scope of review is limited**

196. In order to put the Supreme Court decisions into proper context, it is crucial first to understand the scope of the Supreme Court's review, which Spain conveniently ignores. The SSC is Spain's highest judicial body, except with regard to interpretation of constitutional guarantees.[320] A challenge may be brought in the Spanish courts in relation to a Royal Decree or Ministerial Order.[321] This challenge may then be heard by the SSC. An individual does not have standing to bring a challenge to a Law or Royal Decree-Law.[322]

197. As in many civil-law jurisdictions, the SSC's review is limited to considering whether a Royal Decree or Ministerial Order complies with higher-ranking norms.[323] Thus, when determining a challenge to a Royal Decree, the Supreme Court's role is solely to verify whether the Royal Decree is compliant with the relevant higher-ranking Law.

---

319 See above, section 4.3.

320 **Exhibit C-50**, Constitution of Spain of 27 December 1978, section 123(1).

321 **Exhibit C-50**, Constitution of Spain of 27 December 1978, section 24(1).

322 Laws and RDLs cannot be directly challenged by an individual in the courts. It is only possible for a law or RDL to be challenged on the basis that it contravenes the Constitution. According to Article 162 of the Constitution, only the following individuals and entities are entitled to lodge an appeal of unconstitutionality: "*the President of the Government, the Defender of the People, fifty Members of Congress, fifty Senators, the Executive body of a Self-governing Community and, where applicable, its Assembly*". Thus, non-State entities or individuals, such as the Claimants, cannot challenge a Law. The Supreme Court may refer a matter to the Constitutional Court at the request of an individual alleging that a law breaches the Constitution (see Constitution, Article 163), but this is entirely at the Supreme Court's discretion and is in any event of little value in the present case given the limited protection of the Constitution.

323 Article 9.3 of the Spanish Constitution provides for the hierarchy of legal norms. The Constitution is at the top of this hierarchy. After the Constitution come Laws (including Royal Decree-Laws). (Only Laws are subject to public debate in the Parliament (Articles 87 and 90 of the Constitution)). After Laws come Regulations, which comprise Royal Decrees, approved by the Council of Ministers; then come Ministerial Orders, approved by individual ministers.

198. It follows that, once a Royal Decree such as RD 661/2007 has been modified or derogated by a subsequent Royal Decree, Law or Royal Decree-Law, the SSC does not provide any interpretation of the provisions of the Royal Decree that have been replaced. As far as the Supreme Court's analysis is concerned, once a Royal Decree has been replaced, its provisions no longer exist.

199. This is evident from the judgments on which Spain relies. Most of these judgments concern the modification of RD 661/2007 by RD 1565/2010 (with all these judgments having been issued *after* the Claimants had made their investment). The SSC assessed RD 1565's alleged violation of RD 661/2007 as follows:

> "As there are no regulatory hierarchy relations between both [RD 661 and 1565], it can hardly be asserted that the precept contained in one Royal Decree "breaches" precepts of another which is just as equally binding: it does not breach them but rather it derogates or modifies them, a clearly distinct legal effect."[324]

200. Simply put, unless the derogated provision is contained in a higher-ranking law, the SSC cannot consider whether that provision has been violated.

201. This is why the Supreme Court stated in 2005 that:

> "There is no legal obstacle that exists to prevent the Government, in the exercise of the regulatory powers and of the broad entitlements it has in a strongly regulated issue such as electricity, from modifying a specific system of remuneration <u>as long as it remains within the framework established by the 1997 Electricity Sector Law.</u>"[325] (emphasis added, to indicate words omitted from the English translation submitted by Respondent)

202. Thus, the SSC's review does not extend to assessing whether the new regulation is compliant with – or respects the provisions contained within – a prior Royal Decree. Consistent with the Supreme Court's limited scope of review, a change to a Royal Decree is permissible if it is compliant with the higher-ranking norm, which in this case was the 1997 Electricity Law.

**(c) The pre-investment judgments relied on by Spain do not support its defence**

203. Spain refers to six judgments issued prior to the Claimants' investment which addressed the conformity under Spanish law of changes introduced by RD 436/2004.[326] These are dated 15

---

[324] **Exhibit R-144**, Ruling of the Spanish Supreme Court, appeal 40/2011 dated 12 April 2012, p. 7 (own translation).

[325] **Exhibit R-137**, Ruling of the Third Chamber of the Supreme Court dated 15 December 2005.

[326] Counter-Memorial, paras. 326-339, citing **Exhibit R-137**, Judgment of the Third Chamber of the Supreme Court of 15 December 2005; **Exhibit R-138**, Judgment of the Third Chamber of the Supreme Court of 25 October 2006, cassation case 12/2005, reference El Derecho EDJ 2006/282164; **Exhibit R-139**, Judgment of the Supreme Court of 20 March 2007, app. 11/2005 EDJ 2007/18059; **Exhibit R-140**, Judgment from the Supreme Court of 9 October 2007, app. 13/2006 EDJ 2007/175313; **Exhibit R-141**, Judgment of the Supreme Court of

December 2005,[327] 25 October 2006,[328] 20 March 2007,[329] 9 October 2007,[330] 3 December 2009[331] and 9 December 2009.[332] Spain considers these judgments to have "*expressly refused the possible grandfathering of the remuneration regime*".[333] This is misleading.

204. First, these judgments provide no interpretation of the meaning and effect of the key provisions in dispute. This is because, with one exception, they do not concern investments that had the benefit of the Special Regime in the first place. The Claimants have summarised Spain's domestic judgments in Appendix 1; these will therefore not be dealt with in further detail in this submission.

205. The one exception is the SSC Judgment dated 3 December 2009.[334] This concerned a PV installation previously registered under RD 436/2004. The appellant complained that RD 661/2007 was discriminatory since PV installations had lost the possibility of choosing the premium option which had been maintained for other technologies. In rejecting the challenge, the Supreme Court noted that the investor did not have the right for the legal regime to be "*frozen*".[335] It did not refer to Article 40.3 in doing so. For reasons explained above, this is hardly surprising since the Supreme Court could not verify the compliance of RD 661/2007 with Article 40.3 of RD 436/2004. More importantly, however, the SSC went on to note that the treatment of PV investments was in no way prejudicial:

> "the remuneration contemplated under [RD] 661/2007 for photovoltaic facilities is identical for the year 2007 to the one contemplated under Royal Decree 436/2004, and the remuneration they receive is of 45.5134 EC/Kwh, as opposed to the 44.0381 EC/Kwh they would receive under the transitional regime claimed."[336]

206. Thus, the Supreme Court found that RD 661/2007 had maintained (and in fact improved) the investor's remuneration.

207. Secondly, none of these judgments provided any indication that a regime change akin to the Disputed Measures was possible for existing installations already registered in the RAIPRE. They

---

3 December 2009, appeal 151/2007 EDJ 2009/307349 and **Exhibit R-2**, Judgment of the Third Chamber of the Supreme Court of 9 December 2009, appeal 152/2007, reference El Derecho EDJ 2009/307357.

327 **Exhibit R-137**, Judgment of the Third Chamber of the Supreme Court of 15 December 2005.

328 **Exhibit R-138**, Judgment of the Third Chamber of the Supreme Court of 25 October 2006, cassation case 12/2005, reference El Derecho EDJ 2006/282164.

329 **Exhibit R-139**, Judgment of the Supreme Court of 20 March 2007, app. 11/2005 EDJ 2007/18059.

330 **Exhibit R-140**, Judgment of the Supreme Court of 9 October 2007, app. 13/2006 EDJ 2007/175313.

331 **Exhibit R-141**, Judgment of the Supreme Court of 3 December 2009, appeal 151/2007 EDJ 2009/307349.

332 **Exhibit R-2**, Judgment of the Third Chamber of the Supreme Court of 9 December 2009, appeal 152/2007, reference El Derecho EDJ 2009/307357.

333 Counter-Memorial, para. 327.

334 **Exhibit R-141**, Judgment of the Supreme Court of 3 December 2009, appeal 151/2007 EDJ 2009/307349.

335 **Exhibit R-141**, Judgment of the Supreme Court of 3 December 2009, appeal 151/2007 EDJ 2009/307349, p. 6.

336 **Exhibit R-141**, Judgment of the Supreme Court of 3 December 2009, appeal 151/2007 EDJ 2009/307349, p. 7.

therefore offer little, if any, guidance as to the interpretation of the stabilisation commitments at issue in this case.

### 5.6 The PER 2005-2010 says nothing on retroactive changes

208. Spain considers that the PER 2005-2010 could not give rise to expectations as to the continued application of the RD 661/2007 FIT regime.[337] Spain claims that the "[PER 2005-2010] *is essential to understanding the key aspects of the system of remuneration included in RD 661/2007*".[338] Specifically, Spain contends that: (a) the PER 2005-2010 shows that with RD 661/2007, the Government did not seek to improve the remuneration for RE projects;[339](b) the PER 2005-2010 shows that the remuneration to be provided was subject to the evolution in the electricity demand;[340] and (c) the different Renewable Energy Plans (including the PER 2005-2010) set out the methodology that the Government followed in calculating what the "*reasonable return*" should be.[341] Each of these arguments is addressed below.

209. First, as shown above,[342] the evidence does not support Spain's contention that the Government did not seek to improve the economic incentives for RE projects when it approved RD 661/2007. The PER 2005-2010 itself noted that in order to attract further RE investment, it was necessary to provide sufficient economic incentives.[343] It certainly says nothing about the Government's intention when passing RD 661/2007, nor could it as it was published nearly 2 years before RD 661/2007.

210. Secondly, nowhere does the PER 2005-2010 say that FITs could be changed retroactively for existing investments if the evolution of electricity demand was not as predicted. Spain provides no evidence for its claim.[344] The PER 2005-2010 in fact expressly confirms that regulatory stability was the "*key factor*" to induce investment, meaning no retroactive changes should be made.[345]

211. Thirdly, Spain insinuates that the Claimants overestimated the remuneration they were entitled to because they did not follow the methodology set out in the PER 2005-2010 when calculating their

---

[337] See Counter-Memorial, paras. 364-372 and 406-419.
[338] Counter-Memorial, para. 408.
[339] Counter-Memorial, paras. 411-412 citing **Exhibit R-119**, Government of Spain, Ministry of Industry, Tourism and Commerce and IDAE, "*Renewable Energy Plan in Spain 2005 – 2010*", August 2005, p. 42 and 144.
[340] Counter-Memorial, paras. 413-414.
[341] Counter-Memorial, sub-section 5.3 and paras. 306-308.
[342] See above, section 5.3(b).
[343] **Exhibit C-75**, Government of Spain, Ministry of Industry, Tourism and Commerce and IDAE, "*Renewable Energy Plan in Spain 2005 – 2010*", August 2005, s. 4.3, p. 276 ("[I]*t is essential to position different technologies in such a way that their economic profitability becomes attractive to investors*") (emphasis added).
[344] Counter-Memorial, para. 414.
[345] **Exhibit C-86**, Summary PER 2005-2010, August 2005, s. 7.1, p. 55.

expected returns.[346] This is wrong. The PER 2005-2010 uses a number of assumptions and hypothesis to calculate the costs to the system if the growth targets each technology it advocates are met. Among these "assumptions and hypothesis" is an internal rate of return (**IRR**) of close to 7% – before financing and *after tax*.[347] The PER does not say that this is the return figure used by the regulator in setting the tariffs. It does not even say that this is a "*reasonable return*". The PER 2005-2010 is also silent as to whether the returns expected for wind installations were indeed higher or lower than the return for other RE technologies. As explained below[348], Spain clearly contemplated the possibility of a return higher than 7% post-tax for wind farms[349]. Quite simply, had Spain intended to cap returns at a specific rate, it would have written that into its laws and regulations.

212. Finally, Spain also refers to the National Action Plan for Renewable Energy in Spain 2011-2020 (the **PANER 2011-2020**) that was approved on 30 June 2010[350] to suggest that the Claimants should have known that the regulator may adopt measures to change or even withdraw the RE regulatory regime for RE projects.[351] This is absurd. The PANER 2011-2020 is not a regulatory instrument capable of creating rights and obligations for RE producers. In any event, the PANER 2011-2020 does not show that the Government is entitled to make retroactive changes to the FIT. In fact, the word "retroactive" in not mentioned once in the entire document. The only changes to remuneration referred to in the PANER 2011-2020 are for new installations, in light of the "*technological developments within the sectors, market behaviour, degree of compliance with renewable energy targets, percentage of demand covered by special regime facilities and their effect on the technical and economic management*".[352] This is in line with the Claimants' position, international best practice and indeed Spain's commitment at the time: changes to remuneration of RE plants can, of course, be made, but only for new installations.

## 5.7 The alleged warning of regulatory change set out in the SPA

213. Spain also asserts that "*the Claimants knew before making their investment about the possibility of regulatory changes*",[353] because Clause 11.5 of the "*Sale and Purchase Agreement expressly foresees*

346 Counter-Memorial, para. 424.
347 **Exhibit C-75**, Government of Spain, Ministry of Industry, Tourism and Commerce and IDAE, "*The Spanish Renewable Energy Plan 2005 – 2010*", August 2005, s. 4.2, pp. 273-274.
348 See section 6.3.
349 See above, para. 276.
350 Counter-Memorial, para. 491, citing **Exhibit R-120**, PANER 2011-2020, p. 5.
351 Counter-Memorial, paras. 491-499.
352 **Exhibit R-120**, PANER 2011-2020, p. 115.
353 Counter-Memorial, para. 607.

*the possibility of regulatory changes and it is agreed that the sellers will not be liable for those regulatory changes, whether retroactive or not*".[354] This is misleading.

214. Clause 11.5 of the SPA (titled "*Changes in legislation or in interpretation of existing rules*") reads as follows:

> "The Sellers shall not be liable for any Damage where that Damage is the result (i) of the approval or amendment of any rules, or of the current interpretation of any rules, whether or not having retroactive effect, arising, subsequently to the date of this Agreement, or (ii) any change in the accounting or tax management procedures made by the buyers of the Companies after the Closing Date."[355]

215. Spain misconstrues this provision. As explained in the Second Moreno Statement, this provision was included in the SPA in anticipation of the potential impact of a regional environmental tax on wind farms that had just been approved.[356] The only regulatory measure contemplated by this provision was this environmental tax.[357] A complete overhaul of the RE regulatory regime such as the one implemented by Spain between 2013 and 2014 was not on the parties' radar when this clause was being negotiated.[358] As Mr Moreno confirms, if it had been, the Claimants would not have proceeded with the acquisition.[359]

---

354 Counter-Memorial, paras. 608-609.

355 **Exhibit C-35**, Share purchase agreement between Bridgepoint Europe IV Bidco 3 Limited, Bridgepoint Europe IV Bidco 6 Limited and Bridgepoint Europe IV Bidco 8 Limited and EYRA, Urbaenergía and Iverduero, p. 22.

356 Second Moreno Statement, para. 27.

357 Second Moreno Statement, para. 27.

358 Second Moreno Statement, paras. 26-27.

359 Second Moreno Statement, para. 27.

## 6. THE DISPUTED MEASURES FRUSTRATED THE CLAIMANTS' INVESTMENT

216. Beginning in 2012, Spain implemented a series of measures that, substantially altered the legal framework for *existing* wind power investments such as the Wind Farms and culminated in the complete withdrawal of the RD 661/2007 economic regime. These measures are addressed below, as follows:

(a) section 6.1 and section 6.2 address the Initial Measures and the New Regime, respectively.

(b) section 6.3 explains why the New Regime does not provide a "*reasonable return*" (as now defined by Spain) and rebuts Spain's argument that the Claimants were earning "windfall profits" in excess of the "*reasonable return*".

(c) section 6.4 addresses Spain's assertion that the Claimants explicitly acknowledged the necessity of the Disputed Measures.

(d) section 6.5 puts an end to Spain's fallacy of the so-called "*renewable boom*".

(e) section 6.6 addresses the EC 's criticism of the Disputed Measures.

### 6.1 The Initial Measures

217. As explained in the Memorial, Spain's withdrawal of the New Regime was preceded by various Initial Measures adopted in 2012 and 2013, which eroded the RD 661/2007 economic regime on which the Claimants had relied.[360] These Initial Measures were endorsed in Law 15/2012 and RDL 2/2013.

#### (a) Law 15/2012

218. It is common ground between the Parties that on 27 December 2012, Spain approved Law 15/2012 that put in place the 7% Levy.[361] As explained below, the 7% Levy was implemented as a disguised tariff cut in breach of the commitments contained in the Special Regime.[362]

---

360 Memorial, section 7.1.

361 See for example, Counter-Memorial, paras. 659-660; **Exhibit C-48**, Law 15/2012 of 27 December 2012, concerning tax measures to ensure energy sustainability (published on 28 December 2012, Preamble.

362 See below section 19.

**(b) RDL 2/2013**

219. It is common ground between the Parties that on 1 February 2013, the Government approved RDL 2/2013 on "*urgent measures*" in the Electricity System and the financial sector. RDL 2/2013 eliminated the Premium and repealed the Consumer Price Index inflation update. Compared to the wholesale withdrawal of the Special Regime effected by the New Regime, the impact of RDL 2/2013 was relatively minor. It does, however, demonstrate Spain's clear intent to strip away the rights it had granted to RE investors under the Special Regime.

*(i) The elimination of the Premium*

220. RDL 2/2013 eliminated the Premium, so that RE producers only had the option to sell at the Fixed Tariff. As stated in both the Memorial and the First Moreno Statement, the Claimants made their investment expecting to be able to opt for the Premium option.[363]

221. Spain alleges it reduced the Premium to zero to correct a situation of "*excess remuneration*" and "*ensure a reasonable return*".[364] Spain refers to this "*excess remuneration*" or "*excessive profits*" more than seven times in its submission[365] but it has not put forward any evidence that it considered that to be the case at the time it introduced the measure. Nor is there any evidence that excessive profits were earned – that analysis was not done at the time. In any event, this submission makes no sense; the RD 661/2007 Premium was subject to a cap *precisely* to avoid any such "*excess remuneration*".[366] That "cap" was set at a level deemed to be reasonable by the regulator.[367] It cannot, *ex post facto*, be deemed "unreasonable".

222. Spain asserts that the elimination of the Premium was not an "*arbitrary, unreasonable or unforeseeable measure*"[368] because measures limiting the Premium option retroactively had been passed before the Claimants invested. Spain refers to three instances where the Premium was limited or removed: (a) the removal by RD 661/2007 of the Premium option for PV producers; (b) the removal by RD 661/2007 of the right to change between the Fixed Tariff and the Premium options for installations opting to remain under the RD 436/2004 remuneration regime; and (c) the temporary removal for one year by RD 1614/2010 of the Premium option for CSP producers. None of these measures bears any resemblance to the complete removal of the Premium by RDL 2/2013.

---

363 Memorial, para. 206 and First Moreno Statement, paras. 66 and 68.

364 Counter-Memorial, paras. 672, 675 and 677.

365 Counter-Memorial, paras. 422, 498, 712, 798, 974, 988 and 995.

366 Counter-Memorial, para. 974. See also **Exhibit C-44**, RD 661/2007 of 25 May 2007, Article 24.1.

367 **Exhibit C-44**, RD 661/2007 of 25 May 2007, Article 36, providing that under the Premium option: (i) plants under the "*b.*" would be subject to a cap of 34,3976 EURc/kWh".

368 Counter-Memorial, para. 674.

(a) First, although RD 661/2007 removed the Premium option for PV producers, Spain's contemporaneous documents confirm that RD 661/2007 actually increased the overall remuneration for PV installations by 82%.[369] (That this removal was not harmful was also confirmed by the Supreme Court).[370]

(b) Secondly, RD 661/2007 did not remove this option for installations under the RD 661/2007 transitory period. All it did was remove the right to change, irrevocably, from one option to the other during the transitory period. This is hardly comparable to the outright removal of the Premium enacted by RDL 2/2013.

(c) Thirdly, RD 1614/2010's temporary removal of the Premium, and the temporary reduction of the same for wind installations was a *quid pro quo*: in return for this temporary (and minor) limitation on the Premium, these installations would be guaranteed the Premium in the long-term. RDL 2/2013 offered no such give-and-take.

*(ii) Repeal of the Consumer Price Index inflation update*

223. RDL 2/2013 cancelled the mechanism in RD 661/2007 that had linked the FIT to Spanish CPI inflation despite the fact the CNE specifically noted that the draft of RD 661/2007 foresaw that the "*regulation must...<u>provide both transparent annual adjustment mechanisms</u>, associated to robust trend indexes (such as the average or reference tariff, the CPI, ten-year bonds, etc)*".[371] Spain abandoned that commitment to transparent FIT adjustment by abruptly implementing a new and unfamiliar indexation mechanism. The new indexation method was selected specifically because it would provide for a lower FIT than the original CPI index. The preamble to the subsequent RDL 9/2013 confirmed this; it stated that RDL 2/2013 had been implemented to "*correct the imbalances between the costs of the electricity sector and the revenue obtained from regulated prices*".[372] The change was clearly intended to reduce the income of Special Regime installations.

224. Spain states that the measure did not have any adverse effect on the Claimants; rather the new formula has been beneficial in certain periods in 2013, 2014 and 2015.[373] There is no evidence that the Claimants were better off under the modified indexation formula. The modified formula was introduced as a cut because it was originally lower than CPI. When it could have become beneficial

---

369 **Exhibit C-93**, Government of Spain, Ministry of Industry, Tourism and Commerce, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power*", 25 May 2007, p. 2.

370 **Exhibit R-141**, Supreme Court (Third Chamber, 3rd Section), Appeal No. 151/2007, p.7.

371 **Exhibit R-128**, Report CNE 3/2007, of 14 February 2007, regarding the proposed Royal Decree regulating the activity of electricity production under the special regime and certain facilities under similar technology under the ordinary regime, p. 16, para. 5.3(b).

372 **Exhibit C-51**, Royal Decree-Law 9/2013 of 12 July 2013, p. 52109 (PDF 6), para. 3.

373 Counter-Memorial, para. 665.

for the Claimants (during the period of January to July 2013), it was no longer applicable to them (under the New Regime). Spain's argument is misleading.

225. Further, Spain claims the change was foreseeable on the basis of after the CNE and the CNMC reports of March 2012 and September 2013.[374] These reports were, of course, issued after the Claimants' decision to invest, so are irrelevant. In any event, these reports did not actually advocate the change Spain later implemented. The CNE proposed to increase the discount on Spanish CPI that was applied to the FIT. [375] Spain ignored the CNE's proposal.

226. Finally, Spain suggests that the change was proposed or "*endorsed*" by the European Union.[376] This claim is entirely unsubstantiated.

**6.2 The New Regime: the culmination of the harm caused by the Disputed Measures**

227. The introduction of the New Regime is by far the most harmful of the Disputed Measures. The initial Disputed Measures were changes *to* the Special Regime. The New Regime is a complete change *of* the Special Regime itself, which it repealed and replaced with a wholly different and unprecedented remuneration scheme.

228. The measures enacted prior to the New Regime indicate that Spain was fully aware of the importance of Article 44.3 of RD 661/2007. Spain knew that it could not (openly) modify the FIT that it had guaranteed to existing installations. It therefore sought to impose taxes, remove the Premium option and cut the inflation indexation, all as a way to circumvent this protection for RE investors. In July 2013, however, it dropped the pretence of respecting its obligations to RE investors under the Special Regime and abandoned the Special Regime altogether. Months later, Spain enacted Law 24/2013 which also repealed and replaced the 1997 Electricity Law.

229. The New Regime puts in place an unprecedented remuneration regime for RE projects with a high degree of uncertainty.[377] Spain accepted that at the time. In its own words: " *there is no evidence*

---

374 Counter-Memorial, para. 668 citing **Exhibit C-166**, CNE Report on the Spanish Electricity Sector", Introduction and Executive Summary, 7 March 2012, Part I. Measures to guarantee the financial-economic sustainability of the electricity sector, National Energy Commission, 7 March 2012, p. 16 ("*In line with the observations of the Council of European Energy Regulators (CEER), it is necessary to revise the current discounting mechanisms with fixed efficiency factors X and Y and link them to improvements in objective efficiency. Until the study on those factors has been performed in accordance with the efficiency analyses, a r evision has been proposed to temporarily cancel the discounting, taking into account the current economic environment.* "); and **Exhibit R-132**, Report from the National Commission on Competition 103/13 on the Electricity Sector Bill, p. 11.

375 **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, Introduction and Executive Summary, 7 March 2012, p. 22. The CNE considered this appropriate because operational costs are a small part of the costs of RE installations and so it was not necessary to update the whole FIT with reference to CPI.

376 Counter-Memorial, para. 667.

377 Memorial, paras. 267-271; **Exhibit C-34**, CNE Report 18/2013 of 4 September 2013, p. 6.

*that there is a remuneration model similar to the one reflected in the proposal in any jurisdiction of the European Union, nor in other countries whose support system is known to international associations of regulatory bodies*" (as the Special Payment) "*in any other jurisdiction in the European Union or in other countries with support systems which are known through international regulatory associations*".[378] The CNE also called the New Regime a "*complet*[e] *change*".[379] Brattle agrees with this assessment and refers to the New Regime as "*unprecedented*".[380] Brattle confirms that the New Regime involved retroactive tariff cuts, including a claw-back of revenues received under the RD 661/2007 regime.[381] Brattle also explains that the New Regime significantly lowers the post-tax return as compared to the RD 661/2007 regime.[382]

230. Spain's *ex post facto* assertions that the regulatory framework has not been changed is plainly wrong.[383] As explained in the Memorial and below, the regime changed dramatically.[384] This is obvious not just from the provisions for the New Regime itself but also from how it was implemented.

231. The Government decided to introduce the New Regime through a Royal Decree Law. A Royal Decree Law is an instrument with the rank of a parliamentary act which, unlike Royal Decrees, of lower rank, allows for measures to be enacted without prior consultation and cannot be challenged in legal proceedings by the individuals affected.

232. There was no need for Spain to choose a Royal Decree Law to implement a reform of RD 661/2007. First, a Royal Decree can be amended by a subsequent Royal Decree without the need for any legislation of a higher normative rank.[385] Secondly, Royal Decree Laws, according to the Spanish Constitution, are intended for cases of "*extraordinary and urgent need*".[386] This was clearly not the case as Spain took over 11 months, after the approval of RDL 9/2013, to implement the New Regime. Spain thus chose to implement the New Regime via Royal Decree Law purely to foreclose debate and bypass the legitimate concerns of the investors whose investments would be severely harmed.[387]

---

378 **Exhibit C-34**, CNE Report 18/2013 of 4 September 2013, p. 6.
379 **Exhibit C-34**, CNE Report 18/2013 of 4 September 2013, pp. 15-16.
380 Brattle Regulatory Report, para. 146.
381 Brattle Regulatory Report, section VI(B)(3).
382 Brattle Regulatory Report, para. 17.
383 Counter-Memorial, para. 682.
384 Memorial, section 7.2.
385 By way of example, RD 661/2007 replaced the prior Royal Decree RD 436/2004.
386 **Exhibit C-50**, Constitution of Spain of 27 December 1978, section 86.
387 **Exhibit C-34**, CNE Report 18/2013 of 4 September 2013, p. 4 (PDF 5).

233. Repealing RD 661/2007 through a Royal Decree Law – which has the rank of a Law – allowed Spain to override even the limits established by the SSC.[388] Since Royal Decree Laws have the rank of Law they cannot be challenged by an individual in the courts.[389] By implementing a measure via a Royal Decree Law, the Government can therefore avoid any prior public consultation and prevent any direct challenge to the measure by individuals in the courts. The only possible challenge is before the Constitutional Court.[390] These constitutional protections are, however, inadequate for the inducement and protection of RE investment.[391] It is precisely for this reason that Spain provided the specific commitments contained in Articles 40.3 of RD 436/2004, 44.3 of RD 661/2007 and 5.3 of RD 1614/2010.[392]

**(a) Spain's withdrawal of the RD 661/2007 economic regime**

234. On 12 July 2013, Spain enacted RDL 9/2013. It is common ground between the Parties that RDL 9/2013 repealed RD 661/2007,[393] abolished the Special Regime, and introduced a New Regime for both existing and new installations.

235. As explained in the Memorial and in this Reply,[394] the Special Regime was designed as a production incentive. This meant that plants with more sophisticated and innovative technologies, and greater power production (but also higher investment costs) could earn more than plants with lower generation (and most likely lower investment costs).[395] By contrast, under the New Regime, the Special Payment is not based on production; rather, the remuneration is based on a capacity payment, calculated by reference to the costs of a hypothetical Standard Installation. This diminishes the incentive to build efficient and high-producing plants, and fails to reward those who did so in the past (and took the attendant risks), as RD 661/2007 did.[396]

---

388 Royal Decree-Laws are approved by the Government alone without any consultation or process for public engagement or any debate in the Senate. They enter into force immediately; to continue in force for more than 30 days, they require the approval of a majority in Congress. In practice, this poses little difficulty for the Government where its party holds a majority in Congress (as was the case during the implementation of the Disputed Measures).

389 They can only be challenged by limited State actors and only on the basis that they violate the Constitution. See fn 322.

390 The Constitutional Court consists of 12 judges that are nominated by the Senate, Congress and the Government.

391 The only constitutionally protected acquired rights according to the Spanish Constitutional Court are "*property rights previously consolidated and definitively incorporated into the assets of the recipient, or legal situations already expired or consummated*". In the present context, that would refer to money received for electricity previously sold. Under Spanish law it is impossible to have an acquired right with respect to money owed. The Claimants' right to the benefits of the RD 661/2007 FIT therefore does not qualify as an "*acquired right*" according to this narrow Constitutional definition. See **Exhibit R-154**, Judgment of the Constitutional Court of 17 December, 2015, delivered in constitutional challenge number 5347/2013, 17 December 2015, p. 30.

392 See sections 4.3, 4.5 and 4.6 above.

393 Memorial, para. 248.

394 See section 4.2(c) and Memorial, paras. 107 and 138-143.

395 Brattle Regulatory Report, paras. 23, 24 and 163.

396 Brattle Regulatory Report, paras. 164-168.

236. This is why the Council of State, in its opinion rendered on the draft Law 24/2013, considered that the regime that Spain put in place in 2013 represents:"[a] *reform… of a scope far greater than the previous modifications of the special regime remuneration system, taking into account that the draft involves* [the] *disappearance* [of the special regime]*, with the exceptional possibility of replacing it by a specific remuneration regime based on different parameters…*".[397]

237. Furthermore, the Special Payment does not provide the stability and predictability that the RD 661/2007 FIT provided. In the New Regime, the Government may revise the Special Payment at the end of each regulatory period (i.e. every six years), which creates great uncertainty for producers, such as the Claimants. In fact, the Government has recently announced its intention to cut the remuneration of RE producers further, by reducing returns to 4.2%.[398] This can be contrasted with the RD 661/2007 regime, which did not contain any process or framework for the regulator to update its assessment of efficient operating costs, investments or returns for existing projects.[399] For good reason: it was never envisioned that this data (which underlay the regulation's setting of the FIT but was not communicated to investors) would be updated for existing plants so as to revise their remuneration. This is because the return expectations are determined at the time of the investment, considering the high initial costs incurred to develop these projects.[400] The New Regime severely undermines the legal certainty behind investments made in existing installations due to the radical change in the applicable economic regime.[401]

238. In addition, the New Regime introduced what is effectively a cap on the return that the Wind Farms can enjoy based on what the Government now considers to be "*reasonable*", *ex post*. In practice, this means that whatever payments an installation received in the past in excess of what the Government considers today (or in the future) to be reasonable will have to be discounted from future payments, which has the same practical effect as if the amounts previously received had to be returned.[402] The New Regime is therefore doubly retroactive in nature.[403]

---

397 **Exhibit R-123**, Decision number 937/2013 from the Permanent Commission of the Council of State, 12 September 2013, on the Draft Bill on the Electricity Sector, published in the Official Gazette, p. 16 (our translation).

398 **Exhibit C-251**, Cinco Días, Press Article, "*Nadal is planning to cut in half the remuneration of renewable plants*" dated 26 June 2017; **Exhibit C-252**, Cinco Días, Press Article, "*Nadal: "Remuneration for renewables will go down in order to lower the price of electricity by 5 to 10%*", dated 29 June 2017; **Exhibit C-262**, El Mundo, Press Article, "*The cuts to the electricity sector "are in the Law."*"", dated 20 September 2017; **Exhibit C-263**, Cinco Días, Press Article, "*Nadal will maintain the electric regulation, which will entail a cut to revenues* ", dated 20 September 2017; **Exhibit C-264**, Expansión, Press Article, "*The electricity sector claims that returns are guaranteed*.", dated 20 September 2017; and **Exhibit C-265**, Expansión, Press Article, "*The Govenrment is preparing a new wave of cuts to the electricity sector*.", dated 15 September 2017.

399 Brattle Regulatory Report, paras. 102-110. See also Memorial, paras. 147-153.

400 Brattle Regulatory Report, paras. 49-51 and 69.

401 Brattle Regulatory Report, paras. 161-181.

402 Brattle Regulatory Report, paras. 182-188 and figure 20.

403 The Claimants address Spain's legal submissions concerning the meaning of retroactive at section 13.3 below.

239. Spain's Council of State was clearly concerned with this retroactive feature of the New Regime, referring to "*the calculation of specific special compensation - which is yet-to-be-implemented as its regulation has been submitted for regulatory development - using information from the entire regulatory lifespan of the installations, thus including information preceding the entry into force of the reform underway*".[404] This is why the Council of State recommended "*maximum caution*" when applying the new rules to existing installations.[405]

**(b) Spain's overhaul of the legal framework under Article 30.4 of the 1997 Electricity Law**

240. The New Regime significantly amended Article 30.4 of the 1997 Electricity Law. The following features are worth highlighting.

*(i) The New Regime introduces the Special Payments based on "standard installations" and "reasonable return"*

241. As explained in detail below, under the 1997 Electricity Law, the concept of "*reasonable return*" had been left undefined. The Law left it up to the regulator to implement incentive schemes through regulation that would, among other things, grant a "*reasonable return*". Now Spain has determined that "reasonable" profitability is 7.398% pre-tax. This equates to below 5.5% after tax.[406] Such a defined return was never before established in the law, or the applicable regulations, nor was it communicated to investors. There was obviously no such limit under the RD 661/2007 FIT since the profitability of an installation was determined solely by its efficiency. Spain deliberately encouraged investment in efficient plants by offering a €/kWh remuneration, inviting investors to beat the cost target, i.e. earn more than whatever "*reasonable return*" the regulator may have had in mind when setting the Article 36 tariffs. And any such investor could reap the rewards of having beaten the cost target. That was the entire philosophy underlying the FIT scheme (and indeed any other such scheme).[407] The New Regime seeks to appropriate these rewards. This alone is a radical change.

---

404 **Exhibit R-123**, Decision number 937/2013 from the Permanent Commission of the Council of State, 12 September 2013, on the Draft Bill on the Electricity Sector, published in the Official Gazette, p. 17. ("*Without it being necessary to go so far as to qualify the specific degree of retroactivity, a model for calculating the specific compensation based on standard data on income from the sale of energy, operating costs and initial investment value, could, depending on how they are applied to an existing installation, imply the inclusion of past facts, even for the payment of future compensation. Considering both the difficulty of gathering information in the three aforementioned areas, where a long time has passed since the opening of the installation in question, and the objections related to the aforementioned principles, which could lead to the inclusion of the factors consumed, the Council of the State recommends adopting maximum caution when ordering the temporary application of the specific compensation system, which, as the case may be, shall apply to facilities existing prior to 14 July 2013*.") (our translation).

405 The application of the New Regime to installations in operation before 14 July 2013, when RDL 9/2013 entered into force (**Exhibit R-123**, Decision number 937/2013 from the Permanent Commission of the Council of State, 12 September 2013, on the Draft Bill on the Electricity Sector, published in the Official Gazette, 12 September 2013, p. 17) (our translation).

406 Brattle Rebuttal Quantum Report, para. 172.

407 Brattle Rebuttal Quantum Report, para. 263.

242. Under the New Regime, the Special Payment is calculated considering the costs of a Standard Installation. This means that for existing installations, including the Claimants', the Government has decided *ex post* at what cost those investments should have been made. Spain argues that "*if the investor is efficient and manages to reduce their investment cost below the parameters established for the applicable standard facility, they will obtain a higher return on the investment*".[408] This is evidently absurd. The Claimants cannot change their investment costs years after the plants were commissioned. These investments were undertaken pursuant to an incentive regime that encouraged investors to pursue maximum efficiency. Spain has decided *ex post* that the Claimants instead ought to have invested in the cheapest plants available. In addition, the Government also decided *ex post* how much it should have cost to operate and maintain the installations since they entered into operation.

243. Thus, the Government decided *ex post* the "*reasonable return*" those installations should get based on its own *ex post* determination of what the plant should have cost and its own *ex post* determination of what it should have cost to operate the plant. Based on these criteria, the Government decides what the Special Payment should be, irrespective of whether the data for the Standard Installations corresponds to that of the real and actual plant.[409] Spain's own organs criticised this aspect of the New Regime.[410]

*(ii) The New Regime penalises investors in the most productive plants*

244. As explained by Brattle, Spain has set the Special Payment with hindsight by shifting the implicit cost target of the Original Regulatory Regime.[411] In particular, Brattle notes that:

> "Spain changed the initial investment and operating costs that were implicit in the FITs under the Original Regulatory Regime. As indicated above, there was only one standard installation under the Original Regulatory Regime, and now there are 46. The creation of so many new categories means that Spain has necessarily changed the estimated initial investment costs applicable to existing plants. In fact, Spain stresses that the New Regulatory Regime will never change the initial investment costs estimated in the June 2014 Ministerial Order, but that begs the question why Spain changed the estimated investment costs already established under the Original Regulatory Regime."

---

408 Counter-Memorial, para. 697.

409 In accordance with Article 107 of the Spanish Constitution, the Council of State is "*the supreme consultative body of the Government*". See **Exhibit C-50**, Constitution of Spain of 27 December 1978, section 107.

410 **Exhibit R-123**, Decision number 937/2013 from the Permanent Commission of the Council of State, 12 September 2013, on the Draft Bill on the Electricity Sector, published in the Official Gazette, p. 18 (our translation).

411 Brattle Regulatory Report, paras. 164-168 and Figure 18. See also, Brattle Rebuttal Quantum Report, paras. 268.

245. It is important to note that the Original Regulatory Regime was not designed by Spain to offer each wind installation a specific percentage return (after tax) on their actual costs. That would have required Spain to engage in central planning and provide a different FIT for every single wind installation. Rather, the Original Regulatory Regime was designed by Spain to offer a particular return (after tax) on the marginal plant[412] and the actual return for a particular wind farm would vary based on its own characteristics. Higher producing wind farms would earn comparatively higher returns than others. The more a plant produced, the higher its income. This was also beneficial to Spain as it sought to maximise the proportion of electricity sourced from RE sources and reduce its energy imports.

246. Notably, the New Regime also employs a marginal plant system.[413] However, rather than having just one marginal plant and one FIT for wind farms, the New Regime identifies 46 marginal plants and 46 different investment incentives. The New Regime classifies wind farms in 46 categories of Standard Installation based on technology, installed capacity, year of commissioning and other parameters. By classifying wind farms plants in 46 categories, the New Regime introduces new cost targets *ex post* and not known at the time the investments were made.

247. As Brattle explains, "*the New Regulatory Regime has used hindsight to shift the cost target to appropriate the benefits that investors previously earned by beating the cost target of the Original Regulatory Regime*".[414] This means that under the New Regime Spain is shifting the original cost target downward to new (and lower) cost benchmarks.[415] Brattle's Rebuttal Regulatory Report stressed the lack of precedent for Spain's approach under the New Regime, as it is penalising the most efficient plants by reducing the remuneration for those investors that invested in high-performing equipment or in installations located in more favourable sites.[416] The Claimants' Wind Farms suffered as a result of this perverse feature since they produce more electricity than the average wind farm in Spain.[417] The New Regime thus replaced a system that incentivised higher production *ex post* to a system that does not incentivise production.

---

[412] Spain never published the levelised-cost target underpinning marginal plant used in the RD 661/2007 regime. However, it is undisputed that each of the FITs offered under RD 661/2007 regime were based on an implicit levelised-cost. That implicit levelised cost target is the cost associated with what is known as the "marginal plant", i.e. the plant determined by Spain to represent an efficient plant. In other words, the marginal plant is the hypothetical installation that was considered by Spain to represent an efficient plant, with efficient levelised costs.

[413] See section 26 below.

[414] Brattle Regulatory Report, para. 164.

[415] Brattle Regulatory Report, paras. 164-168.

[416] Brattle Regulatory Report, para. 163.

[417] **Exhibit C-120**, Investment Advisory Committee Paper on Project Greco dated 11 July 2011, p. 20 ("[p]*articular attractions of the Greco assest are likely to include its concentrated portfolio (all in Castilla y Leon), given the lower operating costs that this allows, and its above average wind hours (2,310 hours vs. c2,200 average for Spain)*").

248. The new cost benchmarks imposed by the New Regime (published in 2014) were obviously not known to investors at the time they invested. Rather, investors only had sight of the FIT offered under RD 661/2007 and their investment decisions (including choice of technology, site selection, etc) were based on an attempt to beat the implicit cost target in RD 661/2007. By imposing new (and lower) cost targets under the New Regime, Spain is appropriating the efficiency gains available under the Original Regulatory Regime. Those efficiency gains were for the investors to keep.

*(iii) The New Regime allows Spain to change every six years the "reasonable rate of return" that the Wind Farms are entitled to receive during their entire operational life*

249. Article 30.4 of the 1997 Electricity Law, as amended by the New Regime, allows Spain to revise, at the end of each regulatory period (i.e. every six years), the "*reasonable rate of return*" that a standard installation is entitled to receive during its entire operational life.[418] As noted above, the Government has recently confirmed that it will significantly reduce remuneration for RE in the following review. This is in complete contradiction to how FIT support schemes operate.[419] It is also, of course, inconsistent with Spain's commitment not to change the economic regime for existing plants, in reliance on which the Claimants made their investment.

*(iv) Under the New Regime, the Wind Farms no longer have priority of despatch*

250. The New Regime deprives RE installations of the unconditional right of priority of grid access and priority of despatch that existed under the previous regime.[420]

*(v) Under the New Regime, the Wind Farms may or may not receive the Special Payment*

251. Under the new wording of Article 30.4 introduced by RDL 9/2013, "*installations may receive*" a remuneration in addition to the market price, but this is now entirely at the Government's discretion. Law 24/2013 took the Government's discretion even further by providing that the Special Payment is "*exceptional*" in nature.[421] This is substantially different from the regime that Spain put in place under Article 30.4 of the 1997 Electricity Law, which provided that the remuneration for Special

418 **Exhibit C-251**, Cinco Días, Press Article, "*Nadal is planning to cut in half the remuneration of renewable plants*" dated 26 June 2017; **Exhibit C-252**, Cinco Días, Press Article, "*Nadal: "Remuneration for renewables will go down in order to lower the price of electricity by 5 to 10%*", dated 29 June 2017; **Exhibit C-262**, El Mundo, Press Article, "*The cuts to the electricity sector "are in the Law.*"", dated 20 September 2017; **Exhibit C-263**, Cinco Días, Press Article, "*Nadal will maintain the electric regulation, which will entail a cut to revenues* ", dated 20 September 2017; **Exhibit C-264**, Expansión, Press Article, "*The electricity sector claims that returns are guaranteed.*", dated 20 September 2017; and **Exhibit C-265**, Expansión, Press Article, "*The Govenrment is preparing a new wave of cuts to the electricity sector.*", dated 15 September 2017.

419 Brattle Regulatory Report, paras. 137-140.

420 **Exhibit C-52**, Law 24/2013 of 26 December 2013, Article 6. See also Memorial, paras. 283-284.

421 **Exhibit C-52**, Law 24/2013 of 26 December 2013, Article 14.7.

Regime installations "*<u>shall</u> be supplemented by the earning of a premium under the terms set by regulation*".[422]

*(vi) The New Regime applies retroactively to existing facilities*

252. The New Regime calculates the remuneration that a Standard Installation can earn based on what the Government now considers to be "reasonable", *ex post*: "[t]*his remuneration regime shall not exceed the minimum* [required] *level*".[423] This return is calculated over the deemed regulatory life of the plant (20 years for wind farms) and takes account of the remuneration that the plant obtained during the time the previous regulatory framework was in place.[424] In practice, this means that whatever payments an installation received in the past in excess of what the Government now considers today to be reasonable will have to be discounted from future payments, which has practically the same effect as if the amounts previously received had to be returned.[425] This aspect of RDL 9/2013 makes this measure *fully retroactive* (or doubly so) as it essentially claws back payments previously made under the old regime.[426] As a result, returns received by the plants are used to calculate the returns to which the Claimants are entitled.

*(vii) Under the New Regime, the value of the Claimants' investment is directed and controlled by Spain*

253. The absurdity of the New Regime is made clear through RD 413/2014, which implemented the New Regime. Under the Special Regime, the value of the Claimants' Wind Farms was determined by the amount of electricity they generated. Each kWh produced received the RD 661/2007 FIT which determined the revenues of the Claimants' Wind Farms. The Claimants were thus ultimately in control of the profitability of their business; higher production meant higher revenues and a higher value.[427] In contrast, the value of the Wind Farms is now dictated and controlled by Spain through the approval of certain parameters, which have a direct effect on the plants' remuneration, and will cap it, regardless of the Claimants' efforts to be technically advanced, efficient and productive. In addition, the net asset value of the standard plant, which also has a direct relationship with the remuneration, is now established in accordance with the following formula at Appendix XIII to RD 413/2014:

---

422 **Exhibit C-39**, Law 54/1997 of 27 November 1997, Article 30.4 (emphasis added).
423 **Exhibit C-52**, Law 24/2013 of 26 December 2013, Article 14.7.
424 **Exhibit C-52**, Law 24/2013 of 26 December 2013, Third Final Provision. Brattle Regulatory Report, paras. 22, 182-188 and figure 20.
425 Brattle Regulatory Report, paras. 182-188 and figure 20.
426 This is addressed at section 13.3.
427 Brattle Rebuttal Regulatory Report, paras. 77-81.

2.a) Net asset value.

$$VNA_{j,a} = \left[ VI_a\,(1+t)^{p-a=1} - \sum_{i=a+1}^{p-1} (Ing_i - Cexp_i)(1+t)^{p-i-1} \right]$$

$VNA_{j,a}$ : Net asset value per power unit, at the start of the regulatory semi-period "j", for the standard installation with final operating authorization during the year "a", expressed in €/MW.

$VI_a$: Value of the initial investment of the standard installation with final operating authorization during the year "a" per one power unit, expressed in €/MW.

a: Year of the final operating authorization of the standard installation.

p: 2014, as first complete year of the first regulatory semi-period.

$Ing_i$: Total average revenue per power unit received by the standard installation during the year i, for the years before 2014.

$Cexp_i$: Estimation of the operating cost per power unit of the standard installation during the year i, for the years before 2014.

t: Readjustment rate that takes as a value that of reasonable return as defined in the second additional provision, notwithstanding its subsequent revision under the terms provided by law.

254. It would have been unfathomable to any investor relying on the commitments of the Special Regime that Spain would dictate the remuneration of their investments through an inscrutable formula established by Royal Decree, that takes into account total "average" revenues ("Ing") received during the years the plants were in operation, prior to the passage of the new Law.

255. This lays bare one of the greatest injustices of the New Regime. The net asset value of the Wind Farms, and thus their remuneration, is calculated by taking into account the "ingresos" (revenues) from their year of commissioning. "*Ing*" is the "[t]*otal average revenue*" from the beginning of operation. As such, the value of the Claimants' investment is calculated in part on revenues the Wind Farms are deemed to have received *prior* to 2013. This represents a fundamental change to the economic regime in reliance on which the Claimants invested. As explained above, the Special Regime incentivised RE plants to produce as much electricity as possible.[428] Despite this, Spain has completely changed the regime and used that prior production of energy it encouraged as a means to reduce the value of an RE installation. This makes no sense and is obviously unfair.

### 6.3 The New Regime does not even provide a "*reasonable return*"

256. Spain defends its conduct on the basis that the only commitment it made to the Claimants was that they would receive a "*reasonable return*".[429] As explained in the Memorial, and developed in this

[428] Brattle Regulatory Report, paras. 46-58.
[429] Counter-Memorial, paras. 319-320.

Reply,[430] this is not what Spain committed to provide in RD 661/2007. Even if the Tribunal were to consider that the regime under which the Claimants invested only guaranteed a "*reasonable return*", Spain has breached this commitment, as the New Regime fails to provide such a return.

257. Spain argues that the New Regime offers a "*7.398 percent return for the whole of project for a standard facility*".[431] It further contends that as a result of the New Regime, "*certain activities and their plants have seen how their remunerations have been increased*".[432] No support is offered for this claim. In any case it is not true for the Wind Farms.

258. Spain conveniently fails to mention that the 7.398% rate of return is a *pre-tax* return, rather than a post-tax return. This means that the returns that could theoretically be achieved are, in the best case scenario, much lower than what Spain claims. It is also bears reiterating that Spain's *ex post* determination that this figure represents reasonable profitability is an entirely new regulatory feature. This will be explained below.[433]

259. Moreover, Spain's own documents show that it clearly contemplated the possibility of a return higher than 7% *post-tax*, a figure that Spain derives from the PER 2005-2010.[434] The Ministry Report on the draft RD 661/2007 stated that "[w]*ith the payment considered, the return obtained would be 7% in the regulated tariff option and limited to 5-9% if the market sale option is opted for*".[435] These references are also to *post-tax* returns. This is in line with the position of the CNE at the time it examined draft RD 661/2007 (stating that a "*reasonable return*" would be in the region of 7.2-11% *after-tax*)[436] and the Government's own statements under the May 2007 Announcement that was issued when RD 661/2007 was approved.[437] Importantly, in a presentation dated 29 October 2008, the Vice President of the CNE confirmed that the first goal of RD 661/2007 was to reach planning targets through economic incentives: "*sufficient to guarantee reasonable return, but… incentives that provide greater returns are justified*".[438] Therefore, based on Spain's own contemporaneous representations of what would constitute reasonable returns, the Claimants' expectations have been frustrated.[439]

---

430 See section 5.1; Memorial, paras. 128, 136 and section 4.5.

431 Counter-Memorial, para. 690.

432 Counter-Memorial, para. 793.

433 See para. 13.3.

434 Counter-Memorial, 417.

435 **Exhibit C-203**, *Memoria Económica* for RD 661/2007, 21 March 2007, section 3.2.3, p. 17.

436 See comments from the CNE on the draft RD 661/2007: **Exhibit C-217**, CNE opinion on the resolution adopted by the CNE Board of Directors on 14 February 2007, approving the report on the RD 661/2007, 8 March 2007, p. 8 (PDF 3).

437 **Exhibit C-93**, Government of Spain, Ministry of Industry, Tourism and Commerce, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power*", 25 May 2007, pp. 1-2.

438 **Exhibit C-95**, CNE Presentation, "*Legal and Regulatory Framework for the Renewable Energy Sector*", 29 October 2008, p. 6.

439 This is the basis for the Claimants' alternative damages claim.

260. Furthermore, the concept of "*reasonable return*" is, in itself, subject to change (or even to a complete withdrawal) under the New Regime, given that the Government retains a significant degree of discretion to modify what it deems to be a reasonable rate of return every three years (at the end of every Regulatory Semi-Period)[440] and every six years (at the end of each Regulatory Period).[441]

261. Therefore, the alleged pre-tax 7.398% (or below 6% after tax)[442] return could be forced down depending on the interpretation of the applicable regulations in the various revisions (every three or six years) of the economic parameters. As noted, the Minister of Energy has already declared to Congress the intention to force returns down in the next regulatory period to 4.2% pre-tax.[443]

### 6.4 The Claimants do not acknowledge the need to implement the Disputed Measures

262. Spain alleges that the Claimants acknowledged "*the need for structural reform of the remuneration* " in one of Bridgepoint's internal Investment Advisory Committee documents.[444] In particular, Spain refers to the following statements of Bridgpoint's internal document:

> "Said document points out in this regard that "[t]*he reason behind Government's legislative actions is to address the historical deficit between regulated prices and market costs in the electricity industry*" and that "[t]*he local difficult economic conditions are affecting the historical stability and visibility of the energy industry. The Government has approved a number of economic reforms with the objectives of controlling final electricity prices.*" It likewise, indicates that "[t]*he Government has announced that a new structural law regulating the electricity sector will be passed*", and it foresees regarding what would be the new Electricity Sector Act (Act 24/2013), that "[t]*he new structural law will provide us with a stable framework to implement our strategy.*"[445]

263. Spain clearly takes Bridgepoint's statements out of context. The document was prepared after RDL 2/2013 was passed but, importantly, before the New Regime (RDL 9/2013, Law 24/2013,

---

440 The Government may revise the estimated revenue from the sale of energy in the electricity market, and directly related parameters, which affects the amount of the total payment for the next three years.

441 The Government can modify all of the remuneration parameters (except for the regulatory useful life and the standard value of the initial investment), as well as the reference to which the reasonable rate of return is calculated. The current Regulatory Period ends on 31 December 2019.

442 Brattle Rebuttal Quantum Report, para. 266.

443 **Exhibit C-251**, Cinco Días, Press Article, "*Nadal is planning to cut in half the remuneration of renewable plants*" dated 26 June 2017; **Exhibit C-252**, Cinco Días, Press Article, "*Nadal: "Remuneration for renewables will go down in order to lower the price of electricity by 5 to 10%*", dated 29 June 2017; **Exhibit C-262**, El Mundo, Press Article, "*The cuts to the electricity sector "are in the Law.*"", dated 20 September 2017; **Exhibit C-263**, Cinco Días, Press Article, "*Nadal will maintain the electric regulation, which will entail a cut to revenues* ", dated 20 September 2017; **Exhibit C-264**, Expansión, Press Article, "*The electricity sector claims that returns are guaranteed.*", dated 20 September 2017; and **Exhibit C-265**, Expansión, Press Article, "*The Government is preparing a new wave of cuts to the electricity sector.*", dated 15 September 2017.

444 Counter-Memorial, para. 649.

445 Counter-Memorial, para. 649.

RD 413/2014 and MO IET/1045/2014) was implemented or its features known.[446] This document, dated 11 March 2013, is aimed at informing Bridgepoint's Investment Advisory Committee of the negative effects of the recently-passed RDL 2/2013.[447]

264. In quoting these statements out of context, Spain implies that the Claimants acknowledged that the Disputed Measures were necessary. This is wrong. In fact, the document starts by regretting the "*erratic energy policy of the new government*" which "*contrasts with the historical stability of the electricity industry regulation*".[448] The document describes the changes made by RDL 2/2013 as "*unexpected as the market was envisaging no further actions from the Government until the structural law is introduced during 1H2013* [sic]".[449] RDL 2/2013 is described as being "*retroactive for operating plants as it changes the economic principles on which the initial investments were conducted*".[450] The document goes on to say that "*industry associations and market players are in the process to legally challenge the new regulatory framework*".[451] This document makes clear that the Claimants did not expect any harmful changes to existing plants before the first such measure was introduced by Spain.

265. It is in this context that Bridgepoint referred to the new structural law. Bridgepoint also made clear that it hoped that this new law would provide the Claimants with a stable framework, based on the understanding that the new measures would not "*introduce further economic changes across the sector but focus on increasing competition*" and that measures with retroactive effect would not be enacted.[452] Unfortunately, this was not the case, as the New Regime completely overhauled the economic regime applying to existing RE plants in an unprecedented and harmful manner.[453] This is precisely why the Claimants brought this claim.

### 6.5 The EC's criticisms of Spain's retroactive changes

266. When Spain began introducing the Initial Measures at the start of 2012, the Commission expressed "*strong concern about the overall impacts of such changes on the investors' confidence in renewable energy markets*".[454] Furthermore, in early 2013, soon after the Government introduced

---

[446] **Exhibit C-173**, Paper to the Investment Advisory Committee– six-month review after closing of Project Greco dated 11 March 2013.
[447] First Moreno Statement, para. 68.
[448] **Exhibit C-173**, Paper to the Investment Advisory Committee– six-month review after closing of Project Greco dated 11 March 2013, p. 2.
[449] **Exhibit C-173**, Paper to the Investment Advisory Committee– six-month review after closing of Project Greco dated 11 March 2013, p. 2.
[450] **Exhibit C-173**, Paper to the Investment Advisory Committee– six-month review after closing of Project Greco dated 11 March 2013, p. 2.
[451] **Exhibit C-173**, Paper to the Investment Advisory Committee– six-month review after closing of Project Greco dated 11 March 2013, p. 2.
[452] **Exhibit C-173**, Paper to the Investment Advisory Committee– six-month review after closing of Project Greco dated 11 March 2013, p. 2.
[453] **Exhibit C-34**, CNE Report 18/2013 of 4 September 2013, p. 6.
[454] See **Exhibit C-222**, European Parliament Notice to Members in response to Petition 1606/2010 re alleged broken promises by Spain concerning investment in PV, 16 March 2012, p. 2.

RDL 2/2013, which in practice withdrew the right of producers to sell under the Premium, the EC, once again:

> "… expressed concerns about stop-and-go approaches and retroactive measures affecting renewable energy projects. These concerns remain valid. Moreover, although Spain made good progress on its trajectory to reaching the national target of 20% until 2010, the recent developments… mean that the achievement of the national 2020 target is not certain at this point."[455] (emphasis added)

267. In particular, on 27 March 2013, the Commission stressed that Spain's reforms had a:

> "… negative impact on the investment climate. Most critical have been changes that reduce the return on investments *already made*. Such changes alter the legitimate expectations of business and clearly discourage investment, at a time when significantly more investment is needed."[456] (emphasis added, italic emphasis in original)

268. In this respect, the Spanish Renewable Energy Association in Spain noted that "[w]*e've gone from misery to ruin*"[457] in the series of regulatory reforms that ultimately resulted in the complete overhaul of the RD 661/2007 economic regime in July 2013. Indeed, the New Regime has been so harmful to foreign investors that it "*has triggered diplomatic pressure by the United States and the rest of Europe, as well as expressions of concern from EU authorities*".[458]

269. The EC has also stressed the harmful impact created by the fact that, as explained in the Memorial,[459] it took the Government more than 11 months to define the new economic regime:

> "In June 2014, the authorities adopted a new remuneration scheme applying to existing and future renewable energy sources (RES), a major outstanding element of the 2013 electricity reform. While the new remuneration scheme has been in force since July 2013 (the date of entry of the Royal Decree-Law 9/2013), renewable energy operators have only known since June 2014 which remuneration standards are applied to their particular installations, and what remuneration they can expect."[460] (emphasis added)

---

455 **Exhibit C-223**, European Commission's response to question by the European Parliament (Question for written answer E-001624/13 to the Commission, 15 February 2013), 9 April 2013.

456 **Exhibit C-224**, European Commission, Renewable Energy Progress Report, SWD (2013) 102 final, 27 March 2013, p. 9. See also **Exhibit C-148**, Communication from the European Commission, "*Delivering the Internal Electricity Market and Making the Most of Public Intervention*", C(2013) 7243 final, 5 November 2013, p. 15: "*Retroactive changes to existing support schemes will damage investor confidence and reduce investments in the sector. Support scheme reforms should not frustrate investor's legitimate expectations. The Commission recommends supporting renewables in a stable, transparent, credible, cost-efficient and market integrating way. This will lead to technological innovation and competitiveness of renewable sources*" (emphasis added).

457 **Exhibit C-147**, The New York Times, Press Article, "*Renewable Energy in Spain Is Taking a Beating*", 8 October 2013, p. 1.

458 **Exhibit C-147**, The New York Times, Press Article, "*Renewable Energy in Spain Is Taking a Beating*", 8 October 2013, p. 2.

459 Memorial, para. 386.

460 **Exhibit C-225**, European Commission, "*Macroeconomic imbalances: Country Report – Spain 2015*", European Economy Occasional Papers 216, 1 June 2015, p. 63 PDF 73.

270. The EC noted two fundamental aspects lacking in transparency in the manner in which Spain had withdrawn the previous regime: the uncertainty created by the period during which Spain left RE projects with no visibility as to the economic regime that would apply; and the lack of clarity in the manner in which the current New Regime applies.

271. Finally, in 2015, the EC stressed the fact that "*the Spanish renewable sector is currently facing a lack of investor confidence*" and that "[r]*estoring a stable investment climate is key to promoting renewable energy and making progress towards achieving the 2020 renewables target*".[461] The fact that the Commission publicly voiced its view that Spain needs to restore a stable investor climate speaks volumes about Spain's failure to provide a stable and predictable legal framework for RE projects.

---

[461] **Exhibit C-225**, European Commission's response to question by the European Parliament (Question for written answer E-010506/2015), 27 August 2015.

## 7. SPAIN'S CRITICISM CONCERNING THE NATURE OF THE CLAIMANTS' INVESTMENT

272. Spain asserts that the nature of Bridgepoint's investment was "*speculative*" on the basis that its strategy was to acquire the Wind Farms and then resell them after five years to obtain a capital gain.[462] As noted in the Second Moreno Statement, this betrays a fundamental misconception of the nature of private equity investment. It also clearly misses the point.[463]

273. Private equity is "*medium to long-term finance provided in return for an equity stake in potentially high-growth unquoted companies*".[464] In practice, the private equity business consists of four basic steps. Private equity firms:

(a) raise funds from external financial institutions and/or use some of their own capital to contribute to the fund;

(b) source, carry out due diligence on, and close deals to acquire companies (i.e. they analyse potential target companies, considering among other things: the company's sector, its senior management team, the company's performance in recent years, the current valuation and likely exit scenarios of the company);

(c) seek to improve operations and performance in their portfolio companies; and

(d) seek to exit their portfolio companies at a substantial profit, typically between 3 and 7 years after the original investment.[465]

274. Bridgepoint, as a private equity firm, follows the exact same model when investing in different sectors across Europe, with a focus on: (i) "Business Services"; (ii) "Consumer"; (iii) "Financial Services"; (iv) "Healthcare"; (v) "Manufacturing and Industrials"; and (vi) "Media and Technology".[466] As already explained in the Memorial:

> "Bridgepoint's strategy is to acquire controlling stakes in companies with a strong market position and potential for growth in the long term through: (i) operational

---

462 Counter-Memorial, paras. 586-587.

463 Second Moreno Statement, paras. 6-20.

464 **Exhibit C-227**, The British Private Equity & Venture Capital Association Website, "Private Equity Explained", available at https://www.bvca.co.uk/Our-Industry/Private-Equity (last accessed on 14 September 2017).

465 **Exhibit C-228**, Interview Private Equity Website, "What Do Private Equity Investors Actually Do?", available at http://www.interviewprivateequity.com/what-do-private-equity-investors-do/ (last accessed on 14 September 2017).

466 Memorial, para. 11.

> improvement; (ii) refocusing of strategies; and (iii) the acquisition of additional companies which can be consolidated with the initial investment."[467]

275. Bridgepoint's strategy in respect of the Wind Farms was no different, as it:

> "entailed acquiring a solid platform of wind farms, adding value to the holding company by both improving the operational performance of the Wind Farms and selling the investment after five years."[468]

276. Spain does not dispute the fact that funding for the development of its RE power-generation sector has been actively sought and encouraged over the past twenty years, notably because of environmental reasons and to decrease its dependence on imported fossil fuels.[469] Private equity and venture capital firms invest in those sectors that need investment the most (which is the case of electricity generation) and, it should go without saying, expect such investment to be profitable in the long run.

277. Spain is itself a strong promoter of private equity investments.[470] Spain's policy is clearly directed at attracting this type of investment, as demonstrated by the existence of FOND-ICO Global, a State-supported programme for the development of the private equity and venture capital industry in Spain.[471] This "Fund of Funds" is now endowed with up to EUR 1.5 billion and is said to become the catalyst for the creation of about forty new private equity funds similar to Bridgepoint's.[472]

278. What Spain terms a "speculative" investment is therefore nothing more than good business practice. The fact that the Claimants managed to make a profit on the sale of the Wind Farms in spite of Spain's detrimental measures is not evidence that the investment was "speculative" or, as Spain seems to imply, that the Claimants did not suffer any loss. It rather bears witness to the careful planning of the investment. Had the Disputed Measures not been taken, and the Claimants not suffered severe financial harm as a result, with future cash flows to the Wind Farms being severely reduced, the Claimants would not have had to abandon their plan to expand their wind farm portfolio and would have been able to sell their investment for far more than they eventually did.[473]

---

467 Memorial, para. 11.
468 Counter-Memorial, para. 587.
469 Memorial, section 4.4.
470 Second Moreno Statement, para. 11.
471 Second Moreno Statement, para. 11.
472 **Exhibit C-228**, Interview Private Equity Website, "What Do Private Equity Investors Actually Do?", available at http://www.interviewprivateequity.com/what-do-private-equity-investors-do/ (last accessed on 14 September 2017).
473 First Moreno Statement, paras. 76-78.

## 8. STATE AID IS IRRELEVANT

279. Spain refers on several occasions to EU State Aid rules, intimating that such rules prohibit RE generators from earning more than a "fair return" and oblige Member States to periodically review FITs for existing installations.[474] However, for the reasons set forth below, these arguments are entirely irrelevant to this dispute.

280. First, the EC's State Aid investigation to which Spain refers is in response to a notification that Spain made concerning the June 2014 Ministerial Order, establishing the remuneration parameters for the New Regime.[475] Spain never made any such notification with regards to the RD 661/2007 FIT payment scheme, or indeed with regards to any of the others which preceded it during the time in which they were in force. State Aid concerns could therefore have no bearing on the claims made pursuant to the RD 661/2007 regime.

281. Secondly, there is no evidence that the Disputed Measures were motivated by State Aid concerns. The Preambles to the Disputed Measures do not contain a single reference to State Aid, nor do the documents comprising the Regulatory Dossier.

282. Thirdly, and on any view EU State Aid law did not require Spain to implement the Disputed Measures. Spain refers to both: (a) the Community Guidelines on State Aid for Environmental Protection and Energy 2014-2020, Number 2014/C200/0170 (the **2014 Guidelines**); and (b) the guidelines approved by the Communication from the EC 2008/C82/0171 (the **2008 Guidelines**).[476] With respect to the 2014 Guidelines, these were introduced <u>after</u> Spain introduced the New Regime and could not have prompted the implementation of the Disputed Measures. With respect to the 2008 Guidelines, these postdate the introduction of RD 661/2007 on 25 May 2007. It is therefore the previous version of the Community Guidelines, which were issued in 2001, that should be applied to an analysis of RD 661/2007.[477] In any case, both the 2001 and 2008 Guidelines provide that a FIT provided as part of a State support scheme for RE is a compatible (i.e. lawful) form of State Aid.[478] Even assuming the Disputed Measures were a response to the 2008 Guidelines, Spain offers no explanation why it waited five years (until 2013) before introducing the New Regime.

---

474 Counter-Memorial, see e.g. paras. 269-280.

475 See Counter-Memorial, para. 806.

476 See Counter-Memorial, para. 756 and fn. 488.

477 **Exhibit C-246**, European Commission, Community Guidelines for State Aid for Environmental Protection, OJ 2001/C 37 P.0003-0015, 3 February 2001.

478 **Authority RL-65**, European Commission, *Community Guidelines for State Aid for Environmental Protection*, OJ 2008/C82/01, 1 April 2008, paras. 109-110; and **Exhibit C-246**, European Commission, Community Guidelines for State Aid for Environmental Protection, OJ 2001/C 37 P.0003-0015, 3 February 2001, paras. 58-59.

This is because Spain's motivation for introducing the New Regime is in no way related to State Aid concerns.

283. In any event, it is an established principle of EU State Aid law and policy that beneficiaries of an *existing* support scheme should be allowed to continue to rely upon a stable legal framework. This is reflected in the 2014 Guidelines, which expressly provide that individual beneficiaries of any aid are entitled to receive the same level of support as originally granted to them and specifically excludes any retroactive readjustment of the conditions of that support.[479] The 2014 Guidelines expressly provide that a reduction in renewable incentives should apply *prospectively* to new RE installations as the cost of developing such installations decreases over time.

284. Fourthly, Spain refers several times to a decision from the EC in relation to the Czech RE support scheme, presumably (although this is far from clear) in support of the notion that the RD 661/2007 was a form of State Aid, to which the overcompensated Claimants cannot claim to be entitled.[480] As explained above, there is no evidence that Spain notified the RD 661/2007 FIT as State Aid to the EC when it was in force, nor is there any evidence that the Disputed Measures were motivated by State Aid concerns. Moreover, Spain does not submit any evidence in support of its assertion that the Claimants received overcompensation under RD 661/2007. In any event, in the decision referred to by Spain, the EC found that: (a) project returns of between 6.3% and 10.6% were "*comparable to the rates of returns, accepted by the Commission as reasonable*";[481] and (b) the 15 to 30 year timeframes of the support schemes, which reflected the service life of the relevant RE installation, were also reasonable. Such values are in line with those discussed in this proceeding.[482] Any reference to this decision is therefore irrelevant.

285. Finally, Spain attempts to draw parallels between this case and *Micula*, where the EC intervened to prevent the execution of the award.[483] The *Micula* case is easily distinguishable. As explained above, in *Micula*, Romania had introduced legislation in 1998 to encourage foreign investment. The Micula brothers then invested in reliance on this legislation. This legislation was subsequently removed in 2004 following Romania's accession to the EU, as it was deemed incompatible with EC

---

479 **Exhibit C-247**, European Commission, Guidelines for State Aid for Environmental Protection, OJ 2014/C200/01, 28 June 2014, para. 249: "*such aid can be granted for the entire period under the conditions laid down in the scheme at the time of the confirmation to the extent that the aid is compatible with the rules applying at the time of the confirmation*". As discussed above, the support received at the time was fully compatible with the Guidelines of 2001 and 2008.

480 Counter-Memorial, paras. 276-280, 681 and 758.

481 **Authority RL-21**, Decision C(2016) 7827 final, of 28 November 2016, of the European Commission handed down in the aid dossier SA.40171 (2015/NN)–Czech Republic, para. 99.

482 Section 4.1 and 4.2.

483 Counter-Memorial, para. 815.

rules on State Aid. Importantly, the EC had made it clear pre-accession that the legislation had to be removed. The investment-inducing measures had been declared State Aid while they were in force, and that was the reason for their withdrawal. Although the arbitral tribunal in *Micula* did not consider that to be a valid defence to liability, the EC intervened at the execution stage. None of this is relevant for the case at hand since the RD 661/2007 economic regime was not withdrawn on the basis of a State Aid ruling, nor could it have been since it was never notified to the EC in the first place. Nor is there any EC decision on RD 661/2007 or indeed any other Spanish RE support scheme.

## PART III – THE CLAIMANTS' FURTHER COMMENTS ON INTERNATIONAL LEGAL STANDARDS

## 9. OVERVIEW

286. This Part III addresses Spain's submissions on the international legal standards applicable to the Claimants' claim. It addresses: (a) the object and purpose of the ECT; (b) the relevance of international law; (c) attribution; (e) the majority award in *Charanne*; (d) the unanimous *Eiser* award; and (e) the defence of necessity, which is unavailing in these circumstances. The sections below address (c) – (d), which are more preliminary in nature, first followed by (a) and (b).

## 10. PRELIMINARY MATTERS ON THE LAW

### 10.1 Attribution

287. Spain does not contest the Claimants' submissions on attribution.[484] In short, as already explained in the Memorial, Spain is liable for the acts and omissions of its executive (including the Ministry, the Secretary of State for Energy, and more generally, all present and former Ministers and Deputy Ministers of the Government), the legislature ("*las Cortes*", consisting of the Congress of Deputies and the Senate), the CNE, IDAE and InvestInSpain.[485]

### 10.2 The majority award in *Charanne* is inapposite

288. Spain's reliance on the majority award in the *Charanne* case is misplaced. The *Charanne* case is distinguishable on the facts since: (a) the disputed measures in that case were very different to those at issue here; and (b) the tribunal in *Charanne* was not privy – as is this Tribunal – to material evidence. Moreover, the *Charanne* majority award is not good law as it contains errors of law (c).[486]

#### (a) The *Charanne* case is materially different from the present case

289. The *Charanne* case is distinguishable on its facts. In particular:

    (a) The claim in *Charanne* dealt with a different sector and different measures. It was brought by investors in PV installations and concerned only the RDL 14/2010 caps on the number of hours to which PV installations were entitled to under RD 661/2007 and RD 1578/2008.

---

484 Memorial, section 12.

485 InvestinSpain describes itself as follows: "*InvestInSpain, is the leading government organization that supports foreign companies seeking to set up or expand their business in Spain. We are a* ***ONE STOP-SHOP for investors*** *[...] We provide comprehensive, efficient and confidential consultation* ***at no cost*** *during all stages of the investment process, from planning and evaluation, to start-up and post-investment services*.", see **Exhibit C-248**, InvestInSpain, "*Opportunities in Renewable Energy in Spain*", March 2009, p. 29 (emphasis in original).

486 See sub-section 10.2 below.

This change was implemented in December 2010 and did not affect wind farms. (On the contrary, in the same month, Spain implemented RD 1614/2010, which reconfirmed the "guarantee" that the RD 661/2007 tariff for wind farms would not be subsequently modified by the Government.)[487]

(b) The tribunal in *Charanne* did not consider the Disputed Measures that are at issue in this case. RDL 14/2010 imposed an hours cap for PV installations but otherwise did not alter the tariff. It was therefore a change *within* the RD 661/2007 economic regime and not a complete overhaul of the RD 661/2007 regime.

(c) The *Charanne* majority expressly limited its decision to the 2010 changes to the PV sector: "*in this context, limited to the 2010 rules only, the Arbitr[*al*] Tribunal cannot draw the conclusion that Spain has violated its obligation to* [provide] *regulatory stability*".[488] The majority took care to note that it did not "*intend to prejudge in any way the conclusions that could be reached by another arbitr[*al*] tribunal could reach based on the analysis of all the regulations adoptedto date, including the 2013 regulations*".[489]

290. The *Charanne* majority itself emphasised the irrelevance of its decision to disputes arising out of the later measures. This makes sense, and even more so here: the majority award in *Charanne* refers to a different sector, a different set of contested measures and a totally different timeframe.

**(b) The *Charanne* award does not address key contemporaneous evidence**

291. Further distinguishing *Charanne* from the present case, significant factual and documentary evidence was not put to the *Charanne* tribunal. First, the claimants in *Charanne* did not adduce any fact witnesses. This is important because the Claimants' witness testimony in this case is not mentioned once in Spain's Counter-Memorial. Secondly, of all the documents issued by Spain to entice investment, the *Charanne* tribunal only seemed to see two "*El Sol Puede Ser Suyo*" documents from 2005 and 2007.[490] It appears that the tribunal was not shown the many communications from

487 See Claimants' Memorial, section 4.8 and above, section 4.6.

488 **Authority CL-151,** *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 484.

489 **Authority CL-151,** *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 542.

490 **Authority CL-151,** *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, paras. 95, 102 and 299.

the Ministry, InvestInSpain, the CNE or even the Ministry's official May 2007 Announcement accompanying RD 661/2007.[491]

292. According to the majority, in the presentations that it saw "*none of its wording could lead anyone to reasonably infer that the regulated tariff would remain unmodified during the entire lifespan of the plants*".[492] Clearly this Tribunal cannot reach the same conclusion here given the mountain of contemporaneous evidence where Spain referred to "*guaranteed premiums*"; "*no retroactivity*";[493] a "*warranty by law*";[494] and a "*safeguard clause*" assuring the "*inmodificabilidad*" of the premiums.[495]

293. Finally, since that case dealt with PV technology, the *Charanne* tribunal obviously did not see the text of the July 2010 Agreement or the Government's commitment in RD 1614/2010 reconfirming and the "*inmodificabilidad*" of the premium for wind farms.[496]

**(c) Errors of law**

294. Even if *arguendo* the underlying factual circumstances in *Charanne* were relevant to the present case (*quod non*), the Tribunal should decline to follow the *Charanne* decision due to the following three errors of law.

295. First, the *Charanne* majority made a critical error on the issue of legitimate expectations founded in legislation. It cited an UNCTAD report submitted by the claimants which acknowledges that an investor can derive expectations either from: (a) specific commitments; or (b) rules that are not specific but are designed to induce investment.[497] The majority addressed the first point, but at no point did it return to the second point of whether RD 661/2007 was designed to induce investment. This is a lacuna in the award. The majority appear to have ignored the second basis from which expectations can be derived. If so, that would be a failure to apply the law. Alternatively, the

---

491 **Exhibit C-93**, Government of Spain, Ministry of Industry, Tourism and Commerce, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power*", 25 May 2007.

492 **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012 Award, 21 January 2016, para. 497.

493 **Exhibit C-97**, CNE Presentation, "*Las Energías Renovables: El Caso Español*" (Cartagena de Indias), 9-13 February 2009, pp. 67-68 and **Exhibit C-98**, CNE Presentation, "*Las Energías Renovables: El Caso Español*" (Barcelona), February 2009, pp. 21-22.

494 **Exhibit C-96**, CNE Presentation, "*Renewable Energy Regulation in Spain*", February 2010, p. 29.

495 **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010, p. 24 (PDF 27).

496 **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010; **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010.

497 **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, paras. 489-492.

majority implicitly rejected this second limb. If that is the case, as Professor Tawil states in his dissent, the majority got the law wrong.[498]

296. The second limb of the UNCTAD test that rules designed to induce investment can give rise to legitimate expectations is an accurate reflection of the law; there is weight of authority showing that regulations that are put in place with the specific aim to induce foreign investment and on which the foreign investor relied in making his investment may give rise to legitimate expectations.[499]

297. In this case, there is no doubt that the RD 661/2007 economic regime was put in place specifically to entice investors. There was no other purpose for its implementation than to encourage RE investment that would allow Spain to hit its RE targets and obtain the attendant socio-economic benefits. If Spain was indifferent to inducing investment, it would not have implemented the RD 661/2007 economic regime at all.[500]

298. Secondly, the majority erred in its holding that finding a legitimate expectation arising from RD 661/2007 "*would, in fact, amount to freezing the regulatory framework applicable to eligible plants, even though circumstances may change*".[501] Professor Tawil disagreed with this in his dissent.[502] As already explained above in section 4.4, it is axiomatic that a State's domestic law may permit it to alter its legislation even if there is a commitment to stability. If, however, by doing so a State frustrates an investor's legitimate expectations (or otherwise breaches its treaty obligations) and harm ensues, the ECT provides that the State will be liable to pay compensation to that investor.

299. Thirdly, when looking at whether a State has given a specific commitment (i.e. the first limb of the UNCTAD test), the *Charanne* majority held that "*application of th*[e legitimate expectations] *principle is dependent on whether the expectation was reasonable in the particular case, any representations made by the State with the aim of encouraging investment being relevant in this regard*".[503] The majority correctly understood that contemporaneous statements and representations

---

[498] **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, Dissenting Opinion of Professor Tawil, 21 December 2015, para. 3.

[499] See for example, **Authority CL-155**, *El Paso Energy International Company v The Argentine Republic,* ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006; **Authority CL-43**, *Saluka Investments B.V. v The Czech Republic,* UNCITRAL, Partial Award on Jurisdiction and Merits, 17 March 2006; **Authority CL-132**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd v The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010; and **Authority CL-88**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 532-534.

[500] See section 4.1.

[501] **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 503.

[502] **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, Dissenting Opinion of Professor Tawil, 21 December 2015, para. 11.

[503] **Authority CL-107**, *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001.

made by Spain were relevant to the assessment of legitimate expectations. This again suggests the majority did not have the full set of facts before it. The Claimants have shown the numerous representations that Spain gave contemporaneously to encourage RE investment. In the present case, Spain then ratified its commitment to a specific sector, wind power generation, with the July 2010 agreement and RD 1614/2010.[504]

300. In conclusion, and with respect to the Claimants' legitimate expectations claim, this Tribunal should either distinguish *Charanne* on the facts or decline to follow its findings on the law.[505] It must be recalled in this context that the Tribunal must make its own findings on the facts and its own assessment on the law. As noted in *Methanex*, "[f]*or each arbitration, the decision must be made by its tribunal in the particular circumstances of that arbitration only*".[506]

**10.3 The unanimous award in *Eiser***

301. The recent *Eiser* award is more instructive than *Charanne* as it bears more resemblance to the facts of this case. The Claimants in *Eiser* were infrastructure asset managers that invested in Spain's CSP sector pursuant to the specific commitments offered by RD 661/2007, which, as for the wind sector, were later reconfirmed and strengthened by RD 1614/2010. The rights to which Eiser's installations were entitled were subsequently removed wholesale, following the implementation of the New Regime. Thus, the claim in *Eiser* was brought by investors subject to the same regime and concerned the same detrimental measures as those at issue here.

302. In *Eiser*, the tribunal had to examine four distinct claims under the ECT: (a) expropriation; (b) failure to afford fair and equitable treatment; (c) impairment by unreasonable measures; and (d) breach of the umbrella clause.[507] The tribunal, for reasons of judicial economy, only assessed whether Spain had breached the FET standard. In particular, the tribunal found that the FET standard "[provided] *the most appropriate legal context for assessing the complex factual situation*

[504] See above, section 4.6.

[505] As a further distinguishing factor, it also bears noting that the *Charanne* claimants only asserted a legitimate expectations claim under Article 10(1) of the ECT, compared to the three separate violations of the Article 10(1) of the FET standard identified here, and the three additional Article 10(1) claims asserted by the Claimants on these facts. The *Charanne* claimants also argued that the 2010 measures had been unreasonable and disproportionate, but they presented these arguments as limbs of their legitimate expectations claim. See Charanne, paras. 513-514.

[506] **Authority CL-107,** *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001, para. 51.

[507] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 352.

*presented* [there]" and that "*decision of the remaining claims would not alter the outcome or affect the damages*".[508]

303. The *Eiser* award is important in several aspects.

304. First, the tribunal in *Eiser* recognised the sector-specific nature of the ECT, which was designed to address the specific characteristics of investments in the energy sector, in particular their long-term and capital-intensive nature. The ECT, therefore, sought to provide a high degree of protection that includes political and regulatory risk. The tribunal thus understood that "*in interpreting ECT's obligation to accord fair and equitable treatment, interpreters must be mindful of the agreed objectives of legal stability and transparency*".[509] In other words, *Eiser* makes clear that the ECT obligates a Contracting Party to provide investors with a stable framework. This is precisely the Claimants' case here.

305. Secondly, the *Eiser* tribunal recognised that the ECT, and the obligation to provide stability to investors, does not prevent a State from exercising its sovereign right to regulate. The *Eiser* tribunal nonetheless reasoned that if a State does regulate in a way that breaches Article 10(1) of the ECT, because it frustrates legitimate expectations or undermines the stability of the legal framework, then it has to pay compensation. The *Eiser* tribunal explained that Article 10(1) embraces an obligation to provide "*fundamental stability in the essential characteristics of the legal regime*".[510] In other words, the common features of the RD 661/2007 regime should be maintained.[511] In the tribunal's own terms:

> "Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. … However, the Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value."[512]

---

[508] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paras. 352-353.

[509] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 379.

[510] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 382.

[511] Cf.**Authority CL-151**, *Charanne*, para. 533 (finding that the 2010 measures were adjustments and adaptations that had not eliminated the fundamental characteristics of the existing regulatory framework).

[512] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 382.

306. This finding in *Eiser* is consistent with the Claimants' case: the Claimants legitimately held an expectation that the regime in which they invested would not be radically altered for existing investments. The Claimants filed this claim as a result of the "*drastic and abrup*[t]" revisions made by the Disputed Measures; changes that no investor could rationally have expected (despite Spain's arguments to the contrary).

307. Finally, the *Eiser* tribunal unequivocally found that the Disputed Measures were retroactive:

> "Respondent then retroactively applied these 'one size fits all' standards to existing facilities, like Claimants', that were previously designed, financed and constructed based on the very different regulatory regime of RD 661/2007. No account was taken of existing plants' specific financial and operating characteristics in establishing their remuneration."[513]

308. The Claimants, however, take issue with the *Eiser* tribunal's conclusion that RD 661/2007 did not grant "*immutable economic rights that could not be altered*".[514] This finding, in fact, ignores Spain's express commitment in Article 44.3 of RD 661/2007, subsequently reconfirmed and strengthened by Article 5.3 of RD 1614/2010, which purport to preserve those rights for existing installations. Through these provisions, Spain clearly tied its own hands. Nevertheless, the tribunal went on to say that "*the ECT did protect Claimants against the total and unreasonable change that they experienced here*".[515] The same applies to the Claimants in this case.

309. In conclusion, *Eiser* held that investors are entitled to stability; entitled, once they have invested, to a stable, predictable legal framework. That is all the more the case where, as here, Spain implemented a clear stability commitment in RD 661/2007 (reinforced in RD 1614/2010) under which the Wind Farms qualified. The Claimants are, therefore, protected under the ECT against radical, drastic and sweeping measures, like the Disputed Measures at issue in this arbitration.

## 10.4 Spain's attempt to rework the defence of necessity into the test for legitimate expectations

310. The Claimants have shown that they had a legitimate expectation that the Wind Farms would receive the RD 661/2007 FIT throughout their operational life. This expectation was based on numerous commitments made by Spain to the Claimants. Spain contends that this expectation was not reasonable. On Spain's case, the Claimants (a) were only ever promised a "*reasonable return*"; and

---

513 **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 400.

514 **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para*s*. 363 and 387.

515 **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paras. 363.

(b) should have anticipated that this "*reasonable return*" would have to change in the event of an "*international crisis*" and a "*severe reduction in the energy demand*".[516]

311. The first argument has already been addressed above, Suffice to say here that the evidence overwhelmingly shows that the Claimants were entitled to a specific €/kWh remuneration for the useful life of their installation, not just to a "*reasonable return*".

312. The second argument is also flawed for two reasons. First, Spain expressly bore the risk of a fall in demand by granting the Wind Farms priority of despatch irrespective of fluctuations in electricity demand (see section 4.2(b) above). The Claimants were therefore induced to expect that drops in demand would not affect their ability to market their electricity and receive the RD 661/2007 FITs accordingly. Thus a drop in demand (which is always to be expected given the cyclical nature of economy) could not invalidate the legitimacy of the Claimants' expectations.

313. As a result, it must then be considered if a change in economic circumstances could relieve Spain of its obligations to protect the Claimants' legitimate expectations. This is the second flaw in Spain's defence.

314. This question must, indeed, be determined according to the text of the ECT and the applicable rules and principles of international law.[517] Yet, there is nothing in the text of the ECT that would entitle Spain to abandon its obligations. Article 24 sets out the "*Exceptions*" to a State's obligations to comply with its ECT obligations. None of these exceptions apply here; nor does Spain claim they do.

315. With respect to international law, the applicable rules are contained in Chapter V of the ILC Articles:

> "Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation."[518]

316. These provisions apply to Spain's obligation under Article 10(1) of the ECT.[519] The only circumstances precluding wrongfulness that could possibly apply in the present case are "*Necessity*"

---

[516] Counter-Memorial, para. 883.
[517] See Article 26(6) of the ECT.
[518] **Authority CL-120**, *Yearbook of International Law Commission, Vol. 2, Part. 2, 2001*..
[519] As noted in the ILC Articles, "*Unless otherwise provided, the*[se rules] *apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in*

(Article 25) and "*Force majeure*" (Article 23). It is readily apparent from Spain's submissions that Spain is trying to introduce these defences through the backdoor. No doubt aware these defences are unavailing in the circumstances, it attempts to incorporate them into the list for legitimate expectations. This should not be permitted.

317. The scope of the necessity defence under international law is set out at Article 25 of the Articles on State Responsibility:

> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) <u>is the only way for the State to safeguard an essential interest against a grave and imminent peril</u>;…
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if… (b) the <u>State has contributed to the situation of necessity</u>."[520] (emphasis added)

318. A plain reading of Article 25 confirms that there are at least two reasons why a necessity defence cannot succeed in relation to the Tariff Deficit excuse. First, abandoning the RD 661/2007 regime was not the only way to address the Tariff Deficit problem. Brattle has shown the alternatives that were available to Spain and that did not require breaching its commitments to the Claimants.[521] Article 25(1)(a) is not satisfied. Secondly, necessity may not be invoked if the State has contributed to the situation of necessity. It is beyond dispute that Spain itself created the Tariff Deficit (see section 5.2 above).[522] Article 25(2)(b) is not satisfied.

319. The position is similar with regard to a drop in demand as invoked by Spain (even assuming that this argument can be separated from the Tariff Deficit defence).[523] As noted above, this does not assist Spain as a factual matter given that the Wind Farms were protected against demand risk through priority of despatch. Moreover, Spain reiterated the RD 661/2007 tariff guarantees in 2010[524] *after* the global economic crisis and the demand dip had occurred.[525]

320. Spain's reliance on the global financial crisis to attempt to excuse its liability under the ECT, is an attempt to introduce a *force majeure*-style defence: the fall in demand led to the frustration of the

*question subsists.*" See **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, Article, p. 71, commentary to Chapter V, para. (2).

520 **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, Article 25.

521 Brattle Regulatory Report, paras. 130-146.

522 See also Brattle Regulatory Report, paras. 118-126.

523 Counter-Memorial, para. 883.

524 The July 2010 Agreement and RD 1614/2010 (see above, section. 8.7).

525 See chart at para. 247 of Spain's Counter-Memorial, indicating that there was a dip in demand during in 2008.

original regulatory pact, so that Spain is excused from having had to amend it. The scope of the *force majeure* defence under international law is set out at Article 23 of the Articles on State Responsibility:

> "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
>
> 2. Paragraph 1 does not apply if:
>
> (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
>
> (b) the State has assumed the risk of that situation occurring."[526]

321. There are again at least two reasons why this defence cannot succeed. First, the Commentary to Article 23 confirms that economic problems do not qualify: "*Force majeure does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis*".[527] Secondly, Spain assumed the risk of a fall in electricity demand and that was not a risk that RE investors bore. Therefore, the exception under Article 23(2)(b) of the ILC Articles applies.

322. In light of the above, it is clear that change of circumstances arising after RD 661/2007, the July 2010 Agreement and RD 1614/2010 does not relieve Spain of the commitments it made to the Claimants. Spain's related submission that the Claimants should have expected Spain to breach its obligations is to no avail. Indeed, it follows from the central principle of *pacta sunt servanda* that a State can be relied on to perform its obligations. Spain's submission that it should have been expected not to perform its obligations is manifestly wrong and would deprive the investor protections contained in the ECT of all meaning.

## 11. THE OBJECT AND PURPOSE OF THE ECT

323. The Parties agree, as required by the Vienna Convention, that the ECT shall be interpreted in accordance with the ECT's object and purpose.[528] In the Memorial, the Claimants set out in detail

---

[526] **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, Article 23.
[527] **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, Article 23 Commentary, para. 3.
[528] Memorial, para. 329; and Counter-Memorial, para. 853.

the context, object and purpose of the ECT.[529] Spain has not expressly questioned that analysis. Instead, Spain makes various arguments about the legal standards for investor protection in Article 10 of the ECT.

324. First, Spain argues that the ECT is concerned primarily with non-discrimination[530] and "*national treatment*".[531] On Spain's case, the FET standard only provides the minimum standard of treatment under international law, which Spain claims merely provides protection against discrimination between foreign and national investors.[532] Secondly, Spain submits that the ECT's objective was not to guarantee the "*petrification*" of a regulatory regime or a "*a* [r]*egulatory framework that is predictable during all investments*".[533] Finally, Spain claims that no breach of the ECT can arise if a State-party is adopting "*macroeconomic control measures on the grounds of general interest*".[534]

325. As set out below, Spain's submissions on the legal standards find no basis in the treaty itself. On the contrary, the ECT is unique among investment treaties and it provides the high watermark of investment protection. In particular, the ECT imposes an express obligation on Spain to maintain stable legal and regulatory frameworks, and it deliberately limits the right to regulate without attracting liability to pay compensation.

**11.1 The ECT provides a high level of investor protection**

326. The ECT is unique in that it sets out a legal framework for a single sector: energy.[535] The sector-specific nature of the ECT means that its provisions cannot be equated with the thousands of other investment treaties in operation. The ECT was specifically designed to address the precise characteristics of investments in the energy sector, in particular their long-term and capital-intensive nature.[536] The corollary to long-term and capital-intensive investments is their particular sensitivity to non-commercial risks, such as regulatory and political changes.[537] For energy investments to be made in the first place, investors must have confidence that there will be a stable, predictable and transparent legal and regulatory framework. By ratifying the ECT, Contracting States agreed: (a) to

---

529 Memorial, Part IV, section 11.
530 Counter-Memorial, paras. 857-859.
531 Counter-Memorial, para. 860.
532 Counter-Memorial, paras. 861-866.
533 Counter-Memorial, para. 876.
534 Counter-Memorial, para. 879.
535 Memorial, paras. 331 and 339.
536 Memorial, paras. 336-337.
537 Memorial, para. 336. See **Authority CL-11**, E Paasivirta, "The Energy Charter Treaty and Investment Contracts: Towards Security of Contracts" in T W Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International, 1996), p. 350.

provide such a framework to investors in the energy sector; and (b) to be held to account in the event that they fail to do so.

327. As required by the Vienna Convention, the interpretation of the protections laid out in Part III of the ECT ("*Investment Promotion and Protection*") and any justifications advanced by a State for breaching those protections must be consistent with the core objectives of the ECT and its predecessor, the 1991 Charter. With respect to the ECT, those core objectives include:

(a) the recognition of the role of entrepreneurs, "*operating within a transparent and equitable legal framework*" (Preamble, 1991 Charter);[538]

(a) a provision at the national level for "*a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade*" in order to promote the international flow of investments in the energy sector (Title II(4), Promotion and Protection of Investments, 1991 Charter);[539] and

(b) "*the creation of a "level playing field" for energy sector investments throughout the Charter's constituency, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments*" (Official Introduction to the ECT).[540]

328. As the Claimants have already explained, leading commentators recognise that the ECT offers a "*higher*" level of protection than other investment treaties and that its investor protections are "*extensive, rather than restrictive*".[541] This fact can be seen in Article 10(1) which, unlike most investment treaties, contains an express obligation on the Contracting Parties to "*create stable, equitable, favourable and transparent conditions for investors*".

329. These high levels of protection for energy investments make sense when viewed against the political climate in which the ECT was negotiated and agreed. The Parties agree that one of the original goals of the ECT regime was to enhance energy security and facilitate investment and co-operation

---

538 **Exhibit C-1**, Energy Charter Treaty, 17 December 1994, Preamble, p. 213 (PDF 215).

539 **Exhibit C-1**, Energy Charter Treaty, 17 December 1994, Preamble, p. 218 (PDF 220), Title II(4) (Promotion and Protection of Investments) (emphasis added). These objectives are also enshrined in the substantive provisions of the ECT, with Article 2 providing that the purpose of the Treaty "*establishes a legal framework…in accordance with the objectives and principles of the Charter*" and Article 10(1) providing that the Contracting Parties shall "*encourage and create stable, equitable, favourable and transparent conditions for Investors*" (p.53; PDF 55).

540 **Exhibit C-1**, Energy Charter Treaty, 17 December 1994, p. 14 (emphasis added).

541 **Authority CL-40**, T W Wälde, "In the Arbitration under Art. 26 Energy Charter Treaty (ECT), *Nykomb v The Republic of Latvia – Legal Opinion" (2005), 2* Transnational Dispute Management 5, p. 23 (PDF 24). See also, **Authority CL-35**, T W Wälde, "Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice" (2004), 1 Transnational Dispute Management 2, p. 32 (PDF 33).

in the energy sector in Europe after the dissolution of the Soviet Union.[542] Securing regulatory stability in the ECT through binding investor protection provisions was fundamental to that aim. At the time of negotiation, although many of the newly independent former Soviet States were rich in resources, they were politically fragile with nascent legal systems. Understandably, foreign investors were not prepared to invest on the basis of the protections offered under national legal systems alone. The ECT therefore sought to provide additional legal protections – at the international level – which would reduce, to the greatest extent possible, "*non-commercial risks*", namely, political and regulatory risks, thereby ensuring that legal frameworks remained stable.[543] Spain simply ignores these facts when setting out its views on the legal standards of the ECT.

### 11.2 The FET standard is broader than the minimum standard of protection

330. The Claimants have explained elsewhere that they consider the FET standard to be independent, autonomous and additional to the international minimum standard under customary international law.[544] The Claimants also identify non-cumulative criteria that comprise the FET standard, including: (a) a stable and predictable legal framework; (b) the Claimants' legitimate and reasonable expectations; and (c) State conduct that is transparent, reasonable, non-arbitrary and proportionate.

331. Spain does not expressly take issue with the non-cumulative criteria that comprise the FET standard. Rather, Spain argues that the FET obligation offers nothing more than the minimum standard of treatment and only provides protection against non-discrimination such that foreign investors are only assured the same treatment as domestic investors ("*national treatment*").[545] Spain's position appears to be that it does not matter if it has treated foreign investors unfairly so long as it has equally mistreated domestic investors. This is an unattractive submission which the text of the ECT does not support. Article 10(1) of the ECT provides for, *inter alia,* FET. Articles 10(3) and 10(7) of the ECT provide for, *inter alia*, national treatment. The text of the ECT makes clear that these are separate standards and it is not permissible under the Vienna Convention to interpret the ECT as if these separate protections were in fact the same.

332. Spain's interpretation ignores the obvious and fundamental distinction between the protections of national treatment and FET. National treatment is a contingent standard of investor protection.[546] It

---

[542] Memorial, para. 335 and Counter-Memorial, para. 90.

[543] Memorial, paras. 336 and 369. See **Authority CL-42**, A Konoplyanik and T W Wälde, "Energy Charter Treaty and its Role in International Energy" (2006), 24 Journal of Energy & Natural Resources Law 523, p. 532 (PDF 10).

[544] Memorial, paras. 397-398.

[545] Counter-Memorial, para. 864.

[546] **Authority CL-117**, C McLachlan, L Shore, M Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed. Oxford University Press, 2007), paras.7.176-7.194.

is necessary to show that a local investor has received better treatment than the foreign investor to establish a breach of the national treatment standard. In contrast, FET is a non-contingent investor protection.[547] The contingent and non-contingent standards "*operate independently*" in that "*the fact that an investor is treated as well as a local one will not necessarily mean that the foreigner has received fair and equitable treatment*".[548]

333. This reflects a basic principle of international law. As noted by Elihu Root in 1910:

> "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The (…) system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."[549] (emphasis added)

334. Spain also relies on the decisions in *AES v Hungary*,[550] *Electrabel v Hungary*[551] and *Total v Argentina*[552] to argue that the FET standard is limited to providing the minimum standard of treatment.[553] The extracts that Spain cites from these authorities are either not relevant or do not support Spain's position.

335. Spain cites the award in *AES v Hungary* to contend that legitimate expectations may be found only in presence of "*specific commitments made to an investor that the regulations in force will remain unchanged*".[554] Spain fails to clarify, however, what it would consider to qualify as a "*specific commitment*" that could give rise to legitimate expectations protected by the FET standard contained in the ECT.[555] It is incorrect that, as Spain would appear to contend, only a contractual obligation

547 **Authority CL-117**, C McLachlan, L Shore, M Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed. Oxford University Press, 2007), paras. 7.176-7.192.

548 **Authority CL-117**, C McLachlan, L Shore, M Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed. Oxford University Press, 2007), para. 7.192.

549 **Authority CL-145**, Kluwer Arbitration, "Chapter 1: The Emergence of the Concepts of the Minimum Standard of Treatment and the Fair and Equitable Treatment" in P Dumbery, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law international: Kluwer international 2013), pp. 13-46.

550 **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary* (***AES v Hungary***), ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 13.3.2.

551 **Authority RL-50**, *Electrabel S.A. v The Republic of Hungary* (***Electrabel v Hungary***), ICSID Case No. ARB/07/19, Award, 25 November 2015.

552 Counter-Memorial, paras. 1010-1019.

553 Counter-Memorial, paras. 888-892.

554 Counter-Memorial, para. 907(a).

555 Counter-Memorial, paras. 909-912.

between the investor and the State can constitute a specific commitment.[556] In any event, as explained in more detail below, such specific commitments were made to the Claimants.[557]

336. The extract from *Electrabel* is equally unhelpful to Spain.[558] Spain relies on that tribunal's finding that the FET standard under Article 10(1) "*may legitimately involve a balancing exercise or weighing exercise by the host State*".[559] However, that balancing exercise was agreed between the parties before it.[560] In any event, despite citing this award, Spain does not argue that its right to regulate stems from the FET standard and the "*balancing exercise*" to which the *Electrabel* tribunal refers. In fact, nowhere does Spain explain the basis for its so-called right to regulate insofar as Article 10(1) of the ECT is concerned and, crucially, how that may be consistent with the exceptions set out in Article 24 of the ECT.

337. Finally, Spain wrongly refers to the decision in *Total v Argentina*.[561] Spain contends that the *Total* tribunal applied the minimum standard of protection required by the FET, which would allow a State to modify its legal framework, provided that the investor is still able to recover its operating costs, amortise its investment and make a "*reasonable return*" over said period of time. This decision, however, is unhelpful to Spain's case as: (a) it was not rendered pursuant to the ECT but to the 1991 France-Argentina BIT, which, unlike the ECT, does not contain any engagement with regard to stable conditions for investors;[562] (b) contrary to what Spain contends, the *Total* tribunal considered that the FET standard "*cannot be read as 'treatment required by the minimum standard of treatment of aliens/investors under international law'*";[563] and (c) the quotations from *Total* used by Spain were remarks made when weighing the investors' legitimate expectations on the one hand and the respondent's legitimate regulatory interests on the other in the absence of any specific stability commitment, as noted above. In this context, the *Total* tribunal found that the concept of "regulatory fairness" or "regulatory certainty" intervenes to ensure that the investors recover their operation costs

[556] Counter-Memorial, para. 916.
[557] See section 3.1.
[558] Counter-Memorial, para. fn. 591.
[559] Counter-Memorial, para. fn. 591 citing **Authority RL-48**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 165.
[560] **Authority RL-48**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras. 125 and 166.
[561] Counter-Memorial, paras. 1010-1017.
[562] **Authority RL-50**, *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 116. The *Total* tribunal itself made it clear at the outset: "[i]*n various disputes between U.S. investors and Argentina under that BIT, tribunals have relied on the explicit mention in its preamble of the desirability of maintaining a stable framework for investments in order to attract foreign investment as a basis for finding that the lack of such stability and related predictability, on which the investor had relied, had resulted in a breach of the fair and equitable treatment standard. … However, the BIT between France and Argentina does not contain any such reference, following the French BIT model. <u>This absence indicates, at a minimum, that stability of the legal domestic framework was not envisaged as a specific element of the domestic legal regime that the Contracting Parties undertook to grant to their respective investors</u>*" (emphasis added).
[563] **Authority RL-50**, *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 125.

and make a "*reasonable return*".[564] These facts clearly differentiate the *Total* tribunal's findings from the issue at hand, which is whether Spain may radically change the remuneration regime on which the Claimants relied when making their investment when it made the express commitment not to.

338. In summary, and contrary to Spain's submissions, the FET standard as found in the text of the ECT is not equivalent to the international minimum standard, nor is it limited to national treatment. Indeed, as noted above and in the Memorial, Article 10(1) provides a standard of investment protections additional to, and superior to, the usual FET standard.[565]

### 11.3 State-regulation is significantly restricted under the ECT

339. Spain argues that the global financial crisis and a decrease in consumer demand (that resulted in less revenue to the Spanish Electricity System) required it to enact the Disputed Measures.[566] It also argues that the Spanish Electricity System was unsustainable: that the deficit between its revenues and expenses was unduly large and necessitated a complete overhaul of the RD 661/2007 regime.[567] All of these arguments fall within the broad umbrella of the "Tariff Deficit" (see above section 5.2). This purported defence must be critically assessed against the appropriate legal standard.

340. In that regard, Spain's submissions are misguided and fail to address the moderated regulatory space reserved for ECT Contracting Parties. Indeed, Spain chooses to ignore Article 24 of the ECT ("*Exceptions*") altogether and instead claims that the ECT contains two exceptions to the FET obligation, in relation to: (a) "*macroeconomic control measures*";[568] and (b) "*the public aid regime*".[569] These exceptions do not exist in the ECT. Indeed, Spain's arguments are based on a fundamental misreading of the ECT itself.[570]

341. Spain's tempered ability to regulate is apparent from the plain wording of the ECT, which may be contrasted to other investment treaties such as NAFTA. Indeed, there are limited exceptions in the ECT that preserve the regulatory freedom of Contracting States. As explained elsewhere, Article 24 ("*Exceptions*") does not apply at all to Article 12 ("*Compensation for Losses*") or Article 13

[564] **Authority RL-50**, *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 99.
[565] Memorial, paras. 397-404.
[566] Counter-Memorial, paras. 27 and 247.
[567] See e.g. Counter-Memorial, paras. 616-617.
[568] Counter-Memorial, paras. 877-880.
[569] Counter-Memorial, para. 868.
[570] Spain's contention that "*macroeconomic circumstances*" or the possibility of a fall in electricity demand should have put the Claimants on notice that the stability commitments it freely undertook to include in the regulatory framework could be cancelled out without impunity in fact deprives Art. 10(1) of the ECT of all substantive effect.

("*Expropriation*").[571] Moreover, Article 24(b)(i), which provides the principal exception for regulation in the public interest, namely regulation to protect "*human, animal or plant life or health*" does not apply at all to Part III ("*Investment Promotion and Protection*").

342. Thus, the drafters of the ECT deliberately chose to restrict the right to regulate. By contrast, Article 1114 of NAFTA does the exact opposite. It expressly preserves a state's regulatory freedom to implement measures in the public interest, stating that "[n]*othing in this Treaty shall be construed to prevent a Party from adopting, maintaining or enforcing any measure… that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns*" and that "*it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures*".[572]

343. This is not to say that Spain cannot regulate. It can. However, in pursuit of the aim to ensure stable and transparent regulatory frameworks for energy-sector investments, the Contracting Parties agreed that there would be limited exceptions for enacting measures in the public interest that would *not* give rise to an obligation to pay compensation if such measures otherwise violate Article 10 of the ECT.

344. As the Parties agree, Article 31 of the Vienna Convention requires that a treaty "*be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[573] Article 31(2) provides that the context of the treaty includes "*the text, including its preambles and annexes*". In other words, the ECT must be read as a whole and any purported exceptions to Article 10(1) must be found in the plain language of the treaty.

345. Spain has not sought to engage with the analysis concerning the exceptions found in Article 24. Rather, it seeks to read in two exceptions to the FET standard, which find no basis in the text of the ECT.

346. First, Spain considers Article 10(8) and Article 9 of the ECT to provide an exception to FET in relation to "*the public aid regime*".[574] Article 10(8) clearly states that it refers solely to grants, financial assistance or entering into contracts "*for energy technology research and development*". It

[571] Memorial, para. 342.
[572] Memorial, para. 344, fn. 498; and **Authority CL-10**, NAFTA, 32 International Legal Materials 289 and 605, 17 November 1993 (entry into force 1 January 1994), Article 1114, p. 11-7.
[573] **Authority CL-4**, Vienna Convention, Article 31 (emphasis added).
[574] Counter-Memorial, paras. 868-871.

then provides that the protection of, *inter alia*, national treatment in the sphere of energy technology research and development "*shall be reserved for* [a] *supplementary treaty*".[575] Spain therefore suggests that no investor protection is afforded for subsidies under Article 10. That is simply wrong. Article 10(8) simply does not apply in the context of this case as the present dispute does not concern treatment afforded by Spain in relation to "*energy technology research and development*".

347. Spain also argues that there is an exception found in Article 9(4) of the ECT because that provision states that "*nothing in this Article 9 'shall in any way prevent the Contracting Parties from adopting* [certain] *measures*'" that are specified in the text of Article 9.[576] Again, Spain has simply misread the Treaty. This is an exception that only relates to the obligations on Contracting Parties contained in Article 9 itself. A plain reading of Article 9 makes clear that the Article 9(4) exceptions do not apply to any other provision of the ECT.

348. Spain also refers to an ECT Secretariat Decision from 2010.[577] This says nothing that could be construed to support Spain's submissions. On the contrary, the passage quoted by Spain states that "[t]*he Energy Charter Treaty's investment protections should remain untouched in their fundamental*".[578]

349. Finally, Spain seeks to rely on the "Energy Charter Treaty Readers Guide" to claim that no liability under the ECT can arise from "*macroeconomic control measures*".[579] Spain alleges that the Readers Guide forms part of the official text of the ECT. This is plainly wrong; the document does not form part of the ECT.[580] It is not included within the authenticated version of the text that was signed by the Contracting Parties.[581] Indeed, the first page of the Readers Guide plainly states that "[t]*his guide is intended as a reading aid and in no case can be considered as an official interpretation*".[582] Spain fails to mention this.

---

575 The supplementary treaty is referred to in Article 10(4) of the ECT. It was intended that this supplementary treaty would apply to the treatment applicable to the "*Making of Investments*" (i.e. "*establishing new Investments, acquiring all or part of existing Investments to moving into different fields of Investment activity*" (see Article 1(8)). It is not relevant to the present dispute.

576 Counter-Memorial, para. 868.

577 Counter-Memorial, paras. 869-870.

578 **Authority CL-76**, Energy Charter Secretariat, "Decision of the Energy Charter Conference, Subject: Road Map for the Modernisation of the Energy Process", 24 November 2010.

579 Counter-Memorial, paras. 877-880.

580 The Guide appears in some languages of the consolidated version of the Energy Charter Treaty and related documents available on the ECT's website. As the ECT website makes clear, "[t]*he consolidated version of the Energy Charter Treaty and related documents is not a legal document*" (see http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/).

581 See **Authority CL-103**, Authenticated version of the Energy Charter Treaty, 17 December 1994.

582 **Authority RL-7**, "Le Traite sur la Charte de l'Energie et documents connexes", consolidated text, p. 6, fn. 2 (our translation).

350. The interpretive requirements of the Vienna Convention do not permit a new exception to be inserted into the text of the treaty. As noted above, the text of the ECT is clear and contains all the exceptions that the Contracting Parties intended to apply. If they were relevant, Spain would be able to cite the exceptions at Article 24 of the ECT. Spain does not claim that any of these exceptions apply. Consequently, should Spain wish to plead that its macroeconomic situation was a circumstance precluding the wrongfulness of its breaches of the ECT, the scope of such a defence is clearly defined in the ILC Articles on Responsibility of States for Internationally Wrongful Acts (the **ILC Articles**).[583] Where Spain refers to its "*macroeconomic*" situation, in reality it seeks to assert a necessity defence as contained in the ILC Articles. As will be explained below in sub-section 14.3, Spain fails to satisfy the criteria required for a necessity defence to apply.

## 12. THE DISPUTE MUST BE EXAMINED UNDER THE LENS OF INTERNATIONAL LAW

351. The Claimants identify below the key question to be answered in the context of the legitimate expectations limb of the FET standard: whether the Claimants were reasonable to expect that Spain *would not* make retroactive changes to the RD 661/2007 regime. Spain wrongly suggests that because it *could*, as a matter of Spanish law, make changes to the RD 661/2007 regime, no breach of the ECT can be established. Put simply, that is the wrong legal standard. The core question for this Tribunal is whether the Claimants legitimately expected that Spain *would not* make retroactive changes in the specific factual circumstances of this case. Spain wishes for the Tribunal to ignore the distinction between "could" and "would". But that is a critical distinction.

### 12.1 Spain gives inappropriate primacy to the role of Spanish law

352. Throughout its Counter-Memorial, Spain makes numerous references to Spanish law in order to suggest that the Tribunal should assess the existence and scope of Spain's commitments and obligations towards the Claimants or their investment through the lens of Spanish law.[584] This is an obvious attempt to bring Spanish law to the forefront of the discussion, which flies in the face of the pertinent principles of international law.

353. Spanish law should not be used as a tool to override Spain's international obligations. A State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterisation of that conduct as wrongful by international law. This axiomatic rule of law is set

[583] **Authority CL-27**, ILC Articles, 28 January 2002. See also, **Authority CL-50**, *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 350, noting that "[t]*he Draft Articles are currently considered to reflect most accurately customary international law on State responsibility*."

[584] See e.g. Counter-Memorial, paras. 36, 782 and 833.

out in Article 3 of the ILC Articles.[585] Thus, for example, it is trite law that "*a State cannot adduce… its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force*".[586] Indeed, as observed by the tribunal in *AWG v Argentina*, "*a party may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations*".[587] There are many examples throughout the Counter-Memorial where Spain seeks to rely on Spanish law to evade its international law obligations.[588] The Tribunal should reject these arguments.

354. Put simply, even if Spanish law allows Spain to change its own laws despite its repeated statements that it would not do so for existing installations, Spain can still be liable for a breach of the FET standard under the ECT. If the legal standard for establishing a breach of the FET was dependent on the question "can a state change the law", no investor would ever make out a breach of FET. Leaving aside Spanish law, the question to be determined, among others, is whether, given the contents of the norm itself as well as Spain's contemporaneous and subsequent behaviour, the Claimants were entitled to expect that Spain *would not* change the RD 661/2007 regime for their investment.

### 12.2 The FET standard minimises non-commercial risk

355. In Spain's view, the Claimants' interpretation of the RD 661/2007 economic regime amounts to a claim that the regime would be frozen, thereby precluding Spain's ability to regulate. Not only does this misrepresent the Claimants' actual expectations, it betrays a misunderstanding of the FET standard and what it is designed to protect. The FET standard protects, *inter alia*, legitimate expectations. Accordingly, a core question for this Tribunal is whether the Claimants legitimately expected that Spain *would not* make retroactive changes (even if it could) in the specific factual circumstances of this case.

356. The specific factual circumstances of this case – where Spain repeatedly stated it *would not* make retroactive changes to the RD 661/2007 regime – clearly give rise to a breach of the ECT. The fact that Spain could make changes (and still comply with Spanish law) is therefore irrelevant. And,

---

585 **Authority CL-27**, ILC Articles, 28 January 2002, Article 3.

586 See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion,* 1932, PCIJ Series A/B, No. 44, p. 4 as referred to in **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, p. 211.

587 **Authority CL-132**, *Suez, Sociedad General de Aguas de Barcelona S.A and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd v The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, para. 65. See also **Authority CL-126**, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 313.

588 See e.g. Counter-Memorial, paras. 36, 169, 337, 449, 450, 782 and 833.

even putting aside the Claimants' legitimate expectations claim, the FET standard requires Spain to honour the prohibition on unreasonable, arbitrary and disproportionate measures and its obligations of transparency and fundamental fairness.[589]

357. As already explained above, the 1991 Charter, and then the ECT, aimed to ensure "*the creation of a "level playing field" for energy sector investments throughout the Charter's constituency, <u>with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments</u>*".[590] Underpinning this statement is the recognition that "*non-commercial risks*", namely, political risk, are a reality for investors.

358. The role that investment treaties play in minimising political risk was addressed by the tribunal in *CMS v Argentina*.[591] The tribunal there concluded that while a State could not be required to freeze its laws, it could be held accountable, under international investment law, for violating investors' expectations if the violation arose from the State's exercise of its regulatory powers. The tribunal observed that:

> "It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects."[592]

359. In that case, the "*specific commitments*" were set out in the law as well as in a licence applicable to the gas industry. Argentina undermined those commitments. Despite Spain's arguments to the contrary, the facts of this case resemble CMS: Spain, by enacting RD 661/2007 made specific commitments to the Claimants that future changes to the FIT would not apply to existing investments and, once an investor obtained the RAIPRE certification (which is similar to a licence), the Wind Farms would be entitled to the FIT for their operational lifetime. These commitments were further confirmed by Spain in its July 2010 Agreement and by enacting RD 1614/2010.

360. Spain was aware of the distinction. This awareness is apparent from comments made by the CNE in 2007:

---

[589] See para. 16(b) above.

[590] **Exhibit C-1**, Energy Charter Treaty, 17 December 1994, p. 14 (PDF 16) (emphasis added).

[591] **Authority CL-38**, *CMS Gas Transmission Company v The Argentine Republic,* ICSID Case No. ARB/01/8, Award, 12 May 2005.

[592] **Authority CL-38**, *CMS Gas Transmission Company v The Argentine Republic,* ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 277.

> "The CNE Board of Directors considers that, although it is difficult to defend the petrification of laws, it is necessary to strive to achieve sufficient legal certainty, which ensures, as far as possible, that regulatory uncertainty and risk are removed; this is the only way in which there can be sufficient investment.
>
> The Constitutional doctrine admits that if its need is sufficiently justified, it is possible to retroactively enforce a regulation provided that in exchange, an adequate transition period if established and investors are compensated."[593]

361. The CNE is here drawing a distinction between whether Spain "could" change the RD 661/2007 economic regime and whether Spain "would" do so. The CNE expressly notes that if Spain were to change the regime in the future, although it could technically do so (since laws are not frozen), it would have to make the change in a manner that was consistent with investor expectations: by providing an appropriate transitional period; and offering compensation.

362. The distinction between Spain's ability to change a legal regime and the possibility that it would do so is borne out by the Claimants' due diligence when deciding whether or not to invest in the Wind Farms.[594] A key assumption driving any due diligence is that a State *can* always change a regulatory regime. Indeed, if that were not the case, there would be no need to scrutinise the stability or robustness of a legal regime. Therefore, the Claimants were always concerned with the *possibility* of change, rather than the *ability* to change. Given the unequivocal language of RD 661/2007, the clear terms of the July 2010 Agreement and their codification by virtue of RD 1614/2010, the Claimants never expected that, once RAIPRE certifications for their qualifying installations were obtained, the tariff would change. That is because Spain had said it would not. In focusing in the abstract on its *ability* to effect change, instead of its representations that it would not do so, Spain has missed the point.

363. This distinction between the right to regulate in the abstract and the limitations imposed on a Contracting Party by the FET standard under the ECT was at the heart of the ruling in the *Eiser*

---

[593] **Exhibit C-85**, CNE Report 3/2007 of 14 February 2007, p. 19 (PDF 22) (emphasis added).

[594] **Exhibit C-47**, Technical Due Diligence Report prepared by GL Garrad Hassan Ibérica dated 26 May 2015; **Exhibit C-102**, Allen & Overy Memorandum on RD 661/2007 tariff risk with regards to retroactive effect of future regulations dated 24 February 2010; **Exhibit C-103**, Société Générale and Mediobanca "Information Memorandum: Wind assets", on Project Greco, Lot La Boga dated May 2011; **Exhibit C-104**, Operations Committee Paper dated 13 June 2011; **Exhibit C-113**, Investment Advisory Committee Paper on Project Greco dated 20 June 2011; **Exhibit C-114**, Email from Felipe Moreno to Allen & Overy dated 20 June 2015; **Exhibit C-115**, BCG Report on Project Greco dated 6 July 2011; **Exhibit C-116**, Executive Summary of BCG Report on Project Greco dated July 2011; **Exhibit C-117**, Technical Due Diligence Report on La Boga prepared by Garrigues Medio Ambiente dated 22 July 2011; **Exhibit C-118**, Tax Due Diligence Report on Project Greco prepared by KPMG dated 27 July 2011; **Exhibit C-119**, Legal Due Diligence Executive Report for Project Greco prepared by Allen & Overy dated 2 August 2011; **Exhibit C-120**, Investment Advisory Committee Paper on Project Greco dated 11 July 2011; **Exhibit C-167**, Operations Committee Paper dated 25 January 2010; **Exhibit C-170**, Executive Summary of Valuation Analysis on Project Greco prepared by Citigroup dated 11 July 2011; **Exhibit C-171**, Valuation Analysis on Project Greco prepared by Citigroup dated 11 July 2011; **Exhibit C-172**, Investment Advisory Committee Paper on Project Greco dated 25 July 2011 and **Exhibit C-173**, Paper to the Investment Advisory Committee–six-month review after closing of Project Greco dated 11 March 2013.

case.[595] That claim was brought against Spain by investors in CSP installations that were subject to the RD 661/2007 regime and concerned the exact same detrimental measures as those in dispute here. First, the *Eiser* Tribunal found that:

> "[a]bsent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs."[596]

364. The *Eiser* tribunal nevertheless held that:

> "the evidence shows that Respondent eliminated a favourable regulatory regime previously extended to Claimants and other investors to encourage their investment in CSP. It was then replaced with an unprecedented and wholly different regulatory approach, based on wholly different premises. This new system was profoundly unfair and inequitable as applied to Claimants' existing investment."[597]

365. Spain may not, consistent with Article 10(1) ECT, deprive the Claimants of the economic rights associated with the RD 661/2007 regime when it freely undertook to grant those rights and guarantee their continuity, without paying just compensation.

## 13. SPAIN HAS BREACHED THE FIRST SENTENCE OF ARTICLE 10(1)

366. It is common ground that the FET standard includes the obligation to provide a stable and predictable legal framework for investments.[598] Spain does not appear to dispute that Article 10(1) of the ECT provides an independent obligation to maintain a stable and transparent legal framework. Rather, Spain argues that it has not breached the obligation (whether as part of the FET standard or independently) for three reasons:

(a) First, the absence of a "*specific commitment*".[599] There was no requirement that the RD 661/2007 economic regime be frozen for the lifetime of qualifying installations. The Claimants should have expected that Spain could withdraw the FIT regime for macroeconomic or necessity reasons.[600]

---

[595] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017.

[596] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 362.

[597] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 365.

[598] Counter-Memorial, para. 929.

[599] Counter-Memorial, paras. 930-933 and 959.

[600] Counter-Memorial, para. 912.

(b) Secondly, the ECT standard does not contain a "stability clause".[601]

(c) Thirdly, Spain has not breached the stability obligation given that (i) Spain maintained "*the essential characteristics of the regulatory framework in which the Claimant invested*";[602] and (ii) the Disputed Measures are not retroactive.[603]

367. The Claimants address point (a) in the context of their legitimate expectations claim (section 14). Points (b) and (c) are addressed immediately below.

**13.1 The meaning of the first sentence of Article 10(1)**

368. Citing the award in *AES v Hungary* (and relying also on *Mamidoil v Albania*), Spain contends that "*the stable conditions referred to by the ECT clearly allow the adoption of reasonable and proportionate macroeconomic control measures*" and that the reference in the ECT to those stable conditions does not mean that the ECT contains a stabilisation clause.[604] The Claimants do not suggest that the ECT contains a stabilisation clause (although RD 661/2007 and RD 1614/2010 did). Rather, the Claimants argue that, under the ECT, Spain is required to provide a stable and predictable legal framework to the Claimants' investments.[605] The Claimants also argue that this obligation is stronger under the ECT than under other investment treaties.[606]

369. To be clear: the Claimants' case is that, in the light of the first sentence of Article 10(1) although Spain is permitted to make changes to its regime under the ECT, those changes must be predictable and ensure that the general framework remains stable and in line with the investors' expectations. The Disputed Measures were not.

370. Spain was aware of the stability and predictability of revenue streams that investments in RE projects require, and introduced the RD 661/2007 economic regime guaranteeing the corresponding requisite stability. This was the key reason why Spain was so successful in attracting the investments it needed to develop its RE sector. RD 661/2007 was predictable and in line with standard international practice in that it foreshadowed that certain changes to the FIT would be made, but it confirmed they would not apply to existing investments.[607] Spain first introduced

---

601 Counter-Memorial, paras. 930-932.
602 Counter-Memorial, para. 935.
603 Counter-Memorial, paras. 939-954.
604 Counter-Memorial, paras. 930-932, citing **Authority CL-133,** *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.29; and **Authority RL-46**, *Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v Republic of Albania,* ICSID Case No. ARB/11/24, Award, 30 March 2015, paras. 617-618.
605 Memorial, section 13.2.
606 Memorial, paras. 430-432.
607 See above, section 4.3.

measures to lower the tariff through the backdoor and later chose to ignore this provision altogether, thus failing to provide the stability and predictability it undertook to create and maintain pursuant to the ECT.

371. Furthermore, Spain repeatedly emphasised the stability of its regime to potential investors.[608] Spain did so in Article 44.3 of RD 661/2007, on which the Claimants relied, by unequivocally stating that future changes to the FIT would not affect existing installations. This was confirmed in the Ministry's official May 2007 Announcement accompanying RD 661/2007 and in the numerous presentations made by the CNE and InvestInSpain on the applicable regulatory regime.[609] In addition, after certain adjustments in the PV sector, Spain re-confirmed its commitment to provide stability to the wind and CSP sectors by enacting RD 1614/2010, which provided that any future changes to the RD 661/2007 Premium would not apply to duly-registered existing installations.[610] Spain provided unqualified stabilisation commitment under the RD 661/2007 economic regime. By withdrawing that regime, Spain failed to respect the stability of the legal framework that the ECT requires.

## 13.2 The New Regime is a complete overhaul

372. The Disputed Measures are a complete and retroactive overhaul of the RD 661/2007 economic regime. They were implemented without consulting the Claimants or the sector for that matter (see section 6.2(b) above) and led to a lengthy period of uncertainty while Spain finalised the parameters of the New Regime.[611] The consequences of the Disputed Measures are significant. The fair market value of the Claimants' investments as at June 2014 has decreased by EUR 123.9 million.[612]

373. Spain insists that in circumstances where the New Regime complies with the principle of "*reasonable return*" for the Claimants' investments, Spain has respected the stability and

---

608 See **Exhibit C-85**, CNE Report 3/2007 of 14 February 2007, p. 16; **Exhibit C-162**, CNE Report 83/2010 on the proposal of the Royal Decree regulating and modifying certain issues relating to the Special Regime, 14 September 2010, p. 26; **Exhibit C-93**, Government of Spain, Ministry of Industry, Tourism and Commerce, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy and combined heat and power*", p. 1; **Exhibit C-249**, Ministry of Industry, Tourism and Commerce and IDAE, *"Solar Energy in Spain 2007: Current State and Prospects"*, June 2007, p. 16; **Exhibit C-165**, InvestInSpain Presentation, "*Opportunities in Renewable Energy in Spain*" (Vienna) pp. 26 and 40; **Exhibit C-58**, Ministry of Industry, Tourism and Commerce & InvestInSpain, "*Opportunities in Renewable Energy in Spain*", 1 November 2008; **Exhibit C-95**, CNE Presentation, "*Legal and Regulatory Framework for the Renewable Energy Sector*", 29 October 2008; **Exhibit C-250**, Speech delivered by Miguel Sebastián, Minister of Industry, at the IRENA Founding Conference, Bonn, 26 January 2009; **Exhibit C-96**, CNE Presentation, "*Renewable Energy Regulation in Spain*", February 2010, p. 29; **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010.

609 See Section 4.2.

610 **Exhibit C-46**, RD 1614/2010 of 7 December 2010, Articles 4-5.

611 Memorial, paras. 433-437.

612 Brattle Rebuttal Quantum Report, para. 7, 163 and 232.

predictability of the legal framework.[613] Spain also relies on decisions of the Spanish Supreme Court to support this view.[614]

374. The Claimants do not accept that the concept of "*reasonable return*" is the appropriate yardstick against which to measure the New Regime, since that is not what was promised under the RD 661/2007 economic regime.

375. As explained in section 7.2 of the Memorial and at section 6.2(b) above, the New Regime represents a complete overhaul of the regulatory regime that was in place at the time the Claimants made their investment and dramatically affects the performance of the investment. It self-evidently does not comply with Spain's obligation to provide a stable framework. As explained above, this was one of the tribunal's main findings in *Eiser*:

> "[I]n 2013 and 2014, Respondent changed its regulatory regime in a far more drastic fashion. It adopted and implemented an entirely new regulatory approach, applying it to existing investments in a manner that washed away the financial underpinnings of Claimants' investments. The new regime reduced projected revenues of Claimants' ASTE 1-A plant by 66% compared to those projected under the prior regime. Since, as described below, the plants were highly leveraged – as Respondent's regulatory authorities previously anticipated that such plants would be – this revenue cut had grave consequences for the investment."[615]

376. Even assuming all the Claimants were entitled to was a "*reasonable return*", then Spain breached its obligation to provide transparent conditions for investors. As explained elsewhere, the Claimants did not base their investment on the notion of the "*reasonable return*". Nor could they as Spain never represented that it could make retroactive changes to the regime if it changed its mind as to what constituted a "*reasonable return*" under RD 661/2007. There was no mechanism for updating the remuneration for existing plants in case of changes in international rates anywhere in either RD 661/2007, the 1997 Electricity Law or any other Government document. Yet Spain now argues that a "*reasonable return*" was the fundamental principle underpinning the RD 661/2007 economic regime (see section 5.1 above). If that were true, Spain was not transparent in its dealings with investors.

377. In any event, Spain's submission is no answer to the lengthy and opaque transition from the RD 661/2007 economic regime to the New Regime. Even assuming for the sake of argument that

613 Counter-Memorial, paras. 934-935.
614 Counter-Memorial, para. 833.
615 **AuthorityCL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 389.

the New Regime bears similarities to the RD 661/2007 economic regime, the haphazard and non-transparent implementation of the New Regime was itself a breach of the obligation to provide stable conditions (see section 6.2 above).

### 13.3 The New Regime is retroactive

378. Spain claims that the Disputed Measures are not "retroactive" under domestic or international law[616] and, therefore, that it has not breached the obligation to provide stable conditions (essentially because the conditions remain unchanged). This requires a preliminary clarification as to the meaning of retroactivity.

#### (a) The ordinary meaning of "retroactive"

379. The Claimants use the term retroactive to refer to measures that apply to investments that have already been made. This is the ordinary meaning of the word and also the meaning economists use.[617] This is the appropriate use of the term when discussing FIT systems because the universal understanding of FITs is that, once an installation is registered to receive the FIT, the FIT that the installation will receive shall remain constant for a fixed period.[618] Any cut to the FIT of an already registered RE installation is retroactive. Ecofys described the Disputed Measures as "[repealing] *all Royal Decrees that regulated RES retribution previously, thereby implementing a retroactive change*".[619]

380. Similarly, the EC uses the term retroactive in its repeated statements condemning retroactive changes to FIT schemes, stating that "[r]*etroactive changes to existing support schemes will damage investor confidence and reduce investments in the sector. Support scheme reforms should not frustrate investor's legitimate expectations*".[620] The EC further recognises that retroactive changes to FIT schemes damage investor confidence, discourage further investment and violate investors' legitimate expectations.[621]

#### (b) Spain's contemporaneous use of the word retroactive

381. This is also how Spain used the term retroactive when repeatedly representing that the RD 661/2007 economic regime FIT was guaranteed.

---

616 Counter-Memorial, paras. 939-954.
617 Brattle Regulatory Report, paras. 182-188.
618 See sections 4.1 and 4.2.
619 **Exhibit C-152**, Ecofys, Task 2 Report, "*Design Features of Support Schemes for Renewable Electricity*", 27 January 2014, p. 24.
620 **Exhibit C-148**, Communication from the European Commission, "*Delivering the Internal Electricity Market and Making the Most of Public Intervention*", C(2013) 7243 final, 5 November 2013, p. 15.
621 **Exhibit C-224**, European Commission, Renewable Energy Progress Report, SWD (2013) 102 final, 27 March 2013, p. 9.

382. The Claimants have cited earlier in this submission the numerous contemporaneous documents that prove Spain's understanding of the word retroactive, including a record of Spain's announcement of the RD 661/2007 regime and various CNE Presentations given from 2007 through to 2010.[622]

**(c) Definition of retroactivity under Spanish law**

383. In the light of this weight of evidence (and its own statements at the time), Spain seeks now to refer to the term "retroactivity" as a legal term of art under Spanish law. This is a red herring. The present claim does not arise under Spanish law. Irrespective of whether a change was possible under Spanish law (which the Claimants do not deny), the crucial fact is that Spain made a commitment to investors such as the Claimants that it would not make such a change for existing installations, i.e. that the Claimants would receive the RD 661/2007 FIT for the life of the Wind Farms. Spain's reneging on its commitment gives rise to liability under the ECT.

384. Under Spanish law, there are broadly two forms of retroactivity. The first is "improper" (or "*minimum degree*") retroactivity, which is generally permissible under Spanish law.[623] Applying new tariffs to existing installations for the remainder of their useful life is a case of improper retroactivity, i.e. a change in the law that affects a pre-existing situation. The second is "genuine" (or "*maximum degree*") retroactivity, which occurs under Spanish law and under most legal systems when the regulation not only affects pre-existing situations but also affects activities or results that have already occurred in the past (in this case, the electricity already produced, sold on the market, and for which the tariffs or premiums have already been paid).

385. Spain stresses that the Disputed Measures are permissible under Spanish law because they do not involve a "*maximum degree*" of retroactivity. On Spain's case, retroactivity is permitted under Spanish law so long as the regulation only affects pre-existing situations but does not affect activities or results that have already occurred in the past.[624] Leaving aside whether this would justify Spain's conduct pursuant to the ECT (which is denied), this is wrong on two counts: (a) the RD 661/2007 economic regime protected investors against improper/"minimum retroactivity"; and (b) the Disputed Measures are genuinely retroactive, of the "maximum degree".

---

[622] See Section 4.2.

[623] Under Spanish law, this type of retroactivity is not prohibited by Article 9.3 of the Spanish Constitution. According to the case law of the Spanish Constitutional Court, the retroactivity prohibited by the Constitution is "maximum degree" or "genuine" retroactivity.

[624] See Counter-Memorial, para. 951.

**(d) The RD 661/2007 economic regime protected against all retroactivity – including improper or "minimum degree" retroactivity**

386. Because of the nature of RE installations, it is fundamental to provide protection against any type of retroactivity in order to attract investment. These investments are made by sinking large capital upfront in reliance on the fact that the cash flows guaranteed by the FIT will provide a return on that capital over the course of decades. Given that minimum degree retroactivity was permitted under Spanish law, Spain implemented Article 40.3 of RD 436/2004, followed by Article 44.3 of RD 661/2007 and then Article 5.3 of RD 1614/2010. These commitments made clear to investors that not even "minimum degree" or "permissible" retroactivity would occur for that group of qualifying investors. As the State Council confirmed to the Government, this commitment was "*auto-vinculante*".[625] Such a "self-binding" statement is uncommon in legislation since it is a self-imposed restriction on legal rights.[626] There can be no doubt that it was made deliberately.[627]

*(i) The Disputed Measures implement genuine or "maximum degree" retroactivity*

387. In any event, Spain has in fact introduced genuinely retroactive changes. As explained in the Claimants' Memorial, the Disputed Measures "claw-back" past revenues.[628] Although the Project Companies were not required to pay back any "excess" amounts received in the past beyond the newly-imposed cap of the 7.398% "*reasonable return*" over the lifetime of their plants, the New Regime does discount the "excess" from future payments, which in practice is precisely the same thing. Spain does not contest the fact that the Disputed Measures "claw-back" past revenues by offsetting future revenues.

*(ii) The international precedents relied on do not assist Spain's case on non-retroactivity*

388. Spain relies on the decisions in *Nations Energy v Panama*[629] and *Charanne*[630] to support its view on the non-retroactivity of the measures. These decisions do not assist Spain's case.[631] The *Nations*

---

625 **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010, p. 24 (PDF 27).

626 This was recognised by the State Council (see **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010, p. 20).

627 **Exhibit C-211**, Ministry of Industry, Tourism and Commerce, "Report on the Draft RD 1614/2010", 26 October 2010, p. 11.

628 See Memorial, para. 389. The claw-back is found at the second final provision of RDL 9-2013 (**Exhibit C-27**, Royal Decree-Law 9/2013 of 12 July 2013).

629 Counter-Memorial, paras. 944-945.

630 Counter-Memorial, paras. 948-949.

631 In *Nations Energy v Panama*, the tribunal was comprised of Alexis Mourre (President), Claus von Wobeser (Respondent appointed) and José María Chillón Medina (Claimant appointed). The majority decision was reached by Alexis Mourre and Claus von Wobeser, with José María Chillón Medina dissenting. In *Charanne*, the tribunal was comprised of Alexis Mourre (President), Claus von Wobeser (Respondent appointed) and Guido Santiago Tawil (Claimant appointed). The majority decision was reached by Alexis Mourre and Claus von Wobeser, with Guido Santiago Tawil dissenting. Both dissenting opinions differed with the majority on the retroactivity analysis.

*Energy* decision is irrelevant to this Tribunal's analysis. The paragraphs of that award that Spain cites concern that tribunal's analysis of retroactivity under Panamanian law.

389. In *Charanne*, the claimants had argued that there is a principle of international law prohibiting a State from taking regulatory measures with immediate effect *per se*.[632] That is not the Claimants' position here. The Claimants' case is that Spain implemented the Disputed Measures in circumstances where it promised investors (in return for their investment) that it would not do so. That constitutes a breach by Spain of its international obligations, as the Claimants have explained.[633]

390. Finally, as stated in section 10.3 above, the tribunal in *Eiser* expressly found that the New Regime had retroactive effects:

> "Respondent then retroactively applied these 'one size fits all' standards to existing facilities, like Claimants', that were previously designed, financed and constructed based on the very different regulatory regime of RD 661/2007. No account was taken of existing plants' specific financial and operating characteristics in establishing their remuneration."[634]

## 14. THE CLAIMANTS' LEGITIMATE EXPECTATIONS

391. Spain's primary submission concerning legitimate expectations is that the "*the Claimant made an investment without knowing the essential aspects of the Spanish regulatory framework*".[635] Spain argues that, in any event, Spain made no specific commitment to the Claimants or their investment and their expectations were not objectively reasonable. These points are plainly wrong as a matter of fact, as explained in subsection 14.2. Before doing so, it is helpful to set out a few preliminary considerations on the relevant legal test.

### 14.1 Legal test for legitimate expectations

392. The following is common ground between the Parties. An investor's legitimate expectations are to be assessed at the time of the investment.[636] Those expectations must be legitimately and reasonably held.[637] In other words, a mere subjective belief is insufficient; that belief must also be objectively

---

[632] **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 548.

[633] See Memorial, paras. 408-421.

[634] **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 400.

[635] Counter-Memorial, para. 902.

[636] Counter-Memorial, paras. 896-897.

[637] Memorial, para. 421; Counter-Memorial, paras. 896-898.

reasonable.[638] An investor's legitimate expectations may be derived from the host-State's legal and regulatory framework.[639] Finally, Spain does not seriously dispute reliance. In other words, there is no suggestion that the Claimants and their predecessor, Bridgepoint, did not rely on the regulatory framework when investing in the Wind Farms or that the regulatory framework was not fundamental to the decision to invest in the Wind Farms.[640] There are, however, two arguments advanced by Spain with which the Claimants take issue, as a matter of law.

393. First, relying on the majority award in *Charanne*, Spain suggests that proof of "*a prior analysis of the legal framework*" is necessary to have legitimate expectations.[641] Notwithstanding the fact that the legal advice provided to Bridgepoint demonstrates that the Claimants' expectations were legitimate and reasonable, the Claimants do not agree that there is, at law, such a requirement for a claim for breach of legitimate expectations to be made out. For the reasons explained above, the Claimants do not consider that the *Charanne* award is applicable here. In any event, this is not what the majority held. The majority was merely commenting that when investing in the energy sector, one would expect a high level of due diligence and, in the majority's view, that was not present on the facts before it. In the Claimants' view, it is sufficient for a tribunal, on a case-by-case basis, to determine whether a subjective belief is reasonably held. It is wrong, as a matter of law, to seek to impose the need for a "*preliminary and comprehensive analysis*".[642] Of course, if this Tribunal were to impose such a test, the Claimants meet the test (see, in particular, section 14.2).[643]

394. Secondly, Spain argues that a breach of legitimate expectations can only be successful if the State makes a "*specific commitment*". Spain relies on *Plama Consortium v Bulgaria*,[644] *AES Summit v Hungary*[645] and the majority award in *Charanne*[646] to support this submission. Spain does not, however, clarify what on its case would qualify as a "*specific commitment*" that could give rise to legitimate expectations.[647] Spain appears to contend, although that is far from clear, that only a

[638] Counter-Memorial, para. 898, citing **Authority RL-48**, *Electrabel S.A. v The Republic of Hungary* (*Electrabel v Hungary*), ICSID Case No. ARB/07/19, Award, 25 November 2015.
[639] Memorial, paras. 415-416; Counter-Memorial, para. 935.
[640] The parties diverge, of course, as to what the relevant framework provided for.
[641] Counter-Memorial, para. 905.
[642] Counter-Memorial, para. 905.º
[643] Memorial, section 5.2. See also First Moreno Statement, paras. 12 and 46-60.
[644] Counter-Memorial, para. 873 citing **Authority CL-63**, *Plama Consortium Limited v The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.
[645] Counter-Memorial, para. 873, citing **Authority CL-133** *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.
[646] Counter-Memorial, para. 910.
[647] Counter-Memorial, paras. 909-912.

contractual obligation between the investor and the State can constitute a specific commitment.[648] If that is indeed Spain's case, then it is wrong.

(a) There is no support for Spain's suggestion in investor-State jurisprudence, and the argument is inconsistent with the general rule (which Spain accepts) that expectations can be derived from a State's legal and regulatory framework. Arguing that only a specific commitment, in the form of a contract, can be the basis of an investor's expectations is tantamount to saying that the regulatory framework is irrelevant. The errors of law of the *Charanne* decision have been addressed above. As for *Plama Consortium* and *AES Summit*, neither of these awards supports Spain's position:

(i) Spain relies on paragraph 219 of the *Plama Consortium* award, which actually supports the Claimants' position. In that paragraph, the tribunal stated that, on the facts before it, there was no commitment by the State to maintain the relevant law. The tribunal made no general finding that a "specific commitment" is required under the ECT.

(ii) Similarly, in *AES Summit*, the tribunal noted that the relevant contract did not contain a stabilisation clause (defined as "*a covenant not to change the relevant law, usually for a certain period*"[649]). That case is obviously distinguishable since the applicable Spanish regulations did contain stability commitments, which were indeed "*covenants not to change the relevant law* [RD 661/2007] *for a certain period* [the operational lifetime of the Wind Farms]".[650] In any event, the *AES Summit* tribunal made no general finding that absent a specific commitment in a contract, an investor cannot have an expectations claim under the FET standard.

(b) Moreover, Spain's submission[651] ignores the fact that in order to induce as much RE investment as possible, the RD 661/2007 economic regime FIT intentionally was not implemented through a cumbersome network of individually-negotiated bilateral contracts with the Government but through a guaranteed public offer to invest in the form of RD 661/2007. The *form* of the guarantee (here the regulation) cannot override the

648 Counter-Memorial, para. 916.

649 **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, *para.* 9.3.25.

650 **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.25.

651 See Counter-Memorial, para. 909 ("*The regulatory framework only guaranteed that renewable energy facilities, during their useful life, could achieve a reasonable profitability*").

*substantive* and binding commitments contained within that guarantee (including Article 44.3). In this respect, it is telling that Spain does accept that the RD 661/2007 regime did contain *a* specific commitment. On Spain's case, it was promise of a "*reasonable return*". In other words, despite Spain's insistence that laws of general application cannot give rise to legitimate expectations, it does actually accept that they can. The only disagreement between the Parties is the content of that commitment.

(c) Finally, and most importantly, Spain did in fact provide specific commitments, in the sense of clear commitments made to induce investment to the Claimants: [652]

(i) Article 44.3 of RD 661/2007 and again Article 5.3 of RD 1614/2010, which were included to induce investment and achieve the regulations' object and purpose, namely attract sufficient green energy to meet Spain's international obligations, create jobs and increase GDP, among other things (see further, section 4.2 above).[653]

(ii) The July 2010 Agreement, which Spain declared to be a pact that guarantee[d] the RD 661/2007 incentives.[654]

395. The Parties are, therefore, broadly in agreement as to the legal test to be applied. The key disagreement is whether, as a matter of fact, the Claimants' expectation that the Project Companies would receive the FIT for the operational lifetime of their duly-registered Wind Farms, and without harmful retroactive changes being made, was reasonable. In this respect, if the Tribunal finds that the Claimants' expectation of a FIT regime for the duration of the investment is reasonable, it must rule in the Claimants' favour. This is because reliance is not seriously disputed and Spain does not advance any arguments as to why Spain did not frustrate those expectations by implementing the Disputed Measures. To be clear, Spain's argument that the New Regime offers a "*reasonable return*" only becomes relevant in the scenario where the Claimants' expectations are found to be limited by a "*reasonable return*" concept.

---

652 As noted below with respect to the Umbrella Clause, each of these commitments constitutes obligations protected under the Umbrella Clause of Article 10(1) of the ECT. As noted by Salacuse, obligations protected by the Umbrella Clause "*include but are not limited to specific contracts signed by the investors, legislation applicable to investments generally, administrative orders applicable to a specific investment or investments generally, and oral and written statements made by state authorities at various levels.*" (see **Authority CL-92**, J W Salacuse, *The Law of Investment Treaties*, (2nd ed., Oxford University Press, 2015), p. 312. It applies *a fortiori* when there are specific commitments that give rise to legitimate expectations protected under the FET obligation in Article 10(1)).

653 See also Memorial, paras. 147-153, 219 and 463.

654 See above, section 4.6; Memorial, paras. 179-181.

## 14.2 The Claimants' expectations were reasonable

396. The real difference between the Parties lies in the interpretation of the RD 661/2007 economic regime that was in place at the time of the decision to invest.[655] Spain claims that the Claimants' expectations were not reasonably held because: (a) their due diligence was flawed, leading to their misunderstanding the regulatory framework; or, in the alternative (b) all the due diligence reports obtained prior to making the investment acknowledged that the regime could change, such that Bridgepoint and ultimately the Claimants knew or should have known that there was no guarantee or commitment on Spain's behalf as to the immutability of the RE remuneration regime.[656]

### (a) Spain's unfounded criticisms of the Claimants' due diligence

397. Spain seeks to undermine the Claimants' claim by misrepresenting the advice they received in relation to the Wind Farms and the RD 661/2007 regime. Spain's various criticisms are addressed below.[657]

398. **The A&O Memorandum**. First, contrary to Spain's submission that the A&O Memorandum was not addressed to the Claimants,[658] it was in fact specifically requested by Bridgepoint to inform its understanding of RD 661/2007 in the context of a potential investment in T-Solar.[659] Bridgepoint's (and ultimately the Claimants') reliance on the A&O Memorandum was confirmed by Mr Moreno in the First Moreno Statement:

> "This advice gave us comfort that tariff reviews could not affect the revenues of existing installations. Allen & Overy advised that if the Fixed Tariff was reduced, then investors would be entitled to adequate compensation."[660]

399. This is confirmed in the Second Moreno Statement.[661] In addition, Mr Moreno confirms in his Second Moreno Statement that Bridgepoint commissioned the memorandum.[662]

400. Secondly, Spain uses the February 2010 date of the A&O Memorandum to argue that this could not have reasonably informed any opinion on the applicable regulatory framework, since retroactive

---

[655] As noted, Bridgepoint made the decision to invest in August 2011, and the Claimants were incorporated as a necessary consequence of that decision in September and October 2011.

[656] These two alternative arguments are, of course, mutually inconsistent, which is (further) evidence of the weakness of Spain's defence.

[657] Regarding the alleged Uría Menéndez memorandum (Counter-Memorial, para. 592), this does not exist, as explained and evidenced during the document production phase (Redfern Schedule Respondent's request no. 1)

[658] Counter-Memorial, para. 591.

[659] First Moreno Statement, paras. 32-34.

[660] First Moreno Statement, para. 34.

[661] Second Moreno Statement, para. 22.

[662] Second Moreno Statement, para. 22.

regulatory changes were approved at the end of 2010.[663] This is misleading for the following reasons.

401. First, as explained earlier in this submission, two of the measures mentioned by Spain, RD 1565/2010 and RDL 14/2010, mainly concerned the PV sector and therefore did not affect the remuneration regime of wind installations. Moreover, these measures resulted in extensive litigation, with numerous claims being brought by the PV sector in both national and international forums. This was consistent with the conclusions of the A&O Memorandum, which highlighted that, although "*the Government has the right to legislate and implement regulations*", if the RD 661/2007 was changed retroactively, then "*the Government would have to adequately compensate the producers*".[664] On any view, the impact of these two measures on the guaranteed remuneration scheme of RD 661/2007 is in no way comparable to the complete overhaul of the RE regulatory regime introduced by Spain with the New Regime.[665]

402. Secondly, as explained in the Memorial,[666] the only measure that affected the wind sector, RD 1614/2010, was not only previously agreed with the sector but also *reassured* the Claimants that the RD 661/2007 regime would remain stable with regards to the Wind Farms. This regulation formalised the agreement that the Spanish Government had reached with the wind sector in July 2010.[667] By virtue of this agreement, the Government extended the protection of the RD 661/2007 stabilisation clause to the Premium option, in exchange for a temporary (and minor) reduction of the Premium.[668] If the Government had been entitled to change the RD 661/2007 economic regime without paying compensation (and had believed that it was so entitled), then such an agreement would have been unnecessary. RD 1614/2010 confirmed that the RD 661/2007 FIT could not be modified for existing plants and confirmed that such protection included the Premium. This was also the Claimants' understanding, as stated in the Investment Advisory Paper dated 20 June 2011:

---

663 Counter-Memorial, para. 591.

664 **Exhibit C-102**, Allen & Overy Memorandum on RD 661/2007 tariff risk with regards to retroactive effect of future regulations dated 24 February 2010, p. 2.

665 These measures are: **Exhibit R-104**, Royal Decree 1565/2010, of 19 November, which regulates and modifies certain aspects of the electricity production activities in the Special Regime; **Exhibit R-90**, Royal Decree-Law 14/2010, of 23 December, establishing urgent measures for the correction of the tariff deficit in the electricity sector; and **Exhibit C-46**, RD 1614/2010.

666 Memorial, paras. 182-189.

667 **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release: "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010.

668 Second Moreno Statement, para. 23; Memorial, para. 33.

> "The newly agreed tariff won't be [s]ubject to additional changes and will remain in place for the rest of the life of the operating plants. In 2010, the Spanish government undertook a review of the remuneration scheme applicable to renewable energies. The wind remuneration scheme review had a meaningless impact and its scope was agreed with industry players given the role to be played by this energy source going forward."[669] (emphasis added)

403. Finally, Spain contends that the opinion expressed in the A&O Memorandum was "*not even shared by the recipient of said memorandum, T-Solar*".[670] It is difficult to understand how T-Solar's alleged understanding could be of any relevance to this case. As noted above, the A&O Memorandum was commissioned by Bridgepoint, and, along with other documents, it shaped the Claimants' legitimate expectations that the economic regime to which the Wind Farms were entitled would not be affected by harmful retroactive measures.

404. **The Information Memorandum**. Spain contends that this report, from May 2011, "*makes reference to the retroactive regulatory changes in the renewable energies sector that had already occurred at the end of 2010*", implying that it should have put the Claimants on notice that the RD 661/2007 economic regime could be changed retroactively.[671] Spain relies on various extracts from the report, taken out of context. The Information Memorandum's assessment is quite the opposite, namely that the regulatory regime governing the Wind Farm's remuneration would remain stable in accordance with the Government's commitments, crystallised by means of RD 1614/2010. For example, one of the quotations cited in the Counter-Memorial is cut short, depriving the reader from the wider context of the statement. The full quote referred to is "*it is clear that there has been some retroactivity but it is important to calibrate the relevance of such retroactivity*".[672] Spain highlights only the beginning of the sentence and ignores the second half, as well as the reasons why "*it is important to calibrate the relevance of such retroactivity*", set out directly below the sentence. In particular, Spain purposefully omits the statements on that same page of the document providing that "[t]*he new regulation provides further stability for CSP and wind energies as it confirms that cap in hours will not be modified again*" and that it provided "*regulatory stability*".[673]

405. In addition, Spain conveniently omits to mention that this report clearly states that:

---

669 **Exhibit C-113**, Investment Advisory Committee Paper on T-Solar dated 20 June 2015, slide 14 (PDF 11).
670 Counter-Memorial, para. 591.
671 Counter-Memorial, para. 595.
672 **Exhibit C-103**, Société Générale and Mediobanca "*Information Memorandum: Wind assets*", on Project Greco, Lot La Boga, p. 25.
673 **Exhibit C-103**, Société Générale and Mediobanca "*Information Memorandum: Wind assets*", on Project Greco, Lot La Boga, p. 25.

(a) the RD 661/2007 economic regime provided secure cash flows for the entire useful life of the Wind Farms ("*secured cash flow with long term visibility (either feed-in-tariffs or pool price + premium during the whole life of the plant)*");[674]

(b) RD 1614/2010 provided reassurance as to the long-term stability of the RD 661/2007 regime for Wind Farms ("[f]*avourable regulation recently stabilized (RD 1614/2010)*");[675] and

(c) the Spanish RE framework was designed to induce investment in RE ("[r]*ecent Spanish regulation has set back rumours in the sector and has provided long term visibility, aiming potential investors to invest in Spain due to its favourable regulation vs. other European ones*").[676]

406. Consequently, contrary to what Spain contends, the view expressed in the Information Memorandum was that the 2010 measures had no impact on the guaranteed remuneration scheme for wind installations. Moreover, it confirmed that the Government had committed not to change the Premium for the remainder of existing plants' operational life.[677]

407. **The BCG Report**. As with the Information Memorandum, Spain takes statements of the BCG Report, dated 6 July 2011, out of context and presents an inaccurate picture of the message the document actually conveyed. In particular, Spain contends that the BCG Report:

(a) is not a legal due diligence report;

(b) recognises that future retroactive measures were possible;

(c) refers to retroactive measures that were implemented in the RE sector in 2010;

(d) warns of the effect of the Tariff Deficit on RE producers; and

(e) acknowledges that both the RD 661/2007 regime and the New Regime aim to grant the same return.

408. Again, this is highly misleading.

---

[674] **Exhibit C-103**, Société Générale and Mediobanca "*Information Memorandum: Wind assets*", on Project Greco, Lot La Boga, p. 5.
[675] **Exhibit C-103**, Société Générale and Mediobanca "*Information Memorandum: Wind assets*", on Project Greco, Lot La Boga, p. 5.
[676] **Exhibit C-103**, Société Générale and Mediobanca "*Information Memorandum: Wind assets*", on Project Greco, Lot La Boga, p. 8.
[677] **Exhibit C-103**, Société Générale and Mediobanca "*Information Memorandum: Wind assets*", on Project Greco, Lot La Boga, p. 8.

409. First, the Claimants have never stated that the BCG Report was a legal due diligence report. BCG are, however, experts on RE and have in fact advised Spain on certain aspects of its RE policies and regulations.[678] The Spanish Government having itself received regulatory advice from BCG, it is surprising, to say the least, for Spain now to argue that BCG's advice on the RE regulatory regime in Spain is somehow lacking.

410. Secondly, Spain relies on the BCG Report's characterisation of changes to the RD 661/2007 remuneration regime as "unlikely" (Spain purposefully cuts the word "very" from the quote), rather than "impossible", as evidence that changes such as those implemented by the New Regime could be made. This is misleading. BCG states numerous times throughout the BCG Report that the RD 661/2007 FIT was "*guaranteed by the State*" and displayed "*no regulatory risk*".[679] Such clear statements speak for themselves. They could certainly not have put the Claimants on notice that a change as drastic as the New Regime would affect their investment.

411. Thirdly, according to Spain, the retroactive measures taken at the end of 2010 and mentioned in the BCG Report should have put investors on notice that the RD 661/2007 economic regime could be changed retroactively. This is wrong. There are several references in the BCG Report to the 2010 measures that Spain has (again) failed to mention, none of which could have put the Claimants on notice that the RD 661/2007 economic regime could be subject to drastic retroactive changes:

> "[T]he most relevant retroactive change affected some specific PV installations that were 'illegally' registered under 661/2007"[680]
>
> "[T]he most significant changes affected retribution for new PV installations"[681]
>
> "No significant changes on remuneration have been applied retroactively, except some minor operation modifications that have only limited impact on returns"[682]

412. On any view, as is explained elsewhere,[683] the July 2010 Agreement reassured wind and CSP investors that they would be protected against retroactive measures, in particular in light of the changes made to PV installations.

---

678 **Exhibit W-01026_SP**, BCG, "*Technological and prospective evolution of costs of RE. Technical Study PER 2011-2020*"(year 2011) (own translation of title); **Exhibit W-01027_SP**, BCG, Study of the evolution of technology and of the prospective costs of RE technologies from 2020-2030. Wind generation (May 2011) (own translation of title). See also **Exhibit C-120**, Investment Advisory Committee Paper on Project Greco dated 11 July 2011, p. 2 ("***Sustainability of the Spanish regulatory framework****: We have conducted a full analysis of this together with BCG, who are the retained advisers to IDAE, the government energy institute with responsibility for achieving the national renewable energy plan. BCG view the existing regulatory framework as being stable and sustainable with regard to wind energy*").

679 **Exhibit C-115**, BCG Report on Project Greco dated 6 July 2011, pp. 66 and 69.

680 **Exhibit C-115**, BCG Report on Project Greco dated 6 July 2011, p. 28.

681 **Exhibit C-115**, BCG Report on Project Greco dated 6 July 2011, p. 28.

682 **Exhibit C-115**, BCG Report on Project Greco dated 6 July 2011, p. 16.

683 Counter-Memorial, para. 601.

413. Fourthly, Spain claims that the BCG Report warned of several challenges to the RE sector in Spain "*among which is the tariff deficit*".[684] According to Spain, this should have "*warned*" the Claimants "*about the risk of future regulatory measures*".[685] The BCG Report, however, emphasised that "*the outlook of challenges on renewables has improved since 2010*", that "*wind contribution to system costs is the lowest among renewables*" and that "[h]*istorically Spanish government* [sic] *has accepted a deficit in the system to maintain lower end-user electricity prices*".[686] While it was understood that Spain's policy was to favour end-users through low electricity prices, in violation of its own laws,[687] the Claimants could not reasonably have expected that Spain would suddenly withdraw the entire regulatory regime.

414. Finally, Spain misleadingly suggests that the BCG Report confirms that the RD 661/2007 regime and the New Regime have the same target return.[688] This is false. The BCG Report simply asserts that the target return used in RD 661/2007 is the same as that of a Royal Decree expected to be passed in 2011 to govern remuneration of new RE installations. It does <u>not</u> refer to the New Regime (nor could it have).

415. Spain has simply misrepresented the nature of Bridgepoint's due diligence. The Claimants benefitted from the advice of top law firms and consultancies, which addressed both legal and economic aspects of the projected investments. This included the regulatory framework, RD 661/2007 and RD 1614/2010, and the specific issue of the Tariff Deficit. These documents advised that if a qualifying installation was registered for the RD 661/2007 FIT, the plant would be guaranteed to receive that FIT for its lifetime and not be subject to the future tariff reviews contemplated for later installations. This is, in fact, precisely what was set out in the regulation and what Spain represented the regime provided. No reasonable investor could have formed any other expectation.

**(b) Spain's alternative claim that the Claimants' expectations were unreasonable**

416. Spain advances three reasons why, even if their due diligence was adequate, the Claimants' expectations as to the stability of the RD 661/2007 economic regime were nevertheless unreasonable. In developing these reasons, Spain does not address the first limb of the Claimants' expectations, namely the nature, level and duration of the FIT provided in RD 661/2007. In fact, Spain appears to accept that although RD 661/2007 did promise such a FIT regime (albeit limited by

---

684 Counter-Memorial, 603.
685 Counter-Memorial, para. 604.
686 **Exhibit C-115**, BCG Report on Project Greco dated 6 July 2011, pp. 33, 34 and 38.
687 Memorial, para. 47.
688 603.

a "*reasonable return*"), it would not operate for the lifetime of the Claimants' investment. Spain argues as follows:

(a) RD 661/2007 and RD 1614/2010 did not contain a specific commitment to petrify the regulatory regime.[689] The RD 661/2007 economic regime only guaranteed a "*reasonable return*", which the Claimants are still obtaining under the New Regime.

(b) The RD 661/2007 economic regime expressly allowed for regulatory changes, as acknowledged by the Spanish Supreme Court,[690] and the Claimants did not understand that case law.[691]

(c) Statements made by Spain and its agents did not amount to a promise that the RD 661/2007 economic regime would remain unchanged: (i) the PowerPoint presentations were not addressed to the Claimants and, in any event, PowerPoint presentations cannot form the basis of expectations;[692] and (ii) the July 2010 Agreement was the result of a consultation process and did not amount to an agreement to freeze the RD 661/2007 economic regime – a fact that both the AEE and the Claimants understood.[693]

417. As to (a) above, the flawed nature of this argument is immediately apparent. This is just another permutation of Spain's argument on the hierarchy of laws, and its claim that the only "guarantee" was the one contained at Article 30.4 of the 1997 Electricity Law. That argument must fail. Spain has seized on the notion of hierarchy of norms to argue that a regulation cannot give rise to a legitimate expectation and only a Law can.[694] This is a fallacy: just as regulations can evolve (the Claimants do not dispute this), any law can modify or derogate a previous law.[695] So, even on Spain's case, a "Law" would not be able to generate legitimate expectations either.[696] This is obvious from the fact that the Disputed Measures repealed and replaced the 1997 Electricity Sector Law.

418. As to (b) above, Spain's misplaced reliance on Spanish Supreme Court judgments has already been fully rebutted at section 5.5 above.

689 Counter-Memorial, paras. 909-912 and 919.
690 Counter-Memorial, para. 915.
691 Counter-Memorial, paras. 904 (citing *Charanne*) and 916.
692 Counter-Memorial, paras. 922-925.
693 Counter-Memorial, paras. 517 and 520.
694 Counter-Memorial, paras. 216, 355 and 916.
695 Indeed, the 1997 Electricity Law was amended over 20 times in the 16 years that it was in force.
696 This cannot be the case and Spain does, in fact, accept that laws can give rise to commitments since, on its case, "*The power generation plants from renewable sources included in the SR of Act 54/1997 enjoy a specific remuneration regime. Its purpose is "to achieve reasonable rates of return with reference to the cost of money on the capital market". That is, the RE Plants are guaranteed by law to receive a "reasonable return*" (Counter-Memorial, para. 298).

419. As to (c) above:

(i) It is not the Claimants' position that any Power Point presentation formed the basis of the Claimants' expectations. As such, Spain's reliance on *ECE Projektmanagement v The Czech Republic* and the *Charanne* awards is irrelevant.[697] Rather, the Claimants' position is that these presentations confirm that Spain itself understood the RD 661/2007 economic regime *at the time it was in force* just as the Claimants did.[698] The Claimants' position is grounded on statements included in such presentations which unequivocally confirm that the RD 661/2007 economic regime was protected against retroactive measures:

> "… Regulatory stability: Predictability and certainty of economic incentives for the duration of the facility's lifespan (encourages investors and lower financial costs): **no retroactive effect** …"[699] (emphasis in original)

The statements included in these presentations are aligned with the plain wording of RD 661/2007 and RD 1614/2010 as well as with the Claimants' understanding of the Original Regulatory Regime. Spain has not been able to provide an explanation as to why the content of these presentations is not consistent with its position in this arbitration.

(ii) As to the July 2010 Agreement, it was Spain who described it as a "*pacto*", i.e. an "*agreement*" at the time.[700] Any opinion expressed by the AEE is irrelevant to the Claimants' understanding of the July 2010 Agreement (see above, section 4.6) and, in any event, the quote that Spain cites is taken out of context (see below, paras. 17.2).

420. For all of the foregoing reasons, the Claimants' expectations that the Wind Farms would receive the RD 661/2007 FIT throughout their operational lives – based on RD 661/2007, the July 2010 Agreement, RD 1614/2010 and as evinced by the various representations and assurances provided by Spain – were reasonable and legitimate.

### 14.3 Frustration of legitimate expectations

421. As explained in detail elsewhere, the Disputed Measures have frustrated the Claimants' legitimate expectations (see Memorial, paras. 40, 396, 408-429 and above in section 4. The Disputed Measures represent a complete dismantling of the regime under which the Claimants made their investment, impose an entirely different remuneration model and allow the Spanish treasury to claw-back prior

---

[697] Counter-Memorial, paras. 924-925.
[698] Memorial, para. 423.
[699] **Exhibit C-95**, CNE Presentation, "*Legal and Regulatory Framework for the Renewable Energy Sector*", 29 October 2008, p. 25.
[700] see Memorial, paras. 179-181.

earnings. Nevertheless, Spain seeks to justify its right to regulate under the guise of the "unreasonableness" of the Claimants' expectations. On Spain's case, the Claimants could have foreseen that macroeconomic circumstances would not allow the State to sustain the "guaranteed" tariff into the future.[701] This argument has been addressed in section 5.2 above.

## 15. SPAIN'S CONDUCT HAS NOT BEEN TRANSPARENT

422. The FET standard requires a State's conduct to be fair, equitable and provide for stable conditions, which is further expanded in the ECT to include "*favourable and transparent conditions*".[702] Spain accepts that it has an obligation under Article 10(1) of the ECT to promote such transparent conditions.[703] Spain, however, denies that it failed to meet that obligation, arguing that the predictability of the regulatory framework is not guaranteed under the ECT and nothing short of "*freezing*" of the regulatory framework can ensure such predictability.[704] It further argues that, in the absence of a specific commitment from the State, there can be no guarantee of predictability.[705] Spain argues that the need for reformative measures was announced as early as 2009 and it followed established procedures to introduce a "*predictable, dynamic regulatory system*".[706]

423. The Claimants have already addressed Spain's argument that the regulatory framework would have to be frozen in order to ensure predictability[707] and the issue of whether specific commitments were made.[708] The remaining issues are addressed below.

### 15.1 The Disputed Measures had not been announced and there was no participative consultation

424. Spain relies on the preambles of RDL 6/2009, RD 1614/2010 and RDL 14/2010 to claim that it had "*publicised the need to carry out reforms since 2009 as a result of the international crisis and the necessary sustainability of the system*".[709] The preambles do indeed make reference to the need to address the Tariff Deficit; however, these very regulations gave express confirmation that the tariffs for installations which had already been registered and commissioned were "*guaranteed*" [and that the Government would deal with the Tariff Deficit by respecting the income-sufficiency principle].[710]

---

701 Counter-Memorial, para. 884.
702 Memorial, paras. 434.
703 Counter-Memorial, para. 955.
704 Counter-Memorial, para. 956.
705 Counter-Memorial, para. 957.
706 Counter-Memorial, para. 959(4).
707 See section 14.2.
708 See section 14.2.
709 Counter-Memorial, para. 959(2).
710 See **Exhibit C-100**, Royal Decree-Law 6/2009 of 30 April 2009; **Exhibit C-46**, Royal Decree 1614/2010 of 7 December 2010.

425. Spain does not dispute that it took the Government over 11 months, after the approval of RDL 9/2013 in July 2013, to define the precise level of remuneration (the Special Payment) for existing installations. Nor does Spain deny that it ultimately used the Government's own parameters to calculate the Special Payment, notwithstanding the fact that it had instructed two independent consultancy firms to assist with the configuration of the relevant economic parameters that determine the Special Payment. Thus, RE producers had no visibility whatsoever as to the precise Special Payment to which they would be entitled in the future during the 11-month period that it took the Government to define the remuneration under the New Regime.

426. To make matters worse, RDL 9/2013 provided that during this period the RD 661/2007 economic regime would continue to apply. Although producers would continue to sell electricity under the former regime, once Spain had passed implementing regulations, appropriate adjustments would have to be made. Any payments received during this period would have to be deducted from future amounts due under the New Regime (and future payments would include a claw-back for past earnings). This aspect of the regime produced great uncertainty as the Project Companies still had to cover various costs.[711] Yet they had no visibility as to what their actual cash flow would be for an entire year. The Government provided no guidance as to how the New Regime would work in practice. Spain's argument that the New Regime is the result of a transparent process is therefore entirely misplaced.

427. The Claimants should have been given the opportunity to understand Spain's methodology for the calculation of the Special Payment in the 11 months that elapsed between the Government withdrawing the RD 661/2007 economic regime in July 2013 and its putting in place the New Regime in June 2014. Instead, they were left facing complete uncertainty and a lengthy limbo period in which they did not know what kind of economic regime would, in the future, apply to the Wind Farms. More importantly, they were not consulted about the parameters of the New Regime.

428. The EC has stressed the harmful impact created by the fact that it took the Government more than 11 months to define the new economic regime:

> "In June 2014, the authorities adopted a new remuneration scheme applying to existing and future renewable energy sources (RES), a major outstanding element of the 2013 electricity reform. <u>While the new remuneration scheme has been in force since July 2013 (the date of entry of the Royal Decree-Law 9/2013), renewable energy operators have only known since June 2014 which remuneration standards</u>

[711] First Moreno Statement, paras. 72-73.

are applied to their particular installations, and what remuneration they can expect".[712] (emphasis added)

429. The EC noted two fundamental aspects: first, the uncertainty created by the period during which Spain left RE projects with no visibility as to the economic regime that would apply; and secondly, the lack of clarity regarding the manner in which the current New Regime does apply.

430. Spain argues that the Disputed Measures were implemented after consultation with all the relevant stakeholders. It is true that a consultation process was carried out as part of the preparation of the March 2012 CNE Report. As noted above, however, Spain simply ignored the CNE's proposals, prompting the CNE's criticism of the New Regime in its 2013 report issued after RDL 9/2013 had already been implemented.[713] This was the last report ever issued by the CNE. After this, Spain abolished the CNE and replaced it with a new body – the CNMC. [714]

431. Spain did issue a consultation process but only *after* it had introduced RDL 9/2013. This consultation process concerned the elaboration of RD 413/2014 and the June 2014 Order that implemented the New Regime. The consultation triggered "*more than 600 pleadings*" from the RE sector complaining of the New Regime.[715] This consultation obviously came too late since the principles of the New Regime were already established by RDL 9/2013. Therefore, this was not a proper consultation as it could only address the finer details of the implementation of what was an already legislated abandonment of the RD 661/2007 economic regime.

432. Spain's lack of transparency in withdrawing the RD 661/2007 economic regime is partly the result of the Government's choice of a Royal Decree Law for this measure. As explained in the Memorial, a Royal Decree-Law is constitutionally meant to be used in cases of extreme and urgent necessity,[716] and unlike Royal Decrees, they do not require consultations prior to their implementation. Moreover, it is impossible for affected individuals to challenge Royal Decree-Laws directly in the

---

712 **Exhibit C-225**, European Commission, "*Macroeconomic Imbalances: Country Report – Spain 2015*", European Economy Occasional Papers, Vol. 216, June 2015, p. 63 (PDF 73).

713 **Exhibit C-34**, CNE Report 18/2013 on the Proposal of Royal Decree to Regulate the Generation of Electricity by Renewable Projects, Cogeneration and Waste Plants, 4 September 2013, section 21.7(a).

714 Shortly thereafter, the Spanish Supreme Court filed a preliminary question before the CJEU on 3 July 2015 challenging the legality of the creation of the CNMC and its compatibility with EU regulation, and in particular, with the 2001 and 2009 EC Directives. These directives require Spain, as an EU Member State, to "*guarantee the independence of the regulatory authority*". According to the Spanish Supreme Court, it was questionable whether the merger into a single body was compatible with the 2009 EC Directive. The decision of re-organising the national regulatory bodies without respecting the term of the mandate of its members was also questioned given that the measure was adopted without any legal grounds. The CJEU ruled on 19 October 2016 that this measure did breach the independence requirements under those EC directives. See **Exhibit C-135**, Spanish Supreme Court Procedural Judgment (Contentious-Administrative Chamber), Appeal No. 506/2013, 3 July 2015, p. 8, paras. 6-7; **Exhibit C-136**, European Commission Directive 2009/72/EC on common rules for the internal market in electricity, 13 July 2009, Article 35(4); **Exhibit C-137**, Judgment of the European Court of Justice of the European Union in Case C-424/15 on a preliminary question submitted by the Spanish Supreme Court, challenging the legality of the CNMC and its compatibility with EU regulation, 19 October 2016.

715 Counter-Memorial, para. 789.

716 Memorial, para. 36(b). See also **Exhibit C-50**, Constitution of Spain of 27 December 1978, section 86.1.

Supreme Court. Royal decree laws are therefore a convenient legislative instrument to avoid consultations and to prevent a challenge.

433. Importantly, there was no "*need*" for the Government to repeal RD 661/2007 by way of a Royal Decree-Law since a Royal Decree can be simply modified by a subsequent Royal Decree.[717] There was also no case of extreme and urgent necessity to abandon the RD 661/2007 economic regime, since the Government took another 11 months to implement the New Regime. To make matters worse, by introducing the New Regime and withdrawing the RD 661/2007 regime using a Royal Decree-Law (RDL 9/2013), the Government made it impossible for any affected producers to challenge the measure before the Spanish courts.

### 15.2 The New Regime is opaque and unpredictable

434. Spain claims that it has introduced a "*predictable, dynamic regulatory system*".[718] Spain's submission is that this is achieved through the six-year and three-year regulatory reviews, which Spain claims offer security to investors. This makes no sense. In fact, the very opposite is true, as the current Minister of Energy announced recently that the Government is planning to reduce this "return" in 2019 to approximately 4.2%, so the Claimants will actually suffer another severe cut in their remuneration very soon.[719]

435. This shows that these reviews provide Spain with discretion to reduce the tariffs every three or six years. Thus, investors have no predictability in relation to their cash flows in the future. The CNE Report on the New Regime weighed in on the need for transparency and predictability of the financial incentives, and it confirmed that subjecting RE installations to such periodic reviews fuels uncertainty.[720] Moreover, Spain's approach is not in line with those other EU Member States who have implemented changes to RE regulatory regimes. As Brattle notes:

> "International best practice is for government to commit to particular sets of FITs for existing plants. Germany has changed incentives to new projects after renewable investments exceeded the original targets, but the government continued to honour the prevailing FITs for existing projects. The European Renewable Energies Federation, EREF, cites Germany as an example of best practices. Spain actually considered the German policy when establishing the Original Regulatory Regime. In 2010 France declared a moratorium for new PV projects while honouring the

---

717 See above, section 4.4.

718 Counter-Memorial, para. 959(4).

719 **Exhibit C-251**, Cinco Días, Press Article, "*Nadal is planning to cut in half the remuneration of renewable plants*", 26 June 2017; **Exhibit C-252**, Cinco Días, Press Article, "*Nadal: "Remuneration for renewables will go down in order to lower the price of electricity by 5 to 10%*", 29 June 2017.

720 **Exhibit C-34**, CNE Report 18/2013 on the Proposal of Royal Decree to Regulate the Generation of Electricity by Renewable Projects, Cogeneration and Waste Plants, 4 September 2013, p. 17.

prevailing FITs for existing projects. Portugal, the UK, Poland, Hungary and Switzerland have also reduced FITs for new projects while retaining the same FITs previously offered for existing projects. In 2008, Spain itself passed RD 1578/2008 (Exhibit BRR-197) to set new FITs for new PV projects while continuing to apply the FITs under RD 661/2007 (Exhibit BRR-5) to existing PV plants."[721]

436. It is not common practice to amend a regulatory regime applicable to RE installations in the haphazard manner chosen by Spain.[722]

437. Spain contends that it has followed the procedures established by Spanish domestic law in relation to all measures implemented since 2009. As already explained, Spain cannot rely on its own law to avoid international liability in the instant case.[723] Conformity with municipal law cannot help escape liability for a conduct in violation of international law.[724]

### 15.3 Decisions cited by Spain in support of its arguments are unavailing

438. Spain selectively refers to the Annulment Committee decision in the *MTD v Chile* case to contend that a host State's obligations cannot solely stem from the investor's expectations.[725] However, nowhere have the Claimants in this case stated that their claim arises out of their own expectations only. The legitimate expectations of the Claimants were not just subjectively held but objectively legitimate. This is clearly recognised in the Annulment Committee decision in *MTD v Chile*. While Spain makes much ado about this decision having described "*the apparent reliance on the foreign investor's expectations as the source of the host State's obligations*" as "*questionable*", it conveniently forgets to cite the latter half of the same paragraph from that decision:

> "67. …is questionable. <u>The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty</u> and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.

---

721 Brattle Rebuttal Regulatory Report, para. 44.

722 Brattle Regulatory Report, paras.72-73.

723 Article 26(6) of the ECT requires that the dispute be determined in accordance with the provisions of the ECT and international law.

724 **Authority CL-27**, ILC Articles, 28 January 2002, Article 3. See, e.g. *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion*, 1932, PCIJ Series A/B, No. 44, p. 4 referred to in **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1966, Article 23, Commentary, para. 2 ("*a State cannot adduce… its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force*").

725 Counter-Memorial, para. 956.

> 68. But however that may be, the [Tecmed] Tribunal did not manifestly exceed its powers in the account it gave of the fair and equitable treatment standard, and this for three reasons."[726] (emphasis added)

439. Therefore, a proper reading of the Annulment Committee decision in *MTD v Chile* illustrates that it did not "*question*" the *Tecmed v Mexico* award as Spain claims.[727]

440. Further, Spain does not properly engage with the *Electrabel v Hungary* award it cites.[728] Spain suggests that the *Electrabel v Hungary* tribunal did not interpret the transparency condition when applying the ECT and casts it aside as "*not relevant*".[729] However, the tribunal in *Electrabel v Hungary* did just that – it interpreted the "*favourable and transparent conditions*" to compare it with the generally-understood FET standard in order to arrive at the conclusion that the "*reference to transparency can be read to indicate an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect investments, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations*".[730] This case is rightly referred to by the Claimants in the context of transparency.[731]

441. Spain also relies on *AES Summit v Hungary*,[732] which referred to the transparency FET standard in *Tecmed v Mexico*,[733] to argue that it has not violated the ECT as its implementation of the Disputed Measures was within "*the acceptable range of legislative and regulatory behaviour*".[734] Spain implies that *AES Summit v Hungary* disagreed with the *Tecmed v Mexico* standard. That is not correct. On the facts of that case, the tribunal did not find a breach of the transparency standard; it did not, however, cast aside the *Tecmed* tribunal's formulation, noting that:

> "The Tribunal has approached this question on the basis that it is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense

726 **Authority RL-30**, *MTD Equity Sdn Bhd. & MTD Chile S.A. v The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, p.28 (PDF 30).
727 Counter-Memorial, para. 956(1).
728 **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.
729 Counter-Memorial, para. 956(2).
730 **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.79.
731 Memorial, para. 434.
732 **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras. 9.3.8 and 9.3.10.
733 **Authority CL-33**, *Técnicas Medioambientales Tecmed S. A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (***Tecmed v Mexico***), Award, 29 May 2003.
734 Counter-Memorial, paras. 957-958.

of juridical propriety) – to use the words of the *Tecmed* Tribunal – that the standard can be said to have been infringed."[735] (emphasis added)

## 16. THE DISPUTED MEASURES ARE UNREASONABLE, ARBITRARY, DISPROPORTIONATE AND DISCRIMINATORY

442. The unreasonable, arbitrary and disproportionate nature of the Disputed Measures is relevant to assessing three of the Claimants' claims; namely: (a) Spain's breach of the FET standard arising out of the unreasonableness of the Disputed Measures; (b) Spain's breach of the FET claim due to the disproportionality of the Disputed Measures; and (c) Spain's breach of the non-impairment clause by impairing the Claimants' investment through "*unreasonable or discriminatory measures*". As noted elsewhere, these three claims conceptually overlap so that a breach of the non-impairment clause would breach the FET standard.[736] However, the Tribunal should not lose sight of the discrimination element of the non-impairment protection, it being common ground between the Parties that measures that are *either* unreasonable *or* discriminatory would breach this provision.[737] The Claimants will return to this discrimination aspect below in light of Spain's reliance on the test laid out in *EDF v Romania* for discriminatory measures (section 16.4).[738]

443. In the Counter-Memorial, Spain deals with these three claims together.[739] For simplicity, the Claimants adopt a similar approach immediately below. It nevertheless bears mentioning that a determination that any of these three gives rise to a breach is sufficient to find Spain in breach of its international commitments under the ECT.

444. The following propositions are common ground between the Parties:

(a) Whether a measure is reasonable for the purposes of the FET standard requires a reasonable relationship between the measures in question and a rational policy.[740] That, in turn, requires considering whether the conduct is "*appropriately tailored to the pursuit of that rational*

---

735 **Authority CL-133**,, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40.

736 Memorial, para. 449.

737 Memorial, para. 449. Spain has not taken issue with this in the Counter-Memorial.

738 Counter-Memorial, para. 987.

739 Counter-Memorial, para. 961.

740 Memorial, para. 438, citing **Authority CL-43**, *Saluka Investments B.V. v The Czech Republic,* UNCITRAL, Partial Award on Jurisdiction and Merits, para. 460 and **Authority CL-88**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 525; Counter-Memorial, para.982.

*policy with due regard for the consequences imposed on investors*",[741] taking into account the "*nature of the measure and the way it is implemented*".[742]

(b) Whether a measure is proportionate for the purposes of the FET standard requires a reasonable relationship between the burden on the investor and the legitimate policy aim in question.[743] The state must show that the measures were necessary, in light of available alternatives.[744] (This is the test that the Claimants identified in the Memorial, which Spain has not disputed.)

(c) Whether a measure falls foul of the non-impairment clause requires considering whether an unreasonable or discriminatory measure has impaired the investment in question.[745] The test for unreasonableness in this context is the same as the test within the confines of the FET standard.[746]

445. Based on the foregoing, the following enquiries are common to all three protection standards under the ECT:

(a) The policy aim of the Disputed Measures. Spain seeks to identify a range of policy aims in this arbitration whereas in reality they all pertain to the same aim: addressing the Tariff Deficit.

(b) Whether the policy aim of the Disputed Measures was rational or legitimate. The Parties agree that a rational policy follows a "*logical (good sense) explanation and with the aim of addressing a public interest matter*".[747]

(c) Whether the Disputed Measures are reasonably correlated to this rational policy goal. This enquiry should take into account the nature of the measures, the manner in which the

741 **Authority CL-88**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 525

742 **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras. 10.3.7-10.3.9; Counter-Memorial, para. 990.

743 Memorial, para. 443. See for example, **Authority CL-33**, *Técnicas Medioambientales Tecmed S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 13.3.1-13.3.2.

744 Memorial, paras. 444 and 446.

745 Memorial, para. 449. Spain has not disputed this test.

746 Memorial, para. 450. See **Authority CL-43**, *Saluka Investments B.V. v The Czech Republic,* UNCITRAL, Partial Award on Jurisdiction and Merits, 17 March 2006, para. 460; **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para.10.3.8.

747 **Authority CL-88**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 525, citing **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.

measures were implemented and the consequences or the burden imposed on the Claimants.[748]

446. In addition, the Tribunal should also assess whether the Disputed Measures were <u>necessary</u> in light of alternatives available to the Disputed Measures and whether, balancing the aim of the State against the significant financial burden on the Claimants, the Disputed Measures are justified.

447. Finally, for the non-impairment protection, the Tribunal should also consider whether the measures were discriminatory.

448. There is a disagreement between the Parties on the burden of proof. Spain suggests that it is the Claimants who must show that: (a) the Disputed Measures were unreasonable and disproportionate;[749] and (b) the alternatives to addressing the Tariff Deficit have "*legal, economic and budgetary validity*".[750] This is an extraordinary submission. Proportionality is only relevant where a State has interfered with an investor's rights. The proportionality enquiry provides the State with an opportunity to explain why, notwithstanding that its measures have interfered with an investor's rights, the interference is nevertheless justified because it is proportionate. The very nature of the test means that the burden rests with the State. Spain fails to meet that burden.

**16.1 The stated policy aim of the Disputed Measures was to address the Tariff Deficit**

449. As a preliminary matter, before considering whether a policy aim is rational, the policy aim must be identified. There is a distinction between a policy aim, on the one hand, and the reasons, causes or motivations underlying that aim, on the other hand. The stated policy aim of the Disputed Measures was to address the Tariff Deficit (although Spain for the purposes of its defence now suggests otherwise). Alleged causes of the Tariff Deficit are not in and of themselves the policy aim. Spain conflates the two and in doing so, seeks to expand the relevant policy aim that the Tribunal should consider when determining a breach of Article 10(1) of the ECT. Moreover, Spain identifies a policy aim that was simply not relevant at the time: its compliance with EU law.

450. The Claimants rely on what Spain said at the relevant time to identify the policy aim of the Disputed Measures, namely the Tariff Deficit. Spain expressly referred to the Tariff Deficit as the primary aim for each of the Disputed Measures. For example, on 27 January 2012, the then Secretary of State for Energy, Mr Marti Scharfhausen, noted in a letter to the CNE that, "[i]*n view of the repeated*

[748] Memorial, para. 438; Counter-Memorial, para. 990.
[749] Counter-Memorial, para. 966.
[750] Counter-Memorial, para. 969.

*attempts in the past to deal with the growing evolution in the tariff deficit in the electric sector, the truth is that at present, rather than being resolved, the situation has grown worse, making it necessary to take specific measures*" and requested the CNE to give its opinion in respect of the "*remuneration of the regulated activities*".[751] The measures that were subsequently adopted are those at issue in this arbitration.

451. Moreover, the preamble to RDL 9/2013 of 13 July 2013 states that "*throughout 2012 and to date, urgent new measures have been adopted with an identical purpose, that of coping with the deviations which, due to the worsening of factors already referred to, became manifest in relation to initial estimates*".[752] The reference to "*deviations*" here is to "*imbalances*", namely the imbalance between costs and revenues of the Electricity System. In other words, the Tariff Deficit was the purpose or the policy aim of Law 15/2012, RDL 2/2013 and RDL 9/2013. The "*worsening of factors*" RDL 9/2013 identifies is a reference to a drop in consumer demand, an increase in electricity production from RE sources and a decrease in market prices.[753] As has already been explained elsewhere,[754] the measures that followed RDL 9/2013, namely Law 24/2013 of 26 December 2013, RD 413/2013 of 10 June 2014 and the June 2014 Order, simply gave effect to RDL 9/2013. As such, all the Disputed Measures had the stated policy aim of addressing the Tariff Deficit.

452. Although Spain appears to accept that the aim of the Disputed Measures was to address the Tariff Deficit,[755] Spain then seeks to expand the scope of the purpose of the Disputed Measures beyond the Tariff Deficit. Spain argues that the Disputed Measures were aimed at: (a) addressing a decrease in consumer demand (leading to a foreseeable increase in the Tariff Deficit);[756] (b) implementing macroeconomic control measures arising out of the economic crisis;[757] (c) implementing macroeconomic control measures further to EU commitments (as reflected in a Memorandum of Understanding);[758] (d) achieving the principle of low-costs for,[759] and a lesser burden on,[760]

[751] **Exhibit R-193**, Copy of the letter from the State Secretariat of Energy to the Chairman of the National Energy Commission of 27 January 2012.
[752] **Exhibit C-51**, Royal Decree-Law 9/2013 of 12 July 2013, Preamble, p. 3 (emphasis added).
[753] **Exhibit C-51**, Royal Decree-Law 9/2013 of 12 July 2013, Preamble, p. 3. See also **Exhibit C-49**, Royal Decree-Law 2/2013 of 1 February 2013, Preamble, which refers to similar reasons.
[754] See section 6.2.
[755] See for example, Counter-Memorial, paras. 992 and 1001.
[756] Counter-Memorial, paras. 883 and 963.
[757] Counter-Memorial, para. 993.
[758] Counter-Memorial, paras. 884, 975and 993.
[759] Counter-Memorial, para. 998.
[760] Counter-Memorial, paras. 883(3) and 994.

consumers; and (e) reducing the "*excessive profits*" of investors.[761] Spain also suggests, in passing, that the Disputed Measures were necessary in order to comply with EU law.[762]

453. All of these are potential justifications for addressing the Tariff Deficit as the overarching policy goal. As such, they are more properly dealt with in the context of the reasonable correlation between the Disputed Measures and the policy aim of addressing the Tariff Deficit (see section 16.2 below). In particular, the economic crisis (and the corresponding decrease in demand) had already affected Spain when it opted to implement RD 1614/2010, which reiterated the application of the RD 661/2007 economic regime for existing installations. This did not represent a change in Spain's circumstances that could somehow support a reasonable correlation between addressing the Tariff Deficit and the complete withdrawal of the RD 661/2007 economic regime.

## 16.2 There is no reasonable correlation between the repeal of RD 661/2007 and the Tariff Deficit

454. Below, the Claimants explain why Spain fails to satisfy the reasonable nexus test and therefore breaches the FET criteria of reasonableness and proportionality, together with the non-impairment clause.

### (a) Lack of causal link between the Tariff Deficit and the Claimants' investment

455. As Brattle has shown, the Claimants did not cause the Tariff Deficit.[763] The contribution of installations operating under the RD 661/2007 economic regime was insignificant and the accusation that they made "*excessive returns*" remains a bare assertion.

456. First, Spain failed to set Network Access Tolls at sufficient levels for plainly political reasons.[764] As such, the Tariff Deficit continued to worsen and with it the potential burden on consumers. (See further, section 5.2 above). Rather than complying with its own laws, Spain, who is responsible for balancing the budget, watched the deficit grow over a period of time and ultimately decided that the cost of that deficit should be borne by the Claimants and other investors in the RE sector.[765]

457. Secondly, insofar as "*excessive returns*" are concerned, Spain relies on the award in *AES Summit v Hungary* to support its view that addressing "luxury profits" is a rational policy aim.[766] There is a significant hurdle that Spain cannot overcome in this regard: the Disputed Measures were not

761 Counter-Memorial, paras. 883(1) and 995.
762 Counter-Memorial, section IV.B. 1.
763 Brattle Regulatory Report, section V B, paras. 127-129, and Figure 15.
764 Brattle Rebuttal Regulatory Report, para. 21. See also section 5.2.
765 Brattle Regulatory Report, section VII.
766 Counter-Memorial, para. 995.

designed to address alleged excessive profits nor has Spain sought to show that the Claimants were receiving returns in excess of what Spain considered reasonable under RD 661/2007. No analysis on "excessive returns" was undertaken at the time the Disputed Measures were implemented; nor is there any analysis before this Tribunal. This argument should therefore be dismissed.

**(b) Other purported justifications do not support a reasonable nexus**

458. The economic crisis (and the corresponding decrease in demand) had already affected Spain when it opted to implement RD 1614/2010, which reiterated the application of the RD 661/2007 economic regime for existing installations. This did not represent a change in Spain's circumstances that could somehow support a reasonable correlation between addressing the Tariff Deficit and the complete withdrawal of the RD 661/2007 economic regime.

459. Spain references a Memorandum of Understanding (**MOU**) that was signed with the European Union on 20 July 2012,[767] within the guise of a "national programme of reform", as a reason for implementing the Disputed Measures. There is, however, nothing about this document that suggests it is binding as a matter of international law. On any view, the MOU plainly did not oblige Spain to introduce the New Regime, or even take any other action to reduce RE subsidies. All that it does is declare that the Spanish authorities were committed to "*address the electricity tariff deficit in a comprehensive way*".[768] The lack of credibility of Spain's MOU argument is further demonstrated by the EU's criticism of the New Regime, after the MOU was signed (see section 6.5 above).

460. The MOU in fact dealt with a completely different issue, namely the "*restructuring and recapitalisation of the Spanish banking sector*", for which Spain was given certain deadlines to implement specific measures. As for the Tariff Deficit, all the MOU does is invite Spain to address it in a comprehensive way. As we noted in section 10.4 above, Spain had a number of alternatives to address the Tariff Deficit without reneging on its commitments to international investors.

**(c) Miscellaneous factors**

461. Spain suggests that a reasonable nexus is further supported when viewed against the following factors, each of which is addressed in turn.

---

767 Counter-Memorial, paras. 575-579 and 884.

768 **Exhibit R-62**, Council Recommendation of 6 July 2012 on the National Reform Programme 2012 of Spain and delivering a Council opinion on the Stability Programme for Spain, p. 14, para. 8.

(a) The RE industry itself proposed the Disputed Measures.[769] This is absurd for at least two reasons. First, Spain proffers no evidence to show that the New Regime was prompted by this proposal. There is no reference to the proposal in the Regulatory Dossier of the New Regime. The alleged link between the proposal and the New Regime is a complete fabrication for the purposes of this arbitration. It also cannot, therefore, somehow demonstrate the reasonableness and proportionality of the Disputed Measures, as Spain contends.[770] Secondly, the 2009 APPA and Greenpeace proposal differs from the New Regime in one fundamental aspect: it was never meant to apply to existing installations. This could not have been made clearer:

> "Changes to remuneration amounts from support schemes as a result of revisions referred to in this Article shall apply to facilities that, where appropriate, initiate prior authorization procedures or come into operation after the date of entry into force of the corresponding changes to remuneration amounts, as indicated in the previous section. In any case, it is not permitted for modifications to support schemes to be extended to facilities or users that were enjoying the benefits of previous support schemes, which shall be retained, unless an express replacxement request is submitted by beneficiary."[771] (emphasis added)

The need for RE support schemes to provide legal security, stability and predictability is in fact reiterated throughout the proposal.[772] Had Spain followed the APPA-Greenpeace proposal and only applied the New Regime to new investments, the Claimants would not have brought this arbitration.

---

[769] Counter-Memorial, paras. 976-979.

[770] Counter-Memorial, para. 859.

[771] **Exhibit R-187**, Presentation of the Draft Bill on Renewable Energy by the Association of Renewable Energy Producers (APPA) and Greenpeace on 21 May 2009 to the Ministry of Industry, Tourism and Trade, 21 May 2009, Article 27.5.

[772] **Exhibit R-187**, Presentation of the Draft Bill on Renewable Energy by the Association of Renewable Energy Producers (APPA) and Greenpeace on 21 May 2009 to the Ministry of Industry, Tourism and Trade, 21 May 2009, see e.g. "*This proposal of Law wants to become a legislative instrument that provides **security and stability***" (Cover Letter); "*This proposal of Law wants to become a legislative instrument that provides **security and stability***" (Summary); "*It aims for an explicit recognition of its externalities and of **premiums as a safety and continuity factor necessary** for its financing. The development of renewables is associated with the existence of a **stable and coherent regulatory framework**...*" (Summary) p.3 (our translation); "*The most important decision is that it **maintains the premium system, which has been key to the development achieved so far by renewables** and is essential to form a diversified RE system.*" (Summary) p.5 (our translations): "*...agrees on a **stable and long-term regulatory framework** enabling our country to seize the opportunity to lead the new green economy...*"(Summary) p.7 (our translation); "*The **stability** of the support mechanism and **predictability of its associated amount** will in turn provide confidence in the corresponding technologies allowing them to obtain the necessary financing for its greater implementation.*" (Preamble) p.4 (PDF); "*the need to set the conditions and encourage the development of renewable energy with a **regulatory framework and stable and consistent policies***" (Preamble) p.5 (PDF); "*...reflect the **will of stability and continuity of the measures therein contained**, in order to **generate adequate confidence and credibility** in the legal and economic model being chosen and thereby ensuring the security and certainty that investments require and so forth*" (Preamble) p.5 (PDF 20); "*Consolidate a general framework for **legal certainty and protection of legitimate expectations** of investors in the field of renewable energies*" (Article 2.h) p.5 (PDF 21) (our translation).

(b) Spain has continued to attract investment to the RE sector.[773] This is irrelevant to whether or not there is a reasonable nexus between the Disputed Measures (and the impact on the Claimants) and addressing the Tariff Deficit. Any new investment in Spain is under a different regime and, therefore, made in different circumstances to the Claimants. In any event, Brattle clarifies that the recent activity in market transactions is being driven by "*the desire of certain investors to get rid of distressed assets*".[774] Moreover, the figures are inflated because they are based on a comparison to a year in which no transactions took place (2013-2014), owing to the uncertainty that existed before the June 2014 Order was published.[775] Spain also draws attention to the so-called auction process which was initiated in 2015 for new RE installed capacity. Spain points to the fact that "*the offers received from domestic and foreign companies exceeded the power finally awarded in January 2016 by a factor of 5*" as evidence that investors are placing their trust in the New Regime.[776] Spain omits to mention that all of the installed capacity awarded in this auction for new generation producers will receive no incentives, only the market price. In other words, the investors are now content with receiving the market price and do not need to place any reliance in the New Regime. This is because (wind) plants built today have levelised costs that have reached grid parity, i.e. they can compete with conventional generators without any incentive. That is only, however, because previous investors, such as the Claimants, have allowed the technology to mature. They should not have to pay for having taken that decision. This was also the case with the recent RE auctions held in May and July 2017.[777]

(c) The EC, the International Monetary Fund and the International Energy Agency viewed the Disputed Measures favourably.[778] This is an *ex post facto* attempt to support the reasonableness of the Disputed Measures and overlooks entirely the vast amount of criticism that Spain has attracted by retroactively overhauling the RD 661/2007 economic regime (see further section 6.5 above). Spain relies on the views of those institutions to argue that it had to implement "necessary" macroeconomic control measures. However, these documents cannot support a reasonable nexus as they contain "*nothing more than general statements about the desirability of eliminating the Tariff Deficit*" and "*do not assess whether Spain*

[773] Counter-Memorial, para. 980.
[774] Brattle Rebuttal Regulatory Report, para. 150.
[775] Counter-Memorial, para. 256. See also **Exhibit C-253**, Red Eléctrica de España, Report, *"The Spanish Electricity System"*, 2015.
[776] Counter-Memorial, para. 850.
[777] **Exhibit C-259**, Cinco Días, Press Article, *"Photovoltaic Euphoria and lack of planning"*, 29 July 2010. See also **Exhibit C-260**, Expansión, Press Article, "*ACS, Endesa y Gas Natural irrumpen en el sector fotovoltaico*.", 27 July 2017.
[778] Counter-Memorial, para. 981. See also, paras. 837-843 and 844.

*could have addressed the Tariff Deficit without dismantling the Original Regulatory Regime*".[779]

(d) The Spanish courts have dismissed all constitutional claims that sought to impugn the constitutional validity of the Disputed Measures.[780] The Claimants have already explained above why Spain's reliance on Spanish court decisions is misplaced (see section 5.5). On any view, the Spanish Constitutional Court itself has no authority to apply the ECT.[781]

(e) The *Charanne* tribunal has found in Spain's favour.[782] The irrelevance of this award has already been addressed above (section 10.2).

462. To conclude, there is no reasonable correlation between addressing the Tariff Deficit and implementing the Disputed Measures.

### 16.3 The Disputed Measures were not necessary in light of available alternatives

463. Even if the State can show that there was a rational policy aim underpinning the measures it implemented, it may still fail to comply with the criteria of reasonableness and proportionality if less intrusive alternatives were available. In the circumstances, Spain fails to discharge its burden of showing that there was no other less intrusive way to address the Tariff Deficit. For good reason.

464. As Brattle has shown, Spain had numerous less harmful ways of addressing the Tariff Deficit.[783] Many of those alternatives, including a tax on the sale of petrol and gas, a tax on $CO_2$ emissions, and FIT profiling, were identified by the CNE itself in March 2012.[784] After setting out its alternative proposals, the CNE concluded that:

> "The combination of correct regulatory measures, including the cutting back of premiums to solar thermoelectric plants and a 3% annual increase in tolls until 2014 would allow sufficiency in tolls to be reached in 2015, carrying over a cumulative deficit pending financing of 2.13 billion Euros as of 2014. In this scenario, the structural deficit problem would be resolved in 2014 as long as financing were sought for the mismatch in Fiscal Years 2012 (1.194 billion Euros), 2013 (509 million Euros), and 2014 (427 million Euros) outside of access tolls. Alternatively, depending on the final temporary mismatch resulting

---

779 Brattle Rebuttal Regulatory Report, para. 145.
780 Counter-Memorial, paras. 818-836.
781 **Exhibit C-209**, Constitutional Court Judgement, appeal No. 5347-2013, 16 December 2015..
782 Counter-Memorial, para. 875.
783 Brattle Regulatory Report, paras. 130-146; See also Memorial, paras. 446-447.
784 **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, Introduction and Executive Summary, 7 March 2012. See for example, p. 59.

> from the application of the various measures, its financing through future tolls to consumers will entail an increase in future annuities (for 15 years)."[785]

465. In other words, by adopting the CNE's proposals, the Tariff Deficit would have been resolved by 2014. Importantly, the CNE raised no concern that the 3% annual increase in tolls until 2014 would be difficult for consumers to sustain.[786]

466. The existence of these other valid alternatives, which the CNE itself acknowledged would have resolved the Tariff Deficit, weighs very heavily against a finding of reasonableness and proportionality.

### 16.4 (Non-impairment) Discrimination

467. For the purposes of Spain's breach of the non-impairment clause, the Claimants have already shown above that the Disputed Measures are unreasonable. In addition, for reasons explained in the Memorial, the Disputed Measures were discriminatory. In particular, the 7% Levy was discriminatory, in that it targeted RE generators who, contrary to Ordinary Regime installations, cannot pass the levy to the final consumer.[787] The Claimants reject Spain's application of the test set out in *EDF v Romania*[788] and its suggestions that: (a) the purpose of the Disputed Measures was legitimate; (b) the Disputed Measures complied with Spanish law; (c) the Disputed Measures were not taken for an ulterior reason (but were to address the Tariff Deficit); and (d) the Disputed Measures were implemented in a manner that respected due process and procedure. All of these arguments have already been addressed above.

## 17. SPAIN'S BREACH OF THE UMBRELLA CLAUSE

468. The Parties disagree on the fundamental meaning and scope of the Umbrella Clause. Whereas the Claimants submit that the clause encompasses non-contractual commitments,[789] Spain seeks to

---

785 **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, Introduction and Executive Summary, 7 March 2012, p. 57.

786 **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, Introduction and Executive Summary, 7 March 2012, p. 57.

787 Memorial, paras. 227-231.

788 Counter-Memorial, paras. 987-989.

789 See Memorial, paras. 504 *et seq.*; **Authority CL-15**, United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the Mid-1990s* (United Nations Publications, 1998), p. 56, which provides that umbrella clauses drafted in the same terms as Article 10(1) of the ECT are "*so broad that it could be interpreted to cover all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally*"; **Authority CL-39**, *Eureko B.V. v The Republic of Poland,* Partial Award on Jurisdiction and Merits, 19 August 2005, para. 246, the expression "[a]*ny obligations*" in the Umbrella Clause "*means not only obligations of a certain type, but 'any' – that is to say, all – obligations*"; **Authority CL-63**, *Plama Consortium Limited v The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 186, "*the wording of this* [Umbrella] *clause in Article 10(1) of the ECT is wide in scope since it refers to "any obligation". An analysis of the ordinary meaning of the term suggests that it refers to any obligation regardless of its nature, i.e. whether it be contractual or statutory*"; **Authority CL-85**, R Dolzer & C Schreuer, *Principles of International Investment Law* (2nd ed., Oxford University Press, 2012), p. 177: "[c]*ase law indicates that umbrella clauses are not restricted to contractual obligations but are capable of protecting obligations of the host State assumed unilaterally through legislation or executive acts*"; and **Authority CL-67**, G Salias, "Do Umbrella Clauses Apply to Unilateral Undertakings?" in C Binder, U Kriebaum *et al* (ed), *International Investment Law for the 21st Century* (Oxford University Press, 2009), p. 495: "*tribunals overwhelmingly accept the*

narrow its scope so that it only applies "*in the framework of a bilateral contract or a similar instrument*".[790] To support its submission, Spain argues that investment-treaty jurisprudence does not extend the protection of an umbrella clause to non-contractual commitments.[791] Spain also relies on the majority award in *Charanne* to illustrate this point.[792]

469. The Claimants' maintain that Spain has breached the obligations that it entered into vis-à-vis the Claimants through, *inter alia,* RD 661/2007, the July 2010 Agreement and RD 1614/2010.[793] Non-contractual commitments are recognised in the Umbrella Clause, a fact that is confirmed by investment-treaty jurisprudence (section 17 below). Each of these points is developed further immediately below.

### 17.1 Spain misrepresents the authorities it cites

470. Spain cites various investment-treaty awards, academic commentary and, ultimately, Spanish law, to support its position that non-contractual obligations cannot found a claim under the Umbrella Clause.

471. The plain language of the Umbrella Clause in Article 10(1) of the ECT does not differentiate between contractual obligations and legislative or regulatory undertakings.[794] The Umbrella Clause therefore has a broad scope:

> "One of the most common formulations of the umbrella clause in investment treaties is the following: Each party shall observe any obligation it may have entered into with regard to investments in its territory by investors of the other contracting Party. As an UNCTAD study has pointed out, such language is clearly intended to cover not only investment agreements between investors and host states but also is broad enough to apply to all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally. Such breadth of scope would in effect make the respect by host governments of all their commitments to investors a treaty obligation governed by international law and all disputes related to their failure to fulfil those commitments potentially subject to international arbitration. Thus, depending on the precise terms of an umbrella clause, states become obliged under international law to respect state concession contracts to operate landfills,

*application of umbrella clauses to obligations assumed unilaterally by host States. It follows that, where a treaty for the protection of investment containing an umbrella clause is applicable, the violation of a unilateral undertaking, made through legislation or otherwise, would amount to a violation of the treaty*".

790 Counter-Memorial, para. 1032.

791 Counter-Memorial, paras. 1025-1038.

792 Counter-Memorial, paras. 1039-1040 and 1044.

793 Memorial, para. 461.

794 See Memorial, para. 454.

> tax exemptions promised in foreign investment codes, and even representations made by ministers to investors during investment promotion 'road shows'.
>
> Many countries have viewed the consequences of such a treatment standard as undesirably broad and an unjustified intrusion into what they consider their natural right to regulate persons and activities within their territories. As a result, certain treaties have sought to reduce the scope of the umbrella clause by introducing qualifications into the language of the provision. For example, some treaties may require that the obligation covered by the umbrella clause be in writing and be made with respect to a specific investment. Such a qualification would exclude from umbrella clause protection, for example, a government ministe's oral statements about his department's intentions towards an investor, as well as provisions in a host country's foreign investment code. Other treaty provisions specify that a contracting state is to respect obligations 'subject to its law', a provision that makes clear that the state's obligations under the umbrella clause are dependent on host country law."[795]

472. This broad scope can be limited at the election of the Contracting Party. For example, Spain could have limited scope of the Umbrella Clause and carved it out from investor-State disputes in the same way that Australia, Hungary and Norway have done (see Article 26(3)(c) and Annex IA of the ECT). Spain chose not to. Consequently, the Umbrella Clause applies to all commitments made by Spain, and "*even representations made by ministers to investors during investment promotion 'road shows*'".[796]

473. Spain nevertheless claims that there is no finding that the ECT Umbrella Clause encompasses anything other than contractual obligations. This is simply not true. The tribunal in *Khan Resources v Mongolia* held the following:

> "The Claimants submit that the terms 'any obligations' encompass the statutory obligations of the host state and in this case, Mongolia's obligations under the Foreign Investment Law. Given the ordinary meaning of the term 'any' and the fact that the Respondents have not submitted any arguments or authorities to the contrary, the Tribunal accepts the Claimants' interpretation of Article 10(1) of the ECT. It follows that a breach by Mongolia of any obligations it may have under the Foreign Investment Law would constitute a breach of the provisions of Part III of the Treaty. Consequently, the Tribunal finds that it has jurisdiction under the ECT over Khan Netherlands' Foreign Investment Law claims."[797]

---

[795] **Authority CL-92**, J W Salacuse, *The Law of Investment Treaties* (2nd ed., Oxford University Press), pp. 305-306.

[796] **Authority CL-92**, J W Salacuse, *The Law of Investment Treaties* (2nd ed., Oxford University Press), p. 306.

[797] **Authority CL-138**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, 25 July 2012, para. 438.

474. Breach of the Foreign Investment Law was subsequently found to be a breach of the ECT in the Award on the merits.[798] Article 10(1) of the ECT thus extends beyond contractual obligations and applies also to commitments contained in legislation and elsewhere.

475. Insisting, as Spain does, that an underlying contract between the investor and the State is necessary to satisfy the language "*undertaken*", ignores the fact that States may "*undertake*" obligations also by virtue of unilateral acts.[799] It is a well-recognised rule of international law, which Spain does not challenge, that "*declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations*".[800] Instead, Spain questions the relevance of "*international decisions that apply Treaties other than the ECT*".[801] This is an unusual response in light of Spain's agreement that pursuant to Article 26(6) of the ECT, a tribunal shall decide the issues in dispute in accordance with both the ECT and principles of international law. As espousing principles of international law, this jurisprudence is relevant to determining the issues in dispute between the Parties.

476. In an effort to bolster its defence, Spain relies on the award in *Noble Ventures v Romania*,[802] which stated that "*it is difficult not to regard* [the wording of the relevant umbrella clause in that case] *as a clear reference to investment contracts*".[803] That statement, however, was made in a very specific context, namely to address Romania's contention that the relevant provision did not operate to elevate breaches of contract to treaty violations.[804] The tribunal had to analyse whether the relevant umbrella clause went beyond customary-international-law obligations. The first part of the paragraph cited by Spain, omitted from the quotation contained in the Counter-Memorial, makes this clear:

> "Considering that Art. II (2)(c) BIT uses the term 'shall' and that it forms part of the Article which provides for the major substantial obligations undertaken by the parties, there can be no doubt that the Article was intended to create obligations, and obviously obligations beyond those specified in other provisions of the BIT itself. <u>Since States usually do not conclude, with reference to specific investments, special international agreements in addition to existing bilateral</u>

---

798 **Authority CL-146**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia*, UNCITRAL, Award on Merits, 2 March 2015.

799 Memorial, para. 454.

800 **Authority CL-3**, *Nuclear Tests* (*Australia v France*), ICJ Rep 1974, Judgment of 20 December 1974, para. 43, p. 267. See also **Authority CL-2**, *Case concerning the Temple of Preah Vihear* (*Cambodia v Thailand*), ICJ Rep 1961, Preliminary Objections, Judgment of 26 May 1961, p. 17; and **Authority CL-8**, *Case Concerning the Frontier Dispute* (*Burkina Faso v Republic of Mali*), ICJ Rep 1986, Judgment of 22 December 1986, p. 554. See Memorial, para. 443.

801 Counter-Memorial, para. 1035.

802 See Counter-Memorial, paras. 1022-1023.

803 **Authority RL-26**, *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 51.

804 **Authority RL-26**, *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 45.

investment treaties, it is difficult to understand the notion 'obligation' as referring to obligations undertaken under other 'international' agreements. And given that such agreements, if concluded, would also be subject to the general principle of *pacta sunt servanda*, there would certainly be no need for a clause of that kind."[805] (emphasis added)

477. It is against this background that the tribunal made the statement referred to by Spain. This statement does not support Spain's contention that an umbrella clause does not apply to obligations other than those arising out of contracts simply because the case before the *Noble Ventures* tribunal was precisely limited to contractual obligations.

478. The other authorities invoked by Spain also do not assist:

(a) *SGS v Philippines* recognised that umbrella clauses may cover obligations other than those derived from contractual agreements and thus supports the Claimants' proposition. That tribunal considered that the relevant umbrella clause in that case, Article X(2) of the Swiss-Philippines BIT (which is similar to 10(1) of the ECT), "*is not limited to contractual obligations*".[806]

(b) *AES Summit Generation Limit v Hungary* concerned, *inter alia,* the contractual rights of the investor.[807] The tribunal held that it could not rule on the scope of the contractual obligations because under Annex IA of the ECT, Hungary had not allowed investors to submit a dispute concerning the Umbrella Clause to an international tribunal.[808] It made no finding as to the scope of obligations that would fall within the protection of the Umbrella Clause and it is misleading for Spain to suggest otherwise.

(c) Spain's attempts to distinguish the cases of *Plama v Bulgaria*, *Eureko v Poland*, *Enron v Argentina, LG&E v Argentina* and *El Paso v Argentina* are also misguided.[809] All of these cases – save for *El Paso* (addressed separately below) – contain clear findings that the Umbrella Clause is not limited to contracts between the State and the investor but covers "[*a*]*ny obligation*".[810] These cases therefore support the Claimants' position on the Umbrella Clause in that the tribunals found that: (i) Argentina's commitments in the gas law and its

---

805 **Authority RL-26**, *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 51.

806 **Authority CL-112**, *SGS Société Générale de Surveillance S.A. v The Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 121.

807 Counter-Memorial, para. 1028. See **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.

808 **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, p. 54.

809 Counter-Memorial, paras. 1029 and 1036.

810 See Memorial, section 13.5, paras. 454, 460 and fn. 659.

implementing regulations (also included in promotional material addressed to investors) within the scope of the umbrella clause under the applicable BIT (*LG&E*);[811] (ii) the term "*obligation*" refers to all obligations regardless of their nature, including those contained in the gas legislation (*Enron*);[812] and (iii) the obligations in gas distribution licences also within the scope of the umbrella clause in the relevant BIT (*Sempra*).[813] In addition:

(i) *El Paso v Argentina* was not concerned with legislative acts falling within the scope of an umbrella clause. Rather, it was focused on the existence of any contracts or licences that could potentially found a treaty claim. That tribunal made no findings on the issue of whether state promises found in legislation can form the basis of an umbrella-claim.[814]

(ii) Similarly, the tribunal in *Eureko*, in the context of considering whether Poland's breach of its contractual obligations was also a breach of the umbrella clause in the applicable investment treaty, confirmed that the "*plain meaning*" of the expression "'[a]*ny' obligations*" in the umbrella clause "*means not only obligations of a certain type, but 'any' – that is to say, all-obligations*".[815]

(iii) Finally, in the specific context of the ECT, the *Plama* tribunal noted that "[a]*n analysis of the ordinary meaning of the* [Umbrella Clause] *suggests that it refers to any obligation regardless of its nature, i.e., whether it be contractual or statutory*".[816]

479. Spain also presents a misleading analysis of the *ad hoc* committee's decision in *CMS v Argentina*.[817] Contrary to Spain's suggestions, the *ad hoc* committee made no finding that an umbrella clause only covers contractual obligations. On the contrary, the *ad hoc* committee confirmed that an umbrella

---

811 **Authority CL-46**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 175.

812 **Authority CL-53**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 274.

813 **Authority CL-57**, *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras. 312-314.

814 **Authority CL-79**, *El Paso Energy International Company v The Argentine Republic,* ICSID No. ARB/03/15, Award, 31 October 2011, para. 533.

815 **Authority CL-39**, *Eureko B.V. v The Republic of Poland,* Partial Award on Jurisdiction and Merits, 19 August 2005, para. 246.

816 **Authority CL-63**, *Plama Consortium Limited v The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 186.

817 Counter-Memorial, para. 1036. See **Authority RL-31** *CMS Gas v Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007.

clause encompasses "*specific obligations concerning the investment*" without limiting them to contractual obligations.[818]

480. Spain also relies on academic commentary, including an article written by the late Professor Wälde in 2005,[819] and the ECT Reader's Guide.[820] None of this commentary assists Spain:

(a) Spain cites Professor Wälde's article to support the argument that the Umbrella Clause has a "*contractual*" nature.[821] Spain's point appears to be that because umbrella clauses have also been referred to as *pacta sunt servanda* clauses, they only protect contractual obligations.[822] This is nonsense. Moreover, Professor Wälde's article is not concerned with whether or not an Umbrella Clause may protect non-contractual obligations. That article considered those situations where the State is performing the "*dual role… as both contract party and regulator of such contracts*" and how the Umbrella Clause can mitigate the risks investors face in such situations.[823] Spain interprets the author as saying that the Umbrella Clause may only be invoked in the context of this dual role. That is inconsistent with the author's recognition that some commitments can be unilateral in nature. Professor Wälde observed that although contracts represent the most formal and explicit form of "*commitment*", for the purposes of an umbrella clause, State commitments "*entered into*" may include other "*non-contract forms*", including:

> "by formal statements in other treaties; in investment legislation… in investment promotional literature or official statements; in formal letters (permits, authorizations, interpretative assurances and authorizations) given to investors with a sense of formality and of a legally relevant character."[824]

(b) Spain also quotes from the ECT Reader's Guide[825] to say that breach of an "*individual investment contract*" by the host State becomes a violation of the ECT. The quoted passage is an extract from a section dedicated precisely to investment contracts and is meant to address how these are treated under the ECT. This clarification by the ECT Secretariat

---

818 **Authority RL-31**, *CMS Gas v Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007, para. 95(a).

819 Counter-Memorial, paras. 1027-1028. See also, **Authority RL-55**, T Wälde, "The 'Umbrella' Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases" (2005) 183 Journal of World Investment & Trade 183.

820 Counter-Memorial, para. 1026. See **Authority CL-26**, Energy Charter Secretariat, "The Energy Charter Treaty: A Reader's Guide" (2002), p. 26.

821 Counter-Memorial, para. 1027.

822 Counter-Memorial.

823 **Authority RL-55**, T Wälde, "The 'Umbrella' Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases" (2005) 183 Journal of World Investment & Trade 183, p. 224.

824 **Authority RL-55**, T Wälde, "The 'Umbrella' Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases" (2005) 183 Journal of World Investment & Trade 183, p. 214; fn. 121.

825 Counter-Memorial, para. 1026. See **Authority CL-26**, Energy Charter Secretariat, "The Energy Charter Treaty: A Reader's Guide" (2002), p. 26.

clearly refers to the well-known debate of contract versus treaty breaches. It says nothing about the kinds of obligations covered by Article 10(1) *in fine*: it certainly does not purport to limit the source of the obligations covered by this provision only to contractual ones.

481. Finally, Spain refers to *Charanne*, which sheds no light on this issue.[826] The *Charanne* award contains no discussion of the Umbrella Clause in the ECT; nor did the case involve a claim for breach of the Umbrella Clause.

**17.2 The July 2010 Agreement (and RD 1614/2010) amounts to a commitment by Spain**

482. Spain argues that the July 2010 Agreement has no bearing on the interpretation of RD 1614/2010 and, moreover, that the AEE did not consider RD 1614/2010 as providing for a stable regime for existing installations.[827]

483. In particular, Spain refers to the July 2010 Agreement and the AEE's August 2010 comments on the draft RD 1614/2010 to support an alternative interpretation of RD 1614/2010 whereby there was no stabilisation commitment. This submission is wholly inconsistent with both of those documents and Spain's understanding at the time. The July 2010 Agreement, as stated by the Government Press Release, "*assume*[d] *the reinforcement of the visibility and stability of the regulation of* [CSP] *technologies in the future, guaranteeing the current subsidies and rates of RD* 661/2007 *for the facilities in operation (and for those included in the pre-registration) starting in 2013*".[828] The AEE, for its part, in a document that Spain relies on, had a comment titled "*safeguard against future revisions of the remuneration regime*" and proposed modified wording for RD 1614/2010 as the AEE considered it "*unacceptable*" that the draft sought to restrict the Article 44.3 "safeguard" to installations with commissioning certificates of a particular date.[829] The quote Spain relies on is taken out of context.[830] The AEE clearly expressed its understanding of RD 1614/2010 in its presentation dated 13 December 2010 which stated that:

> "*For ... installations registered under RD 661/2007, **the revisions of the tariffs, premiums and upper and lower limits to which article 44.3 of RD 661/2007 WILL NOT AFFECT said installations.***"[831]

---

[826] Counter-Memorial, para. 1040.

[827] Counter-Memorial, para. 1279.

[828] **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010.

[829] **Exhibit R-166**, Arguments from the AEE to the CNE during hearing proceedings with the Electricity Advisory Board concerning the Draft Royal Decree that regulates and modifies certain aspects relating to the special regime, 30 August 2009, p. 7.

[830] Counter-Memorial, para.482.

[831] **Exhibit C-212**, Asociación Empresarial Eólica, Work group meeting on prices, 13 December 2010, p. 67 (emphasis in the original).

484. This is emphatically clear; the AEE shared the exact same expectations as the Claimants.

485. Spain also appears to argue that the AEE (and other investors) never acknowledged the existence of the July 2010 Agreement.[832] That is inconsistent with contemporaneous documents in which the AEE refers to "*the major effort made by the wind energy sector to reach an extraordinary and provisional agreement with the* [Ministry] *in view of the current economic situation in the country*" and that some aspects of the draft Royal Decree "[did] *not respect certain fundamental aspects of the agreement*".[833] Spain itself referred to the July 2010 Agreement as follows:

> "This agreement furthermore assumes the reinforcement of the visibility and stability of the regulation of these technologies in the future, guaranteeing the current incentives and rates of RD 661/2007 for the facilities in operation (and for those included in the pre-registration) starting in 2013…."[834] (emphasis added)

486. Again, as Spain's own contemporaneous document show, Spain made a clear commitment to the Claimants.

### 17.3 Spain entered into a specific and binding obligation vis-à-vis the Claimants

487. There can be no doubt that Spain's commitments were clear and specific: Article 44.3 of RD 667/2007 and Article 5.3 of RD 1614/2010 are strongly-worded stabilisation commitments. The meaning and scope of its commitment was confirmed time and time again by Spain. No one, including Spain itself, was in any doubt until the Disputed Measures were implemented that Spain had promised not to change the RD 661/2007 economic regime for existing investors. Indeed, the meaning of the commitment was specifically clarified by the Minister,[835] the CNE,[836] and the InvestInSpain road-shows.[837]

488. RD 1614/2010 was applicable to wind farms and was implemented pursuant to the July 2010 Agreement. This was an agreement "*guaranteeing the current incentives and rates of RD 661/2007*

---

832 Counter-Memorial, paras. 520-521.

833 **Exhibit R-166**, Arguments from the AEE before to the CNE during hearing proceedings with the Electricity Advisory Board concerning the Draft Royal Decree that regulates and modifies certain aspects relating to the special regime, 30 August 2009, p. 1.

834 **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010.

835 **Exhibit C-93,** Government of Spain, Ministry of Industry, Energy and Tourism, announcement of RD 661/2007, "*The Government prioritises profitability and stability in the new Royal Decree on renewable energy*", 25 May 2007, p. 1

836 **Exhibit C-85**, CNE Report 3/2007 of, 14 February 2007, p. 16; **Exhibit C-94**, CNE Report 30/2008 of 29 July 2008, p. 20; **Exhibit C-95**, CNE Presentation, "*Legal and Regulatory Framework for the Renewable Energy Secto*."""", 29 October 2008, p. 25. See also pp. 11 and 27 and **Exhibit C-96**, CNEPresentation, "*Renewable Energy Regulation in Spain*", February 2010, p. 29.

837 **Exhibit C-163**, Government of Spain, Ministry of Industry, Tourism and Commerce and InvestInSpain, Presentation, "*Legal Framework for Renewable Energies in Spain*", undated, p. 4; **Exhibit C-164**, InvestInSpain Presentation, "*Opportunities in Renewable Energy in Spain*" (Graz), dated 15 November 2007, p. 32; **Exhibit C-165**, InvestinSpain Presentation, "*Opportunities in Renewable Energy in Spain*", (Vienna), dated 16 November 2007, p. 32 and **Exhibit C-199**, InvestinSpain, Presentation, "*Opportunities in Renewable Energy in Spain*", undated, p. 16.

*for the facilities in operation* (*and for those included in the pre-registration*) *starting in 2013*".[838] The State Council determined that this was a "*safeguard clause*" which "*established the immutability* [*inmodificabilidad*] *of the premiums in the future*".[839] According to the State Council Report on November 2010, this was a "*self-binding*" [*auto-vinculante*] provision "*with respect to subsequent revisions to the law or the premiums*".[840] The Government confirmed that the clause "*ensure*[d] *the invariability of the premium for wind and solar thermal plants*".[841]

489. The Government also confirmed that this was a "*specific consensual relationship*" between the State and wind power-generation investors since the greater tariff protection constituted "*compensation for the modifications with economic effect that are realized in the present Royal Decree*".[842] This was a *quid pro quo* entered into between two parties and both considered themselves to be bound by the terms of this agreement. Spain's abandonment of its obligations to the Claimants under this agreement thus constitutes a breach of the ECT.

---

838 **Exhibit C-45**, Government of Spain, Ministry of Industry, Tourism and Commerce, Press Release, "*The Ministry of Industry, Tourism and Trade Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks*", 2 July 2010, p. 2.

839 **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010, p. 24 (PDF 27).

840 **Exhibit C-177**, State Council Report on draft RD 1614/2010, 29 November 2010.

841 **Exhibit C-187**, *Memoria Económica* for RD 1614/2010, 1 December 2010, p. 11.

842 **Exhibit C-187**, *Memoria Económica* for RD 1614/2010, 1 December 2010

## PART IV – COUNTER-MEMORIAL ON JURISDICTION

### 18. THE INTRA-EU OBJECTION

#### 18.1 Introduction

490. Spain's Intra-EU Objection is based on a unilateral interpretation of the ECT. Such interpretation has no support in the plain meaning of the Treaty, or in the context of its drafting and signing, and is contrary to, among others, the Vienna Convention.[843] In fact, the Intra-EU Objection has been posited after the fact to serve a policy objective of the EC and has been rejected by every Arbitral Tribunal that has decided on the objection.

491. Spain alleges that the Tribunal does not have jurisdiction to hear the Claimants' claims due to the fact that they do not qualify as "Investors" of "another Contracting Party" under the ECT. According to Spain, "[t]*he Claimants are not from the territory of another Contracting Party, given that both Luxembourg and the Netherlands as well as the Kingdom of Spain are Member States of the European Union*" and therefore "[t]*he ECT does not apply to disputes relating to Intra-EU disputes*".[844]

492. In support of its objection, Spain cites various articles of the ECT that recognise the EU as a Contracting Party.[845] Spain asserts that these articles establish that "intra-EU" disputes should be excluded from the scope of Article 26 of the ECT.[846] Spain also purportedly looks to the object, context and purpose of the ECT as well as provisions of EU law to conclude that neither the EU nor any EU Member State intended for Intra-EU disputes to fall within the scope of Article 26.[847] Finally, Spain appears to allege that the ECT contains an implicit disconnection clause such that the inclusion of an express disconnection clause was unnecessary.

493. These submissions have no merit. There is nothing in the text of the ECT indicating that Intra-EU disputes are to be excluded from its scope. Further, the alleged subjective intention held by the EU and its Member States regarding the provisions of EU law (even if it could be assumed that such an unexpressed intention actually existed, *quod non*) can in no way serve to amend the ordinary meaning of Article 26 of the ECT. These arguments will be examined in turn below. It is useful

---

[843] **Authority CL-4**, Vienna Convention.
[844] Counter-Memorial, section III(A).
[845] Counter-Memorial, para. 5.
[846] Counter-Memorial
[847] Counter-Memorial, section III(A)(3).

first to address Spain's efforts to ignore the relevance of previous arbitral decisions on the Intra-EU Objection and to rely on authorities that have no relevance to the present dispute.

### 18.2 Preliminary remarks on the relevance of previous awards and other authorities

494. Every single investment-treaty arbitral tribunal that has considered the issue has concluded that the "intra-EU" nature of a dispute does not preclude its jurisdiction.[848] This includes at least four recent ECT cases brought against Spain.[849] As of today, that means that no fewer than eleven tribunals have considered and rejected the Intra-EU argument. Therefore, it cannot seriously be disputed that "intra-EU" disputes are excluded from the jurisdiction of an arbitral tribunal constituted under Article 26 of the ECT.

495. In the face of the numerous authorities rejecting its argument, Spain tries to distinguish non-Member States to the EU at the time they ratified the ECT from States that were already members to the EU at the time of the ratification of the ECT (the latter being the case of the Kingdom of Spain, Luxembourg and The Netherlands).[850] Even if such a distinction were relevant, it does not assist Spain. The *Charanne v Spain* and *Eiser v Spain* awards and the *RREEF v Spain* decision confirm that Article 26 of the ECT applies among "old" Member States. In any event, Spain offers no explanation as to why an "old" EU Member State should be treated any differently from a "new" EU Member State. The reason for this, of course, is because that fact is actually *unhelpful* to Spain's case. According to Spain's theory, if it is assumed that the two treaty regimes (the EU and the ECT)

---

[848] Arbitral tribunals have decided, without exception, that the "Intra-EU" nature of a dispute does not preclude jurisdiction under the ECT or under "intra-EU" bilateral investment treaties. In the particular context of the ECT, see **Authority CL-86**, *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.11; **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 432; **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 232(4); and **Exhibit C-176**, L E Peterson, "*Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors vs. Spain and Hungary*", available at https://www.iareporter.com/articles/intra-eu-treaty-claims-controversy-new-decisions-and-developments-in-claims-brought-by-eu-investors-vs-spain-and-hungary/ (last accessed on 10 September 2017). In the context of other investment treaties see **Authority CL-52**, *Eastern Sugar B.V. v The Czech Republic*, SCC Case No. 088/2004, Partial Dissenting Opinion of Robert Volterra, 27 March 2007; **Authority CL-128**, *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, paras. 106-109; **Authority CL-134**, *Eureko B.V. v Slovak Republic*, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; and **Authority CL-139**, *European American Investment Bank AG v The Slovak Republic,* UNCITRAL, Award on Jurisdiction, 22 October 2012. In addition, it has been reported that the tribunal in *EDF v Hungary* upheld EDF's claims of unfair and inequitable treatment, notwithstanding an Intra-EU Objection being advanced. This award remains confidential and the nature of the tribunal's rejection of the objection is therefore unavailable; and **Exhibit C-178**, L E Peterson, "*Details Surface on Jurisdiction Holding in Binder v Czech Republic; Ad-Hoc Tribunal Saw No Conflict between BITs and EU law*", available at http://www.iareporter.com/articles/details-surface-of-jurisdiction-holdings-in-binder-v-czech-republic-ad-hoc-tribunal-saw-no-conflict-between-bits-and-eu-law/ (last accessed on 2 February 2017).

[849] See **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012 Award, 21 January 2016, para. 432; **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 232(4); **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 486(a); and **Exhibit C-176**, L E Peterson, "*Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors vs. Spain and Hungary*", available at https://www.iareporter.com/articles/intra-eu-treaty-claims-controversy-new-decisions-and-developments-in-claims-brought-by-eu-investors-vs-spain-and-hungary/ (last accessed on 10 September 2017).

[850] Counter-Memorial, paras. 53 and 101.

have the same subject matter (which the Claimants deny), the ECT, by its own terms, would take precedence over any conflicting provision of the EU founding treaties.[851] This is not only based on the conflict rule found in Article 16 of the ECT – according to which the provision most favourable to the investor prevails – but also Articles 30 and 59 of the Vienna Convention, which enshrine the *lex posterior* principle. It would therefore be an *a fortiori* conclusion that the ECT applies in a dispute between an EU investor and an "old" EU Member State.

496. Spain's position, if taken to its logical conclusion, means that Article 26 of the ECT *applies* to an Intra-EU dispute so long as either the home State of the claimant-investor or the respondent-host State was not an EU Member State at the time the ECT was signed and/or ratified, but that it *does not apply* to Intra-EU disputes if both of the relevant states were a EU Member State at the time the ECT was signed. This is an absurd proposition and it would amount to impermissible discrimination under both the ECT (see Article 10) and also under EU law. Nothing in the text of the ECT itself would support Spain's argument. Not surprisingly, Spain offers no legal support for its argument.

497. In addition to various ECT decisions directly addressing (and rejecting) the Intra-EU Objection, there have been numerous other ECT cases involving disputes between EU Member States and EU investors where no Intra-EU Objection was even raised by the respondent State. Indeed, as stated by Graham Coop, former General Counsel to the ECT Secretariat:

> "… something like half of all known ECT investor-State cases – and considerably more than half of the recent known ECT investor-State cases – concern disputes between an EU investor and another EU government. In other words, the ECT is invoked as an Intra-EU BIT more often than not."[852]

498. For example, the respondent State did not raise an Intra-EU Objection in *AES Summit Generation Limited v Hungary*,[853] *Electrabel v Hungary*[854] or in *Micula v Romania.*[855]

499. Spain's assertion that EU Member States did not intend for Investor-State tribunals to determine Intra-EU disputes clearly has no basis in reality.[856]

---

[851] Counter-Memorial, para. 80.

[852] **Authority CL-144**, G Coop, "20 Years of the Energy Charter Treaty" (2014), 29 ICSID Review – Foreign Investment Law Journal 515, p. 523.

[853] **Authority CL-133**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, section 6.

[854] **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

[855] **Authority CL-88**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013.

500. Spain makes a number of other submissions concerning previous authorities that are equally without merit. First, Spain alleges that the possibility of "*bringing arbitration proceedings against an EU Member State… would be contrary to EU law*".[857] Spain suggests therefore that BITs between EU Member States that have been considered in previous arbitral decisions are "*contrary to EU law*".[858] Yet Spain offers no evidence that it has denounced its own Intra-EU BITs. The status of BITs under EU law notwithstanding, what is clear is that the ECT has not been denounced by the Kingdom of Spain, Luxembourg or The Netherlands and it continues to apply fully even as between EU Member States.

501. Secondly, Spain notes that the Court of Justice of the European Union (**CJEU**)[859] has issued an opinion on the impossibility of an Intra-EU dispute.[860] This is wrong, and the decision cited by Spain does not support its position. In addition, Spain ignores the fact that the CJEU has stressed that an international dispute-settlement mechanism set forth by an international treaty to which the EU is a party is compatible with EU law, and that the decisions of the court with jurisdiction to decide disputes under that treaty will be binding on the CJEU.[861]

502. Notably, the Advocate General of the CJEU[862] issued an opinion on 19 September 2017 on the compatibility of investor-State dispute settlement mechanisms, established by intra-European Union bilateral investment treaties, Articles 18(1) of the Treaty on the Functioning of the European Union (**TFEU**), 267 of the TFEU and 344 of the TFEU. The Advocate General concluded that:

(a) Not only are the dispute settlement mechanisms not incompatible with such provisions but they represent the "*only means of giving full practical effect to the BITs by creating a specialised forum where investors may rely on the rights conferred on them by the BITs*".[863]

---

856 Indeed, as noted by the tribunal in *Jan Oostergetel and Theodora Laurentius v The Slovak Republic* (albeit in the context of an intra-EU BIT), citing a 2007 Report by the EU Economic and Financial Committee, "*most Member States have not shared the Commission's concern in respect of arbitration risks and discriminatory treatment of investors and have preferred maintaining the existing agreements without either terminating or re-negotiating them*". See **Authority CL-128**, *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, para. 108.

857 Counter-Memorial, para. 76.

858 Counter-Memorial, para. 76.

859 With the Lisbon Treaty (effective from 1 December 2009), the "European Court of Justice" (ECJ) became known as the "Court of Justice of the European Union."

860 Counter-Memorial, para. 79.

861 **Authority CL-102**, CJEU, Opinion 1/91, *Economic Area Agreement*, ECR 1991, I-6079, 14 December 1991.

862 The Advocate General's Opinion is not binding on the CJEU. It is the role of the Advocates General to propose to the CJEU, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the CJEU are now beginning their deliberations in this case. Judgment will be given at a later date.

863 **Exhibit C-261**, Opinion of Advocate General Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV,* C-284/16, provisional text, pars. 266.

(b) The fact that EU law may apply to the dispute between an investor and a State arising from a BIT does not determine that the dispute concerns the interpretation and application of EU and FEU Treaties.[864]

(c) The scope of BITs is wider than that of the EU and FEU Treaties. In particular, some of the protections established in BITs have no equivalent in EU Law while others overlap without resulting in contradictory results.[865]

503. Consequently, the Advocate General has recommended that the CJEU finds that dispute resolution mechanisms set out in BITs are compatible with, among others, Article 344 of the TFEU.

504. Thirdly, Spain's reliance on the EC 's intervention in the enforcement of the award in *Micula v Romania*[866] to support the Intra-EU Objection is misleading.[867] The EC's intervention did not relate to an Intra-EU Objection. Rather, the European Commission intervened in respect of a pre-existing pronouncement by the EC that the impugned measures were (unlawful) State aid and had to be repealed.[868] In *Micula v Romania*, Romania had introduced legislation in 1998 to encourage foreign investment. The Micula brothers invested in Romania in reliance on this legislation. The legislation was subsequently repealed in 2004 during Romania's accession to the EU because the 1998 legislation was deemed incompatible with European Community rules concerning State Aid. The CJEU and the EC had said so pre-accession. The Claimants commenced arbitration proceedings in 2005 and the arbitral tribunal subsequently awarded damages for breach of the FET standard. The Claimants sought to obtain payment and the Commission intervened at that point to suspend implementation of the award on the grounds that it would be another way of giving unlawful State Aid, contrary to Article 107(1) of the TFEU.[869] That is a separate issue to the one that Spain is raising, namely that this Tribunal has no jurisdiction to hear Intra-EU disputes.

---

864 **Exhibit C-261**, Opinion of Advocate General Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV,* C-284/16, provisional text, paras. 173 ("*the fact that EU law is part of the law applicable to disputes between investors and States in accordance with Article 8(6) of the BIT does not mean that those disputes concern the interpretation and application of the EU and FEU Treaties, for two reasons: in the first place, the jurisdiction of the arbitral tribunal is confined to ruling on breaches of the BIT and, in the second place, the scope of that BIT and the legal rules which it introduces are not the same as those of the EU and FEU Treaties*")

865 **Exhibit C-261**, Opinion of Advocate General Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV,* C-284/16, provisional text, paras. 180-181 ("*intra-EU BITS, and more particularly the BIT at issue in the main proceedings, establish rights and obligations which neither reproduce nor contradict the guarantees of the protection of cross-border investments afforded by EU law.*" This is because "*In the first place, its scope is wider than that of the EU and FEU Treaties (1). In the second place, some of the legal rules introduced by the BIT have no equivalent in EU law (2). In the third place, some of its rules overlap in part with EU law without achieving results that are incompatible with the EU and FEU Treaties*").

866 **Authority CL-88**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013.

867 Counter-Memorial, para. 86.

868 **Exhibit C-179**, Communication from the Commission to Romania, "*Implementation of Arbitral award Micula v Romania of 11 December 2013*", C(2014) 6848 final, dated 1 October 2014, paras. 50, 63 and 71.

869 **Exhibit C-179**, Communication from the Commission to Romania, "*Implementation of Arbitral award Micula v Romania of 11 December 2013*", C(2014) 6848 final, dated 1 October 2014, para. 71.

505. Fourthly, Spain's reference to a decision of the EC is equally misleading.[870] Spain fails to provide the context of that decision, which was rendered pursuant to the notification by the Czech Republic of a support scheme for all types of installations generating energy from renewable sources built within a seven-year period. The EC approved this scheme under EU State Aid rules, concluding that the measure would further EU energy and climate goals without unduly distorting competition.[871] This has nothing to do with the case at hand. While the decision also answers to submissions from investors from other EU Members States who initiated investment arbitration on the basis of the ECT and the Germany-Czech Republic BIT, it bears emphasising that a decision of the EC that is addressed to a Member State or an individual company, as is the case here, is not binding upon anyone other than the particular Member State or company to which it is addressed.[872] It should therefore be disregarded by the Tribunal. In any event, the arguments made by the EC's decision do not differ from those already addressed by all the ECT tribunals that have rejected the Intra-EU Objection, as seen above. The decision is therefore unhelpful to Spain's case.

506. All relevant authorities unanimously confirm that Spain's Intra-EU Objection is devoid of merit. Spain's attempts to distinguish these authorities are wholly unconvincing.

### 18.3 The ordinary meaning of the ECT expresses Spain's unconditional consent to arbitrate disputes with Investors from Luxembourg and The Netherlands

507. Spain argues that the text of the ECT indicates that Investors from an EU Member State may not bring a claim against another EU Member State under Article 26 of the ECT. Spain considers this to be evident from: (a) the wording of Article 26 of the ECT;[873] (b) the recognition of regional organisations at Articles 25, 1(2), 1(3) and 1(10) of the ECT;[874] and (c) the provision for the settlement of disputes between Contracting Parties contained in Article 27 of the ECT.[875] Bearing in mind the requirements of the Vienna Convention with respect to treaty interpretation,[876] the ordinary meaning of each of these provisions is considered in turn below.

---

870 **Counter-Memorial**, paras. 100 and 280.

871 **Exhibit C-180**, European Commission – Press release, State Aid: Commission clears Czech support scheme for renewable energy, 28 November 2016.

872 **Authority CL-122**, Treaty on the Functioning of the European Union, Article 288.

873 Counter-Memorial, para. 50.

874 Counter-Memorial, paras. 68-75.

875 Counter-Memorial, paras. 76-85.

876 **Authority CL-4**, Vienna Convention, Article 31.1 ("*A treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*").

### (a) The ordinary meaning of Article 26 of the ECT

508. The ordinary meaning of Article 26 of the ECT is plain: it applies to disputes between any Contracting Party to the ECT and an Investor of any other Contracting Party. There is no indication in the text of the ECT that the Contracting Parties have limited their consent to arbitration on the basis that some of the Contracting Parties belong to the same Regional Economic Integration Organisation (**REIO**), such as the EU. On the contrary, Article 26(3) of the ECT specifically provides that the Contracting Parties' "*unconditional consent*" to arbitration is "*subject only to subparagraphs (b) and (c)*". Those subparagraphs in turn refer to Annexes ID and IA of the ECT pursuant to which certain Contracting Parties have specifically narrowed their consent in respect of disputes previously submitted to another forum and to the umbrella clause contained in Article 10(1) of the ECT. The ECT provides no further exception to the Contracting Parties' consent. Thus, a good faith interpretation of the ordinary meaning of Article 26 leads to the conclusion that there is no Intra-EU exception to the Contracting Parties' unconditional consent to arbitration.

509. Therefore, in the absence of any provision to the contrary in the ECT, the dispute-settlement mechanism under Article 26 applies to "*disputes between a Contracting Party and an Investor of another Contracting Party*", irrespective of whether the Investor is an EU national and the ECT Contracting Party is also an EU Member State. Watkins Holdings is a company incorporated under the laws of Luxembourg and Watkins BV a company incorporated under the laws of The Netherlands. The remainder of the Claimants, Watkins Spain, Redpier, Northsea, Marmellar SL and La Boga SL, are companies incorporated under the laws of Spain. Each of Watkins Spain, Redpier, Northsea, Marmellar SL and La Boga SL is controlled by Watkins BV which, in turn, is fully owned by Watkins Holdings.[877] Luxembourg and The Netherlands are Contracting Parties to the ECT, as is Spain. The present dispute is therefore evidently a dispute between a Contracting Party, Spain, and investors from other Contracting Parties, Luxembourg and The Netherlands.[878] The ordinary meaning of the terms of Article 26 of the ECT is clear and the Tribunal has jurisdiction to hear the present dispute.

[877] See Memorial, para. 303.

[878] According to the provisions of the ECT and the ICSID Convention, Watkins Spain, Redpier, Northsea, Marmellar SL and La Boga SL are to be considered nationals of "another Contracting State".

### (b) The ECT's recognition of the existence of a regional organisation does not deprive Investors of their rights under Article 26

510. Spain states that the EU's "*integral system to promote and protect Intra-EU investments*" is expressly recognised in Articles 25, 1(2), 1(3) and 1(10) of the ECT.[879] Spain appears to use the definitions in Articles 1(2), 1(3) and 1(10) of the ECT to argue that their inclusion must be understood to indicate that Intra-EU disputes are not within the scope of Article 26 of the ECT. However, as set out below, the text of these articles is clear and can in no way be construed to deprive EU Investors of the right to bring a claim against EU Member States under Article 26 of the ECT.[880]

511. Article 1(3) of the ECT defines the meaning of REIO. Article 1(2) of the ECT includes REIOs within the definition of Contracting Party. Article 1(10) defines the meaning of the "Area" of a REIO. These definitions recognise the existence of REIOs among the ECT's Contracting Parties and identify with clarity the "Area" of REIOs. This is unequivocally conveyed by the ordinary meaning of the words used. In the context of Article 26 of the ECT, the clarity provided by this definition ensures that a claim can be brought against a REIO regarding a dispute arising out of an investment made in that same defined area. Equally, it ensures that a REIO cannot be sued in respect of an investment made outside that defined area. The simple reference in a multilateral treaty to the existence of a regional organisation that is also a party to that same treaty does not establish that the multilateral treaty does not apply within the regional organisation absent a disconnection clause (as to which, see below at section 18.5). Spain's reliance on the definition of REIO in the ECT gets it nowhere.

512. Article 25 of the ECT provides that the obligation to accord most-favoured-nation treatment does not require a Contracting Party from an Economic Integration Area (**EIA**) to accord investors from outside that EIA the preferential treatment that may be applicable inside the EIA. In other words, in the context of the EU, it provides that most-favoured-nation treatment does not oblige EU Member States to extend the rights of the EU internal market to investors from beyond the EU. For example, a Japanese investor could not cite the most-favoured-nation treatment obligation at Article 10 of the ECT to obtain exactly the same rights as an EU citizen under EU law. Clearly, this provision does not state that EU Investors cannot bring claims against EU Member States under Article 26 of the ECT. What it does show, however, is that when the Contracting Parties intended to restrict

---

[879] Counter-Memorial, para. 73.

[880] As noted by Professor J Paulsson "*Article 26 is unambiguous, technical, and precise*", see **Authority CL-156**, J Paulsson, "Arbitration Without Privity" (1995), 10 ICSID Review – Foreign Investment Law Journal 232, p. 249 (PDF 19).

Investors' rights, they did so by expressly stating how Investors' rights under the ECT would interact with the EU. No such restriction with respect to Intra-EU disputes was included at Article 25 or anywhere else in the ECT.

513. As set out above, Article 26 applies to disputes between any Contracting Party to the ECT and an Investor of any other Contracting Party. The phrase "*in the Area of the former* [Contracting Party]" in Article 26(1) of the ECT refers to the particular dispute initiated by the Investor. If the Investor commences arbitration against a Member State of the EU (rather than against the EU itself), then "Area" means, "*with respect to a state that is a Contracting Party*", the territory of that particular Member State, in accordance with the first sentence of Article 1(10). In other words, the relevant "Area" is that of the Contracting Party "*that is party to the dispute*". In this case, the relevant "Area" is the territory of Spain (not of the EU). The situation would be different if the EU itself were the respondent. In that case, "*with respect to a* [REIO]" (Article 1(10), second sentence), the relevant "Area" would be the entire EU "*Area*". This is not, however, the scenario in the present case. Investors from Luxembourg or The Netherlands are entitled to bring claims against Spain in relation to "*Investments*" made in the "*Area*" of Spain. The recognition of REIOs in the text of the ECT does not alter this entitlement.

**(c) Article 27 is of no relevance to the Present Dispute**

514. Spain argues that construing Article 26 to allow Intra-EU disputes would contravene Article 344 of the TFEU.[881] However, a plain reading of Article 344 of the TFEU shows that it applies only to disputes involving two or more EU Member States "*regarding the interpretation of EU law*". It clearly does not prohibit Member States from submitting disputes that are not related to EU law to other "*fora*", nor does it prohibit the submission of investor-State disputes to a different method of settlement not contemplated in the EU treaties.[882]

515. Given that Article 344 does not refer to investor-State disputes, it cannot affect the operation of Article 26 of the ECT. This was confirmed by the tribunal in *Electrabel*, which held that Article 344 of the TFEU was not applicable in the context of Investor-State arbitration.[883] This was also

---

[881] Counter-Memorial, para. 77.

[882] See **Authority CL-122,** Treaty on the Functioning of the European Union, Articles 343-347. Article 344 states the following: "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*".

[883] **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, 30 November 2012, para. 4.151. See also **Authority CL-118**, C Söderlund, "Intra-EU BIT Investment Protection and the EC Treaty" (2007), 24 Journal of International Arbitration 455, p. 458: "[t]*he investor-state dispute resolution mechanism contained in a BIT does not call into question the competence of the ECJ. The EC Treaty only imposes obligations on Member States in their dealings with each other, inter alia, by instituting an obligation to refer disputes within the exclusive remit of the EC Treaty to the ECJ for adjudication to the exclusion of any*

confirmed by the tribunal in *Eiser*, which found that the case did not involve any dispute between EU Member States, or address the allocation of competence between the EU and its members.[884] The *Charanne* Tribunal held that if Spain's argument were true, "*no state would be able to decide any matter involving an interpretation of the European treaties each time that the liability of a Member State is involved*".[885]

**18.4 The subjective intention of the EU and its Member States concerning the provisions of EU law cannot alter the ordinary meaning of Article 26**

516. Spain seeks to interpret Article 26 of the ECT in a manner that would exclude Intra-EU disputes by purportedly relying on the context, object and purpose of the ECT and EU law.[886] Spain submits that, because: (a) the ECT allegedly contradicts EU law; and (b) the EU internal market contains supposedly superior investor protection provisions, Article 26 of the ECT cannot have been intended by the EU or its Member States to permit Intra-EU disputes.[887] This is wrong, and has been found to be wrong by several arbitral tribunals and national courts.

**(a) The subjective intentions of the EU and its Member States are irrelevant to an interpretation of Article 26 of the ECT**

517. Spain's submission requires the Tribunal to speculate as to what might have been the private *and unexpressed* intentions of the EU and its Member States when they took part in the conclusion of the ECT. In light of this submission, a somewhat trite principle bears repeating: "*what matters is the intention of the parties as expressed in the text*".[888] As Brownlie indicates, this is the view of the International Law Commission (**ILC**) and the Institute of International Law, as well as the position taken by the ICJ and ultimately adopted, as reflective of customary international law, in the Vienna Convention.[889]

518. It is also important to recall that the intention of one party to a treaty, on its own, is entirely irrelevant to determining the proper interpretation of that treaty. As aptly put by the Appellate Body of the World Trade Organization (**WTO**) in *EC – Computer Equipment*:

---

*other procedural remedy. It does not commit any non-signatory – such as a private investor – to submit to ECJ jurisdiction. Hence, provisions of the EC Treaty cannot intrude on the BIT-based investor-state dispute resolution facility*".

884 **Authority CL-154,** *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 204.

885 **Authority CL-151** *Charanne B.V and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012 Award, 21 January 2016, para. 443.

886 Counter-Memorial, section III(A)(3)).

887 Counter-Memorial, para. 54.

888 **Authority CL-110**, I Brownlie, *Principles of Public International Law* (6th ed., Oxford University Press, 2003), p. 602 (emphasis added).

889 **Authority CL-110**, I Brownlie, *Principles of Public International Law* (6th ed., Oxford University Press, 2003), p. 602.

> "The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intentions of the parties. The *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty."[890] (emphasis added)

519. Spain is requesting that the Tribunal ignore these basic principles and instead rely on the alleged (but unexpressed) position of the EU and some (and certainly not all)[891] of its Member States that the ECT should not apply to Intra-EU disputes because this would be contrary to EU-law. Spain's entire submission is premised on the false assumption that the Tribunal must resort to supplementary means of interpretation of the ECT, a second-line method that may in fact be resorted to only if the good faith interpretation, according to the general rule of interpretation (i.e. in accordance with the ordinary meaning of the terms of the ECT in their context and in the light of the treaty's object and purpose),[892] "*leaves the meaning ambiguous or obscure*" or"*leads to a result which is manifestly absurd or unreasonable*".[893]

520. As explained above, the ordinary meaning of Article 26 is clear and unambiguous. There is therefore nothing that would justify resorting to supplementary means of interpretation under Article 32 of the Vienna Convention. Moreover, Spain does not refer to supplementary means of interpretation to confirm the ordinary meaning of Article 26 of the ECT, as permitted by Article 32 of the Vienna Convention. On the contrary, Spain seeks to use supplementary materials to change the otherwise perfectly clear meaning of Article 26 of the ECT. Where the meaning of a treaty is sufficiently clear from its text, there is no basis for referring to supplementary material or rules of interpretation to try to establish a contrary meaning.[894] According to Vattel, "*it is not allowable to interpret what has no need of interpretation*".[895] Consequently, it is not permissible to have

---

890 **Authority CL-106**, *European Communities – Customs Classification of Certain Computer Equipment*, WTO Appellate Body (WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R), 5 June 1998, para. 84.

891 See for example, **Authority CL-134**, *Eureko B.V. v The Slovak Republic*, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 161, quoting the Written Observations of The Netherlands Government to the Arbitral Tribunal: "*The Netherlands affirms again that the BIT in question in this dispute continues to be fully in force. Consequently, there is also no reason to doubt the jurisdiction of the Arbitral Tribunal in this dispute. Accordingly, Article 8 of the BIT, which prescribes international arbitration as a dispute settlement tool for disputes between an investor and a Contracting Party, is fully applicable. In the view of The Netherlands, European Union law aspects cannot and do not affect in a way the existing jurisdiction of this Arbitral Tribunal. Thus, this Arbitral Tribunal should fully exercise its jurisdiction and adjudicate this dispute.*"

892 **Authority CL-4**, Vienna Convention, Article 31.

893 **Authority CL-4**, Vienna Convention, Article 32.

894 **Authority CL-94**, *The Lotus Case (France v Turkey),* PCIJ Series A, No. 10, 1927, p. 16 (in which the Permanent Court of International Justice first laid down the principle that "*there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself*"); **Authority CL-95**, Conditions of Admission of a State to Membership in the United Nations, ICJ Rep 1948, Advisory Opinion, 28 May 1948, 57, p. 63: "[t]*he Court considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of the convention is sufficiently clear in itself*"; **Authority CL-97**, *The Italian Republic v The Federal Republic of Germany,* Arbitral Commission on Property, Rights and Interests in Germany, Second Chamber, 29 ILR 442, 14 November 1959, p. 449; **Authority CL-96**, *Competence of the General Assembly for the Admission of Member States to the United Nations*, ICJ Reports, Advisory Opinion, 1950, 4, p. 8 (PDF 12); and **Authority CL-104**, R Jennings & A Watts, *Oppenheim's International Law* (9th ed, Longman, 1996), p. 1267.

895 **Authority CL-104**, R Jennings & A Watts, *Oppenheim's International Law* (9th ed, Longman, 1996), p. 1267, fn. 1.

recourse to the supplementary means of interpretation under Article 32 or to have any consideration of the intentions of the EU and its Member States concerning EU law when agreeing to be bound by the provisions of the ECT.

**(b) The provisions of the ECT do not contradict EU law nor are the Investor protections contained in the EU internal market superior to those under the ECT**

521. Even if it were permissible to interpret Article 26 of the ECT by taking into account the intentions of the EU and its Member States concerning EU law, there is nothing within the provisions of EU law that could be understood to override the rights granted in Article 26 of the ECT. Spain argues that "*the EU system confers particular protection upon the EU-national investor, which is preferential to the protection conferred by the ECT and any BIT*" and highlights various investor protection provisions contained in the TFEU.[896] Spain seeks to confuse the different concepts of substantive protections offered under EU law, which would apply to the merits of a dispute brought under EU law, and the jurisdiction of the Tribunal. Crucially, Spain neither explains how these allegedly superior rights conflict with the provisions of the ECT, nor how they might serve to deprive the Tribunal of its jurisdiction under Article 26 of the ECT.

522. The fact is that the protection that nationals of EU Member States have under EU law is different from the protection that the ECT provides to qualifying "*Investors*" and their "*Investments*". The EU treaties cover a different subject matter. Indeed, investment protection under EU law is primarily focused on ensuring access to the market of another Member State.[897] Once an investment is made, EU law provides only limited protection, compared with the broad, sector-specific protection afforded by an investment treaty such as the ECT. For example, there is no obligation on the EU Member States to provide foreign investors or their investments with fair and equitable treatment.

523. Turning to the dispute-resolution provisions in Part V of the ECT, EU law does not provide for an investor to bring claims in international arbitration proceedings for violation of any illegal governmental action taken against foreign investment. While it is possible for a private investor to claim damages from a Member State concerning a breach of the rights afforded to it under the rules of the internal market, for example on free movement of capital or freedom of establishment, such claims need to be brought before the domestic courts of the State where the investment is located.

---

896 Counter-Memorial, paras. 54-66.

897 See for example, **Authority CL-116**, C Barnard, *The Substantive Law of the EU: The Four Freedoms* (2nd ed, Oxford University Press, 2007), p. 19.

The ECT, however, is different in that it allows investors direct recourse against the Contracting States through international arbitration.[898]

524. As stated above, the CJEU itself has stressed that an international dispute-settlement mechanism set forth by an international treaty to which the EU is a party is compatible with EU law and with the decisions of the court with jurisdiction to decide disputes under that treaty will be binding on the CJEU.[899] It is only decisions on the distribution of competence between the EU and its Member States, or on the legality of acts of European institutions, that are considered by the CJEU as falling within its exclusive jurisdiction.[900] Neither of these issues is relevant to the present dispute.

525. In light of the above, it is apparent that the ECT grants investors rights that are additional to any other rights provided by the internal market and that there is no inconsistency between EU law and the ECT. This was made very clear by, among others, the tribunals in *Electrabel, Eastern Sugar*, *Charanne* and *RREEF*.[901]

---

[898] On all these points, see **Authority CL-134**, *Eureko B.V. v The Slovak Republic*, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 245. In that case, the tribunal stated that "*the BIT establishes extensive legal rights and duties that are neither duplicated in EU law nor incompatible with EU law. The protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law (or, indeed, under the laws of any EU Member State). Those rights and duties are central to the purpose of the BIT*". The tribunal then went on to analyse whether EU law provides the same protections and guarantees as the BIT and concluded that this is not the case regarding, for example, fair and equitable treatment (para. 250), full protection and security (para. 260), protection from unlawful expropriation (para. 261), and the right to bring a claim before an UNCITRAL tribunal (para. 264). In the latter context, the tribunal noted that "[a]*n essential characteristic of an investor's rights under the BIT is the right to initiate UNCITRAL arbitration proceedings against a State party (as the host State) under Article 8 of the BIT. Such a consensual arbitration under well-established arbitration rules adopted by the United Nations, in a neutral place and with a neutral appointing authority, cannot be equated simply with the legal right to bring legal proceedings before the national courts of the host state*". See also **Authority CL-119**, *Eastern Sugar B.V. v The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, paras. 159 *et seq*.; **Authority CL-128**, *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, paras. 75 *et seq*.; and **Authority CL-135**, A Reinisch, "Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations" (2012) 39 Legal Issues of Economic Integration 159, pp. 167-170, specifically p. 167: "[a] *BIT contains very specific protection standards for admitted investments, which may ultimately be enforced through direct investor-state arbitration. EU law, however, aims at liberalizing trade and investment between Member States in order to create a comprehensive economic union. The liberalization guarantees of EU law comprised in the so-called four freedoms (of goods, persons, services and capital) primarily aim at access to other Member State markets, which is, in investment law, called the 'pre-establishment phase', while most Intra-EU BITs contain guarantees in the post-establishment phase once an investment has been made. This fact further reduces the potential overlap between EU law and applicable BITs*".

[899] **Authority CL-102**, CJEU, Opinion 1/91, *Economic Area Agreement*, ECR 1991, I-6099, 14 December 1991. See also **Authority CL-118**, C Söderlund, "Intra-EU BIT Investment Protection and the EC Treaty" (2007) 24 Journal of International Arbitration 455, p. 458: "[t]*he investor-state dispute resolution mechanism contained in a BIT does not call into question the competence of the ECJ. The EC Treaty only imposes obligations on Member States in their dealings with each other, inter alia, by instituting an obligation to refer disputes within the exclusive remit of the EC Treaty to the ECJ for adjudication to the exclusion of any other procedural remedy. It does not commit any non-signatory – such as a private investor – to submit to ECJ jurisdiction. Hence, provisions of the EC Treaty cannot intrude on the BIT-based investor-state dispute resolution facility*".

[900] **Authority CL-141**, S Schill, "Luxembourg Limits: Conditions for Investor-State Dispute Settlement under future EU Investment Agreements" (2013), 10 Transnational Dispute Management 1, pp. 8-9, referring to **Authority CL-102** , CJEU, Opinion 1/91, *Economic Area Agreement*, ECR 1991, I-6099, 14 December 1991, referring to CJEU, Opinion 1/00, *European Common Aviation Area*, ECR 2002, I-3498, 18 April 2002, paras. 12-13.

[901] See **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.166; and **Authority CL-119**, *Eastern Sugar B.V. v The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 165; **Authority CL-151**, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. 062/2012 Award, 21 January 2016, para. 439; **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 87.

526. Even if the ECT and EU treaties were found to cover the same subject matter, Article 16 of the ECT provides that the provision more favourable to the investor shall apply. Thus, if there were a provision of the EU treaties prohibiting Investor-State arbitration (which there is not), Article 26 would prevail. Article 26 of the ECT should also be held to prevail when applying the customary-international-law principle that where two treaties are signed between the same contracting parties, the later treaty takes precedence (which in this case is the ECT).[902]

527. There is therefore no basis on which the provisions of EU law could be considered to deprive investors such as the Claimants of the right to bring a claim against EU Member States under Article 26 of the ECT.[903] If the EU and its Member States had wished for this result, the obvious method to achieve it would have been to negotiate the inclusion of a disconnection clause in the ECT. As discussed in the following section, they chose not to do this.

**18.5 The ECT contains no disconnection clause; to construe an implicit disconnection clause is irreconcilable with the ordinary meaning of the ECT**

528. In the absence of a disconnection clause, as explained below, Spain appears to rely indirectly on certain doctrine to argue that the ECT contains an implicit disconnection clause providing that it does not apply to Intra-EU disputes.[904] Spain further contends that "*when the ECT was signed, the Member States of the then European Community were unable to contract obligations between them as regards the Internal Market as it is an area in which they had transferred their sovereignty to the then European Community*" and therefore "*Article 26 of the ECT does not generate any obligations between the Member States*".[905] This submission is not credible given that, as set out below: (a) before the conclusion of the ECT, the EU had used disconnection clauses where they were intended to apply; (b) the ECT contains disconnection clauses where they are intended to apply; and (c) had it been intended, the inclusion of a disconnection clause would have been eminently necessary given the ordinary meaning of Article 26 of the ECT.

529. The ECT contains no disconnection clause or declaration of competencies that would allow the Tribunal to disregard its provisions in an Intra-EU dispute. Disconnection clauses are a well-known mechanism of public international law. They have been widely used by the EU, even before the

---

902 See Articles 30 and 59 of the Vienna Convention enshrining the *lex posterior* principle referred to above at para. **Error! Reference source not found.**.

903 **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paras. 74 and 77.

904 Counter-Memorial, para. 90 and fn. 16. Spain does not expressly state, however, that the ECT contains an implicit disconnection clause concerning intra-EU disputes.

905 Counter-Memorial, para. 83.

ECT was negotiated. The first treaty to which the EU is a party that contains a disconnection clause is the 1988 Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters. This provides, in Article 27, as follows:

> "Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community."[906]

530. The purpose of such a clause is to ensure that, as between those parties to a multilateral treaty that are also parties to a regional organisation, the rules of the regional organisation instead of the treaty apply. This is also the purpose the EC ascribes to these clauses, namely to:

> "… 'clarify relations between Community or EU rules, on the one hand, and the provisions of each of the conventions on the other hand' and 'to ensure the coexistence of this Convention with other (including existing) international legal instruments dealing with matters which are also dealt with in this Convention. If Member States would be obliged to among themselves apply the law of a convention or a treaty instead of Community law these would, 'jeopardise the integrity and development of Community law in the area covered by the Convention, unless they are countered by a disconnection clause in the Convention itself.'"[907]

531. In the absence of such a disconnection clause, a multilateral treaty applies between all of its contracting parties. In the words of Tietje:

> "In the reverse – resulting from the practice of disconnection-clauses – without a respective contractual provision, from the perspective of public international law, a corresponding treaty has supremacy of application over Union law. That is not a particularity, but it is imperative for international law."[908]

532. This commentary makes it abundantly clear that, in the present circumstances, the ECT is to apply with full effect as between EU Member States.

---

906 **Authority CL-114**, 1988 Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, Article 27, quoted in *Fragmentation of International Law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission*, finalised by M Koskenniemi, International Law Commission, fifty-eight session, Geneva, 1 May-9 June and 3 July-11 August 2006, Document A/CN.4/L.682, 13 April 2006, para. 289.

907 **Authority CL-121**, M Smrkolj, "The Use of the 'Disconnection Clause' in International Treaties: what does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?" (2008), presented at the GARNET Conference, "The EU in International Affairs", Brussels, 24-26 April 2008, pp. 5-6. See also **Authority CL-114**, 1988 Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, Article 27, quoted in *Fragmentation of International Law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission*, finalised by M Koskenniemi, International Law Commission, fifty-eight session, Geneva, 1 May-9 June and 3 July-11 August 2006, Document A/CN.4/L.682, 13 April 2006, para. 289: "[t]*he purpose of the clause is, according to the European Commission, to ensure the continuing application of Community rules between EC member States without any intent to affect the obligations between member States and other parties to treaties*"; and **Authority CL-124**, C Tietje, "The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States" (2008), Beiträge zum Transnationalen Wirtschaftsrecht, Martin-Luther-Universität Halle-Wittemberg, No. 78, pp. 10-11.

908 **Authority CL-142**, C Tietje, "Bilateral Investment Treaties Between EU Member States (Intra-EU BITs) – Challenges in the Multilevel System of Law" (2013), Transnational Dispute Management 1, p. 10.

533. Despite the fact that the EU had experience of disconnection clauses (and indeed was already using them) by the time the ECT was negotiated, the ECT does not contain a disconnection clause specifying that its provisions do not apply to the EU Member States' *inter se* relationships. In the absence of such a clause, there can be no doubt that the ECT applies to Intra-EU disputes.[909]

534. The absence of a disconnection clause with regard to the EU Member States' *inter se* relationships is all the more meaningful given that the ECT contains various provisions catering for the application of other international treaties. Annex 2 to the Final Act of the European Energy Charter Conference contains a decision regarding the Svalbard Treaty as follows:

> "In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply."[910]

535. By contrast, in the context of the ECT, the EU and its Member States did not negotiate a similar clause for their *inter se* relationships.[911] Reading an implicit Intra-EU disconnection clause into the ECT is therefore irreconcilable with the ordinary meaning of the ECT.[912]

536. Consequently, it cannot reasonably be maintained that the Claimants are not entitled to bring the present claim. In this context, it is worth quoting the decision of the *Electrabel* tribunal:

> "this Tribunal is an international tribunal established under the ECT… It is therefore no answer for the European Commission to submit that the 'proper avenue' for the Claimant lies only in 'the Community courts', whether the Respondent's own national courts or the [CJEU]."[913]

---

909 **Authority CL-124**, C Tietje, "The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States" (2008), Beiträge zum Transnationalen Wirtschaftsrecht, Martin-Luther-Universität Halle-Wittemberg, No. 78, p. 11. ("[t]*he Energy Charter Treaty does not contain a 'disconnection clause'. From a public international law perspective, this again clearly indicates that the ECT establishes a comprehensive legally-binding effect, also with regard to the inter se relationship of the EU Member States*.").

910 **Exhibit C-1**, Energy Charter Treaty, 17 December 1994, p. 135.

911 Moreover, the ECT also does not contain any declaration of competencies on the part of the EU and its Member States. As Tietje observes, internal competence allocation between the EU and its Member States is not legally relevant and at no time had the EU or its Member States issued a document of public international law regarding the precise allocation of their internal legal competences. Again, this means that the ECT applies in full to the *inter se* relationship of EU Member States. See **Authority CL-124**, C Tietje, "The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States" (2008), Beiträge zum Transnationalen Wirtschaftsrecht, Martin-Luther-Universität Halle-Wittemberg, No. 78, pp. 9-10.

912 See **Authority CL-152**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paras. 78-87; **Authority CL-154**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 207.

913 **Authority CL-86**, *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.37.

537. The same applies here. The Claimants have the unconditional right to bring a claim against Spain in arbitral proceedings under Article 26 of the ECT. The Claimants have chosen to exercise this right and the Tribunal has jurisdiction to hear their claims.

## 19. THE TAX OBJECTION

### 19.1 Introduction

538. Spain's second objection is that the Tribunal does not have jurisdiction to hear disputes concerning taxation measures pursuant to Article 21 of the ECT (the so-called taxation carve-out).[914] On this basis, Spain contends that the Tribunal may not consider whether the 7% Levy contained in Law 15/2012 constitutes a breach of Spain's obligations under Article 10(1) of the ECT.[915] For the reasons outlined in this section, it is clear that the ECT does give rise to obligations concerning taxation measures that are not *bona fide*. In other words, the tax carve-out does *not* apply if the challenged measure is not a *bona fide* tax. Consequently, the key issue for the Tribunal to determine is whether the 7% Levy is *a bona fide* tax or, on the contrary, a measure implemented under the guise of taxation.

539. Spain implemented the 7% Levy as part of a series of measures designed to strip away and ultimately dismantle the incentive regime upon which the Claimants were induced to invest. It is a backdoor tariff cut labelled as "*a tax*" to scale back even further the incentives provided under RD 661/2007, in violation of Spain's obligations under the ECT. It has a direct economic impact on installations that qualified under the RD 661/2007 economic regime (and discriminated against these installations) and, as explained further below, achieves the opposite of its officially professed aim.

540. section 19.2 below addresses: (a) the basis on which the Article 21 exemption only applies to *bona fide* taxation measures and not to implement unlawful measures under the cloak of taxation; (b) how the distinction is drawn under international law; and (c) the evidentiary requirements for concluding that a tax is not *bona fide*. section 19.3 establishes why the 7% Levy is not a *bona fide* tax. section 19.4 explains why Spain's defence grounded on its own characterisation of the 7% Levy as a tax under its domestic law is irrelevant to the present dispute. Finally, section 19.5 states why Spain's submissions concerning the definition of "tax" get it nowhere.

### 19.2 Article 21 only applies to *bona fide* Taxation Measures

#### (a) The requirement that Taxation Measures be *bona fide* follows from the central principle of good faith under international law

[914] Counter-Memorial, section III(B).
[915] Counter-Memorial, paras. 102-105.

541. It is necessary at the outset to specify the basis for the requirement that Article 21 only applies to *bona fide* taxation measures. Good faith is a basic principle for the interpretation of any treaty. This is evident from Article 31(1) of the Vienna Convention, which requires that "[a] *treaty shall be interpreted in good faith*". Thus, the ILC Draft Articles on the Law of Treaties with Commentaries, 1966, state:

> "(1) *Pacta sunt servanda*—the rule that treaties are binding on the parties and must be performed in good faith—is the fundamental principle of the law of treaties. Its importance is underlined by the fact that it is enshrined in the Preamble to the Charter of the United Nations. As to the Charter itself, paragraph 2 of Article 2 expressly provides that Members are to "*fulfil in good faith the obligations assumed by them in accordance with the present Charter*."[916]

542. The ILC Draft Articles note that there is "*much authority*" for this principle in the jurisprudence of the ICJ, the Permanent Court of International Justice and the decisions of arbitral tribunals.[917] Good faith is a basic principle that governs States' performance of treaties and is reflected in Article 26 of the Vienna Convention, which provides that "[e]*very treaty in force is binding on the parties to it and must be performed by them in good faith*". In the words of the ICJ: "[t]*he principle of good faith is, as the Court has observed, one of the basic principles governing the creation and performance of legal obligations*".[918]

543. It follows from the good faith principle that Spain cannot simply avoid liability by framing a harmful measure as a tax and then pointing to the literal wording of the taxation carve-out. An example from the PCIJ, to which the commentaries on the ILC Draft Articles refer, is instructive for present purposes:

> "[T]he Permanent Court of International Justice, in applying treaty clauses prohibiting discrimination against minorities, insisted in a number of cases, that the clauses must be so applied as to ensure the absence of discrimination in fact as well as in law; in other words, the obligation must not be evaded <u>by a merely literal application of the clauses</u>."[919] (emphasis added)

544. Importantly, the ILC Commentaries also state that:

---

916 **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, p. 211.

917 **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, p. 211.

918 **Authority CL-100**, *Border and Transborder Armed Actions (Nicaragua v Honduras)*, ICJ Rep 1988, Judgment on Jurisdiction, 20 December 1988, p. 105.

919 **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, p. 211. The cases referred to in this quote are: *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, P.CM. (1932), Series A/B, No. 44, p. 28; and *Minority Schools in Albania*, PCIJ (1935), Series A/B, No. 64, pp. 19 and 20.

> "(4) Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible."[920] (emphasis added)

545. One of the objects and purposes of the ECT is to ensure that qualifying foreign investors are accorded fair and equitable treatment. Spain must not use its tax powers to deprive the rights of the Claimants to fair and equitable treatment by stripping away their rights in a way calculated to fall within the taxation carve-out of the ECT. This principle is so "*clearly implicit*" that it is not specified in the ECT (or, for that matter, in the Vienna Convention).

546. Similarly, good faith is a relevant rule of international law that the Tribunal must take into account pursuant to Article 31(3)(c) of the Vienna Convention. As noted by the tribunal in *Canfor Corporation v The United States of America*, it is "*a fundamental principle of international law that States Party to a treaty must perform treaty obligations in good faith and, therefore, would not intentionally take steps that would undermine performance of those obligations*".[921]

547. The centrality of the principle of good faith under international law requires the following with regard to the present dispute: (a) the Tribunal must interpret Article 21 of the ECT in good faith; (b) Spain must observe its ECT obligations in good faith and must not take steps to undermine its performance of those obligations or to frustrate the purpose of the ECT; and (c) Spain must exercise its rights under the ECT in good faith. It follows that, if Spain wishes to avail itself of the exemption at Article 21 of the ECT, it may only do so if the exemption concerns *bona fide* taxation measures. If, on the contrary, the disputed measure is merely a disguised tariff cut implemented to achieve an illicit purpose, the investor-protection provisions of the ECT must apply; a State cannot abuse its right to tax as an instrument to treat investors unfairly.

548. In this sense, Article 21 of the ECT reflects the general position under international law:

> "While international law has long recognized that taxation is a necessary and legitimate component of the State's sovereign prerogative, it equally recognizes that the taxing power may be easily used to confiscate, discriminate, violate specific commitments and otherwise serve as an abusive tool, particularly in the context of foreign investment where specific tax incentives may have been given to attract foreign investment.

---

[920] **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, p. 211

[921] **Authority CL-115**, *Canfor Corporation v The United States of America; Terminal Forest Products Ltd v United States of America,* UNCITRAL, Decision on Preliminary Question, 6 June 2006, paras. 182 and 323.

> What underlies all of the limitations on the sovereign taxing prerogative is that the power to tax is not really what is at stake. In each instance, the cloak of taxation is peeled away in order to determine whether the State has used its government authority to achieve an unlawful end under principles of international law."[922]

549. The justification for this limitation on the Article 21 exemption is obvious. It was not the object or purpose of Article 21 of the ECT to enable States to use their upper hand to frame their conduct as taxation measures in order to achieve an unlawful end with impunity. This was confirmed by the *Yukos* tribunal, which held that the tax exemption of Article 21 of the ECT does not apply to "*actions that are taken only* <u>*under the guise of taxation*</u>*, but in reality aim to achieve an entirely unrelated purpose*".[923]

550. The Energy Charter Secretariat itself has summarised the holdings in *Yukos* as follows:

> "the [Yukos] Tribunal concluded that Article 21 carve-out did not apply to the Russian Federation's measures because they were not, on the whole, a bona fide exercise of tax powers. According to the Tribunal, <u>simply labelling a measure as taxation would not subject a taxation action to an exemption under the carve-out in Article 21(1)</u>.
>
> Thus, in a nutshell, the Tribunal found that:
>
> <u>1. Whether it is explicitly provided within the carve-out provision or not, Contracting Parties to the ECT shall take measures in good faith irrespective of whether they are labelled as taxation measures or not</u>.
>
> 2. The referral mechanism in Article 21(5) is not binding in matters of expropriatory taxation, and shall not be a bar to arbitrability, particularly where the relevant authorities would not be able to come to some timely and meaningful conclusion about the disputes."[924] (emphasis added)

551. In light of the above, the mere fact that the 7% Levy is labelled as a taxation measure does not automatically mean that the taxation carve-out applies. For it to apply, the Tribunal must be satisfied that the 7% Levy is a *bona fide* tax.

---

922 **Authority CL-150**, R Teitelbaum, "What's Tax got to do with it? The *Yukos* Tribunal's Approach to Motive and Treaty Interpretation" (2015), 5 Transnational Dispute Management 1, pp. 4-5.

923 **Authority CL-157**, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, Case PCA No. AA 227, Final Award, 18 July 2014, para. 1407 (emphasis added). The *Yukos Award* has been set aside by a District Court in the Hague. The District Court took issue with the arbitral tribunal's decision to accept jurisdiction over the case despite Russia having only signed, and not ratified, the ECT. The District Court held that the ECT could not be applied to Russia by virtue of its acceptance of provisional application of the treaty and that each individual measure of the ECT must be assessed for its compatibility with Russian law before it could be provisionally applied. The District Court however explicitly declined to address Russia's argument that a carve-out in the ECT for tax matters should have excluded the tribunal's jurisdiction. The Yukos' shareholders are said to [have] appealed the decision.

924 **Authority CL-149**, Uğur Erman Özgür, "Article 21 of the Energy Charter Treaty in Context" (2015), Energy Charter Secretariat, June 2015, p. 48.

### (b) The distinction between *bona fide* and abusive taxation measures under international law

552. Given that abusive taxes do not fall within the Article 21 exemption, it must be determined in what circumstances a taxation measure may be considered not to be *bona fide*. The requirement of good faith under investment treaties has been analysed by many tribunals and, for the reasons set out above, it pervades all aspects of Investor-State relations. This has resulted in many *dicta* on the good faith obligations of States, some of which are particularly pertinent in the context of the present dispute. The award in *Saluka v Czech Republic* explains *bona fide* conduct as follows:

> "A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination."[925]

553. As such, good faith obliges a State not to violate the requirements of consistency, which is linked to the concept of estoppel. Indeed, Brownlie rightly notes the overlap of good faith and estoppel: "[a] *considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency*".[926] Similarly, the tribunal in *Nova Scotia Power v Venezuela* held that the concept of estoppel or *venire contra factum proprium non valet* was an aspect of good faith under international law long recognised in investment arbitration:

> "The existence of the doctrine of *estoppel*, or the prohibition of *venire contra factum proprium*, is consolidated in public international law, even though its existence as a general principle of law or as customary law is subject to debate. There is a consensus around the origin of the doctrine, which in public international law can be viewed as connected to the principle of good faith. Its applicability has been recognised in investment arbitration for a long time."[927]

554. The ILC Commentaries to the Vienna Convention also note that:

> "(1) The foundation of the principle that a party is not permitted to benefit from its own inconsistencies is essentially good faith and fair dealing (*allegans contraria non audiendus esi*). The relevance of this principle in international law

---

925 **Authority CL-43**, *Saluka Investments B.V. v The Czech Republic,* UNCITRAL, Partial Award on Jurisdiction and Merits, 17 March 2006, para. 307.

926 **Authority CL-110**, I Brownlie, *Principles of Public International Law* (6th ed Oxford University Press, 2003), p. 616.

927 **Authority CL-127**, *Nova Scotia Power Incorporated (Canada) v The Bolivarian Republic of Venezuela*, UNCITRAL, Decision on Jurisdiction, 22 April 2010, para. 141.

is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases."[928]

555. Applying to the present case, this principle holds that Spain cannot benefit from its own inconsistencies by making specific commitments to investors and then manipulating an ostensible loophole in the ECT to avoid honouring that commitment.

556. Moreover, the tribunal in *Daimler v Argentina* specified that the good faith requirement is meant to encapsulate well-established principles such as, among other things, *effet utile*, honesty, fairness and reasonableness in interpreting a treaty and avoidance of abuse of rights.[929] These principles require that Spain not be allowed to abuse its right to taxation under the literal wording of the ECT to deprive the Claimants of their right to fair and equitable treatment.

557. The result is that, when performing its obligations under an international investment agreement and when seeking to avail itself of an exemption in such an agreement, a State must not act in a way that is manifestly inconsistent; nor can it flout the principle of estoppel that is binding on it under international law. Equally, a State cannot implement a measure with a declared purpose that is merely a sham. The Tribunal must also take these principles into account when interpreting the ECT.[930]

**(c) A determination that a State has implemented an unlawful measure "*under the guise of taxation*" must be deduced from conduct and determined on the balance of probabilities**

558. The task of determining whether a taxation measure is *bona fide* must of course be inferred from the conduct of the State; a State will not expressly declare that a taxation measure is a sham.[931] This means that a State's pattern of conduct must be viewed in its totality and then it must be determined, on the balance of probabilities, whether the measure concerned is *bona fide*.

559. This is apparent from the following passage of the *Yukos* award:

---

928 **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, p. 239. The ICJ cases to which the ILC Commentaries to the Vienna Convention refer are the following: *The Arbitral Award made by the King of Spain*, I.C.J. Reports 1960, pp. 213 and 214; and **Authority CL-2**, *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Rep 1961, Preliminary Objections, Judgment of 26 May 1961, pp. 23-32.

929 **Authority CL-108**, *Daimler Financial Services AG v The Argentine Republic*, ICSID Case No. ARB/05/1, Dissenting Opinion of Judge Charles N Brower, 15 August 2012, para. 7; and **Authority CL-109**, *Daimler Financial Services AG v The Argentine Republic*, ICSID Case No. ARB/05/1, Award 22 August 2012, para. 173 and fn. 317.

930 As a recognised rule of international law, pursuant to Article 31(3)(c) of the Vienna Convention, the Tribunal must specifically take into account the principle of estoppel when interpreting Article 21 of the ECT.

931 The reason for this was well expressed by the tribunal in **Authority CL-137,** *Renta 4 S.V.S.A, Ahorro Corporacion Emergentes F.I., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L v The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012, in its consideration of whether tax measures amounted to a breach of an investment treaty at para. 45: "[i]*ndirect expropriation, of course, does not speak its name. It must be deduced from a pattern of conduct, observing its conception, implementation, and effects as such, even if the intention to expropriate is disavowed at every step*".

> "The crucial question addressed in this chapter of the Award, therefore, is whether Claimants have discharged their burden of proof and established that the tax assessments, and the enforcement processes of the Russian Federation which followed, <u>are more consistent with</u> the conclusion that they evidence a punitive campaign against Yukos and its principal beneficial owners with sanctions entirely disproportionate to the company's tax liability, rather than with the conclusion that they were a legitimate exercise of tax enforcement."[932] (emphasis added)

560. The same applies in the present case. The Tribunal must determine whether the implementation of the 7% Levy is "*more consistent with*" the conclusion that it forms part of a scheme to deprive the Claimants of the rights they were granted under RD 661/2007 despite the stabilisation provision found therein. This is confirmed by commentary on the evidential approach adopted in the *Yukos* award:

> "The *Yukos* tribunal did not view Article 21 of the ECT as creating a presumption in favor of the sovereign prerogative to tax. Rather, the tribunal determined that the very existence of a so-called "tax carve-out" increased the importance of its role in assessing the Russian Federation's motive because the existence of a limitation on some tax claims could make it that much easier for a sovereign to hide behind the guise of tax measures to violate international law."[933]

561. This commentary also correctly notes that "[t]*he* Yukos *tribunal articulated a 'more likely than not' or <u>'balance of the probabilities'</u> standard of proof for finding that the tax assessments and measures that followed <u>were part of a scheme to deprive</u>* <u>Yukos</u> *<u>of its rights and assets</u>*".[934] Accordingly, there is no presumption that a tax measure cannot amount to a breach of the ECT; the fact that the ECT grants States latitude concerning their taxation measures makes it all the more fundamental for a tribunal to examine the real purpose of the measure to ensure a tax is not merely the instrument chosen to violate international law.

562. As a result, where, as here, there is *prima facie* evidence that the 7% Levy is arbitrary and discriminatory, the Tribunal may draw inferences in favour of the Claimants, in the same way that the tribunal did in *Yukos*.[935] Further, as held by the tribunal in *Feldman v Mexico*, where a taxation

---

932 **Authority CL-157,** *Yukos Universal Limited (Isle of Man) v The Russian Federation*, Case PCA No. AA 227, Final Award, 18 July 2014, para. 514.

933 **Authority CL-150**, R Teitelbaum, "What's Tax got to do with it? The *Yukos* Tribunal's Approach to Motive and Treaty Interpretation" (2015), 5 Transnational Dispute Management 1, p. 11.

934 **Authority CL-150**, R Teitelbaum, "What's Tax got to do with it? The *Yukos* Tribunal's Approach to Motive and Treaty Interpretation" (2015), 5 Transnational Dispute Management 1, p. 22 (emphasis added).

935 **Authority CL-150**, R Teitelbaum, "What's Tax got to do with it? The *Yukos* Tribunal's Approach to Motive and Treaty Interpretation" (2015), 5 Transnational Dispute Management 1*: "the* Yukos *tribunal drew inferences in favor of the Claimants when it appeared,* prima facie*, that the Russian Federation's measures were heavy-handed or arbitrary, and whenever the Russian Federation's explanations for*

measure is *prima facie* arbitrary or discriminatory, the burden of proof switches to the respondent State to provide a rational explanation for its conduct.[936] The Appellate Body of the WTO has confirmed that this is the general position under international law:

> "… various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[937] (emphasis added)

563. The tribunal in *Asian Agricultural Products v Sri Lanka* also demonstrated this in finding that "*in case a party adduces some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent*".[938] Accordingly, the Tribunal is not confined by the unattractive submission that the tax must be *bona fide* unless there is conclusive proof that it is a sham to achieve a tariff cut. On the contrary, Article 21 is not triggered and there is a breach of the ECT if the balance of the evidence and surrounding circumstances are more consistent with the claim that the 7% Levy was implemented as a disguised cut of the rights granted under RD 661/2007.

### 19.3 The 7% Levy is not a *bona fide* measure

564. In light of the principles outlined in the preceding sub-section, it is readily apparent from Spain's conduct that the 7% Levy is not a real tax measure, but was in fact a measure designed to strip away the rights of the Claimants' installations under the RD 661/2007 regulatory regime. This is most obvious from the fact that the money raised by the 7% Levy goes to the State budget and an identical amount is then returned to the electricity system. It therefore serves the exact same purpose as a tariff cut. The only difference is that the funds raised by the tariff cut are channelled

*those measures were either inconsistent, contradicted by witness testimony, contradicted by the treatment of other taxpayers or contradicted by Russian law*", p. 22.

[936] **Authority CL-140**, *Marvin Roy Feldman Karpa v The United Mexican States*, ICSID Case No. ARB (AF)/99/1, Award, 16 December 2012, paras. 177-178.

[937] **Authority CL-105**, *WTO Appellate Body, United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* AB-1997-1, WT/DS33/AB/R, adopted 25 April 1997, p. 14.

[938] **Authority CL-101**, *Asian Agricultural Products Limited v The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 56.

through the State budget,[939] which Spain accepts.[940] This is completely unnecessary; the only purpose for this intermediate step via the State budget is so that the measure can be labelled as a tax.

565. There are numerous other factors that reveal the 7% Levy not to be a *bona fide* tax. First, the Government's conduct reveals that the 7% Levy was intended as (and in fact was) a tariff cut, notwithstanding the fact that it was to be labelled and presented as a tax. Secondly, the 7% Levy pointedly achieves the opposite of its official aim. This is evident from the Regulatory Dossierprepared prior to its enactment.[941] Thirdly, the 7% Levy can only be understood as part of a Government scheme to dismantle the RD 661/2007 economic regime through which the Claimants were encouraged to invest. Such conduct is manifestly inconsistent and constitutes a breach of the principle of good faith and the associated concept of estoppel.

**(a) The Government's conduct reveals that the 7% Levy was intended as a tariff cut**

566. In order to understand the Government's underlying motives concerning the 7% Levy, it is important to understand the context in which Law 15/2012 was approved.

567. On 3 July 2012, the Spanish press announced that the Government was preparing an important set of regulatory reforms for the electricity sector.[942] Specifically, the Government was likely to introduce a "revenue tax", the 7% Levy, for all generators in Spain.[943]

568. The Government introduced the 7% Levy in a draft bill on 28 September 2012 (the **Draft 2012 Bill**).[944] The explanatory statements to the Draft 2012 Bill provided that its purpose was to harmonise the Spanish tax system with environmental policy, in accordance with EU policies. Further, with this law Spain aimed to achieve the financial sustainability of the Electricity System,

---

939 **Exhibit C-48**, Law 15/2012 of 27 December 2012, concerning tax measures to ensure energy sustainability (published on 28 December 2012, Additional Provision two.

940 Counter-Memorial, paras. 185-186.

941 The Spanish Constitution grants the Government of Spain (in addition to Congress and the Senate) the right to initiate the law-making process. The procedure for the preparation of laws and regulations is set out in Law 50/1997 of 27 November 1997 titled "Ley del Gobierno" (the **Government Law**), which applies to the Government's preparation of laws and regulations. Title V of the Government Law (Articles 22-26) sets out the rules on the form of preparation of laws and regulations, as well as detailing the competent bodies for legislative initiation at the State level, and on the regulatory powers and controls on the acts of the Government. Regarding the procedure for the drafting of laws and regulations, each Ministry is responsible for preparing the draft legislation. Within the relevant Ministry, the competent directorate-general proposing the legislation is under a statutory obligation to produce different economic reports called "Memorias" (the **Memorias**), setting out the justification for the proposed legislation, as well as opportunity reports regarding the timing, necessity and appropriateness of the proposed legislation (the **Opportunity Reports**). In addition, the Technical Secretariat General (**TSG**) of the Ministry proposing the law or regulation must validate the proposal. For the purposes of this Reply Memorial, the Memorias, the Opportunity Reports or any documents issued by the TSG validating or rejecting legislation proposals, as well as any other documents issued pursuant to Title V of the Government Law, will hereinafter be jointly referred to as the **Regulatory Dossier**.

942 **Exhibit C-48**, Law 15/2012 of 27 December 2012, concerning tax measures to ensure energy sustainability (published on 28 December 2012) also creates: (i) the tax on the production of spent nuclear fuel and radioactive waste from nuclear power generation; and (ii) the tax on the storage of spent nuclear fuel and radioactive waste in centralised facilities.

943 See Memorial, paras. 231-236.

944 **Exhibit C-181**, Draft Bill on tax measures for sustainable energy, 28 September 2012.

which was by then running a significant deficit as, because of the Government's decision not to comply with the income-sufficiency principle, its income did not cover all regulated costs to the system.[945] Moreover, the Second Additional Provision of the Draft 2012 Bill, titled "*Costs of the Electricity System*", stipulated that the law was intended to address this deficit, and that the funds obtained through different forms of measures would be used to finance the Electricity System's regulated costs.[946]

569. The Draft 2012 Bill provided that the production of all electricity would be subject to a 6% levy and it was to apply regardless of the regulatory regime under which the installation was operating. Ultimately, Law 15/2012 introduced the levy at the higher rate of 7%. It also introduced an amendment to Law 38/1992, of 28 December on Special Taxes contained in Article 28 of Law 15/2012.[947]

570. By applying the so-called "tax" to all revenues generated by the plants, the effect of the Government's measure is equivalent to a tariff cut or a reduction in the amount of incentives RE installations are entitled to. This is for two reasons. First, RE generators operate in a regulated environment, so that most of the revenues they receive from the generation of electricity (namely the FIT under RD 661/2007) are fixed by the Government. This means that RE generators have no choice but to absorb the decrease in those revenues as a result of the levy. Secondly, the cost of paying the tax is higher for RE installations. A RE installation with the same MWh as a conventional installation pays more in tax per MWh (irrespective of its actual profitability). In particular, for a RE installation under the Premium option (the Claimants' preferred remuneration option),[948] the taxable base of the levy (i.e. the installation's entire revenues) consists of both the pool price obtained on the market *and* the premium paid on top of this. Alternatively, where RE installations had opted for the regulated tariff option, the tax payment is also higher than the equivalent for conventional installations because the regulated tariff is (by necessity and design) higher than the market price. Consequently, in all cases, the taxable basis upon which the tax is calculated is higher for RE installations, requiring them to pay a higher cost per MWh produced compared to conventional generators.

---

945 **Exhibit C-181**, Draft Bill on tax measures for sustainable energy, 28 September 2012, p. 1.

946 **Exhibit C-181**, Draft Bill on tax measures for sustainable energy, 28 September 2012, p. 9.

947 **Exhibit C-48**, Law 15/2012 of 27 December 2012, concerning tax measures to ensure energy sustainability (published on 28 December 2012, Article 28. See also Brattle Regulatory Report, para. 149.

948 First Moreno Statement, para. 68.

571. Prior to the enactment of Law 15/2012, and while the draft bill of 2012 was on the table, the Government has all but confirmed that these measures were designed as a means to cut the incentives that it had committed to provide to the Claimants' installations throughout their entire operational life. In an interview discussing the introduction of "*fiscal measures*", Mr Jose Manuel Soria, the former Minister for Industry, Energy and Tourism,[949] stated the following:

> "We could have opted for a reduction in premiums but we opted instead for the fiscal measures. There were distinct alternatives on the table, it's true, but finally the one that I took to the Council of Ministers was the one for a tax on generation, of a fixed type."[950]

572. Mr Soria did not state why he chose to implement the reduction in premiums as a tax. Mr Soria's comment is an acknowledgement that Spain was intent on stripping away the rights afforded under RD 661/2007 and effecting a tariff cut. The 7% Levy was the method chosen to achieve this. It is simply a tariff cut that has been presented in the form of a "tax". By imposing the 7% Levy instead of imposing an actual tariff cut, Spain was able to circumvent the stabilisation provision in RD 661/2007 that provided that any changes to the tariff would only apply to new investments.

573. To appreciate fully the context of Mr Soria's comments, it must also be borne in mind that the 7% Levy was implemented at a time when Spain was already facing several claims brought against it under the ECT that arose from its retroactive cuts to RD 661/2007.[951] As such, by the time Law 15/2012 was implemented in December 2012, Spain was fully aware that adverse changes to existing investments made under RD 661/2007 had provoked claims from foreign investors enforcing their rights under the ECT.

574. Thus, when Spain implemented the 7% Levy, it was fully on notice that further changes affecting these other international investors were likely to provoke additional ECT claims. It had retained legal advice to defend ECT claims concerning changes to RD 661/2007 and must have been familiar with its obligations under the ECT and any potential loopholes that may exist with respect to those obligations.[952] It was at this time, in December 2012, that Spain elected to introduce these cuts in the form of a taxation measure. It cannot reasonably be denied that, when it introduced the 7%

---

949 **Exhibit C-182**, New York Times, Press Article, "*Spain's Industry Minister steps down over Panama Papers*", 15 April 2016. Mr Soria has subsequently resigned as a result of the fallout from the Panama Papers.

950 **Exhibit C-131**, La Gaceta, Press Article, "*Interview with the Minister of Industry Energy and Tourism*", 14 October 2012.

951 See the Energy Charter Treaty Web page http://www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/?id=226&tx_kesearch_pi1%5Bsword%5D=spain&tx_kesearch_pi1%5Bpage%5D=1&tx_kesearch_pi1%5BresetFilters%5D=0&tx_kesearch_pi1%5BsortByField%5D=&tx_kesearch_pi1%5BsortByDir%5D=&x=0&y=0 (last access on 15 March 2017).

952 Spain instructed the international law firm Herbert Smith Freehills to act on the *Charanne* and *PV Investors* matters, see http://www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/31-the-pv-investors-v-spain/; and http://www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/34-charanne-the-netherlands-and-construction-investments-luxembourg-v-spain/ (last accessed 11 August 2016).

Levy, Spain was aware of the content of Article 21 of the ECT and its special provisions for taxation measures. The inference must be that the 7% Levy was framed as a tax with the purpose of avoiding liability for breaching investors' rights under the ECT.

575. Having consciously framed the tariff cut as a tax in the midst of looming ECT claims, Spain seeks to avail itself of the ECT's tax carve-out now that these claims have been brought. It is not, however, permissible for Spain to manipulate its domestic law in this manner in order to evade its obligations under the ECT. Its decision to implement the tariff cuts in the form of a tax does not constitute a *bona fide* taxation measure and consequently Spain cannot avail itself of the taxation exemption at Article 21 of the ECT.

**(b) The 7% Levy is discriminatory and unrelated to its purported rationale**

576. As noted above, the 7% Levy is particularly harmful to RE installations. As explained in the Memorial, under the RD 661/2007 economic regime, RE installations were entitled to transfer all their net power to the grid in exchange for: (a) the Fixed Tariff; or (b) the market price plus a regulated Premium.[953] However, subsequently, RDL 2/2013 of February 2013 reduced the Premium to zero and in essence left qualifying installations with only the possibility of selling under the Fixed Tariff (before the entire RD 661/2007 economic regime was withdrawn in 2013). This meant that the income received was fixed by the Government. Therefore, where the Government imposes a levy on the production of energy by these installations, although it is not a direct tariff cut, it has the same effect as a tariff cut.

577. The effect of the 7% Levy on RE installations can be contrasted with that on conventional generators, which are paid by the consumer (at a price largely fixed by the generators) and can ultimately increase the cost of the electricity they sell and pass some or all of the additional cost imposed by the levy on to consumers when selling electricity in the open market. As such, the effect of the 7% Levy specifically targets RE generators because they have no other option available to them but to bear the full brunt of the measure with respect to the revenue derived from the FIT.

578. This description of the effect of the 7% Levy is far from tendentious. A recent scholarly article describes the 7% Levy measure as follows:

> "Then in July 2013, the Spanish government approved Royal Decree-Law 9/2013 which completely abolished the tariff regulation and replaced it with a

[953] Memorial, paras. 23 and 127.

new remuneration scheme. The new calculations for remuneration were not based on energy produced but on installed capacity and the exploitation costs of a standard facility. In addition, the 2013 changes included a 7% tax increase for power generation, which due to the different treatment of renewables and fossil-fuel-based power production, impacted and targeted only renewable energy production (these producers had no ability to pass on the costs to the final consumer). The tax carve-out contained in Article 21 of the ECT could be one of the reasons why the government took this approach."[954] (emphasis added)

579. The discrimination inherent in the 7% Levy is all the more striking since it is in stark contrast to the situation when the Claimants invested. The Claimants were enticed by Spain's attractive incentive regime and its strong commitment to RE. Having made those investments and poured money into the Spanish renewable sector, RE investors have been targeted by a measure that has a highly negative impact on them, yet leaves conventional generators comparatively unscathed.

580. Such measures, even if carefully presented in a form that notionally applies to all installations, cannot be in good faith if it has the effect, and indeed the aim, of unfairly targeting a particular sector. This applies *a fortiori* where the discrimination is in direct contradiction to Government commitments that induced the foreign investors to invest. Where foreign investors have been deliberately enticed to invest in a sector by a regime of incentives that the Government has committed not to change for the lifetime of the investments, it is unjustifiably discriminatory when those same investors are targeted with taxes that cut those guaranteed incentives. It is all the more unjustifiable when this forms part of a Government campaign to strip away the entire incentive regime. It follows that, when interpreting the tax carve-out in good faith and in light of its purpose, the Tribunal must conclude that the 7% Levy is not a *bona fide* measure for which the exemption applies.

581. The discriminatory nature of the 7% Levy is also clear when it is considered that its effects are at odds with its purported aim. The opening paragraph of the preamble to Law 15/2012 states that the aim of the tax measures is to support the environment and the environmental policy of the EU:

> "The objective of this Law is to harmonise our tax system with a more efficient and respectful use of the environment and sustainable development, values which inspire this tax return, and as such, bring it into line with the basic principles that govern the tax, energy and of course the environmental policy of the European Union."[955]

---

[954] **Authority CL-148**, K Talus, "Introduction - Renewable Energy Disputes in the Europe and beyond: An Overview of Current Cases" (2015) 12 Transnational Dispute Management 1, p. 7 (emphasis added).

[955] **Exhibit C-48**, Law 15/2012 of 27 December 2012, concerning tax measures to ensure energy sustainability (published on 28 December 2012, Preamble, part 1. The same was said in the Regulatory Dossier for Law 15/2012; See also **Exhibit C-183**, Regulatory Dossier, Law 15/2012, tax measures for energy sustainability, 14 September 2012. According to that Regulatory Dossier, the alleged purpose of the 7%

582. Thus, in the official Preamble to the new tax measures, Spain claimed that the measures were intended to benefit the environment. One might reasonably think the Preamble was introducing an eco-tax on greenhouse gases or something of the like. In reality, however, the taxes constitute a cut to the FIT that was specifically designed to increase investment in the RE sector in Spain. It is settled law that a measure that has no rational link to its purported aim is arbitrary. A measure that intentionally does the opposite of what it claims to achieve is not only arbitrary, it is *mala fide*. Indeed, as noted above, where the Government explanation for a taxation measure is inconsistent or contradictory, as here, the tribunal may infer that it is not *bona fide*.

583. There are of course, many "green" measures a Government can take to improve the environment or minimise the adverse environmental effect that electricity generation can have. Equally, there are many ways for a Government to raise money to achieve these ends. The Regulatory Dossier reveals that Spain did not consider *any* other measure to achieve the purported objective of achieving "*a more efficient and respectful use of energy resources with the environment and sustainability*".[956] The section of the Regulatory Dossier devoted to "*Main alternatives considered*" merely notes the following: "*not adopt any measure with the consequent lack of sufficient budgetary resources to address the environmental costs of the charges and resulting infrastructure of facilities that generate electric power*".[957] This is a further indication that Spain's true purpose was not to introduce an environmental measure but to implement a disguised tariff cut with the sham justification of "*contribut*[ing] *to preserve* [Spain's] *rich environmental heritage*".[958]

584. The Claimants' position is shared by the EC. With respect to Law 15/2012, the EC has observed that:

> "the objectives set out in the Preamble of the Law (environmental protection and balanced budget) can perfectly be achieved through the IE [Electricity Tax], which means that the IVPEE [the 7% Levy] does not pursue any 'particular purpose'."[959] (emphasis added)

585. Therefore, Spain has not provided any rational link between the 7% Levy and its professed aim, i.e. to benefit the environment (as stated in its Preamble). Law 15/2012 intentionally does the opposite of what it purports to achieve.

---

Levy is "[t*o harmonize our tax system with a more efficient and respectful use of energy resources with the environment and sustainability*" (at p. 1).

956 **Exhibit C-183**, Regulatory Dossier, Law 15/2012, tax measures for energy sustainability, 14 September 2012, p. 1.

957 **Exhibit C-183**, Regulatory Dossier, Law 15/2012, tax measures for energy sustainability, 14 September 2012.

958 **Exhibit C-183**, Regulatory Dossier, Law 15/2012, tax measures for energy sustainability, 14 September 2012., p. 5.

959 **Exhibit C-185**, Request for information of the European Commission to Spain regarding Law 15/2012, "EU pilot 5526/13/TAXU", para. 10.

586. Concerning the impact of this measure, the Regulatory Dossier indicates that it will raise significant sums for the Government budget.[960] It appears, however, that of the "*other impacts considered*", there were "*none*".[961] It is extremely surprising that Spain would have introduced the 7% Levy, which it knew would adversely affect RE installations,[962] without giving *any* consideration to the impact they might have on those installations, or addressing the fact that this would amount to a significant cut in the incentives promised to RE installations. Indeed, a rational policy maker would have to consider the possibility that a tax on electricity installations that impacts RE installations might achieve the *opposite* of the professed purpose of benefitting the environment. Spain's failure even to consider this is yet further indication that the implementation of the 7% Levy deserves scrutiny by this Tribunal. Harmful measures taken without regard to their impact on the investor is a hallmark of a breach of the FET standard.[963]

587. As mentioned above,[964] the Regulatory Dossier refers to a 6% tax.[965] It does not, however, provide any rationale for setting the tax at this rate; nor does it state that the amount of money intended to be raised from a 6% tax was calculated to pay for a specific environmental object or purpose. Again, this suggests that it was simply an arbitrary tariff cut aimed at reducing the Tariff Deficit. This is reinforced by the fact that at some point, with no visible explanation, the envisaged 6% tax was increased to 7%. If the increase was necessary to fund environmental projects that had been earmarked to receive the funds, for example, the increase would have had a rational explanation in line with the professed purpose of Law 15/2012. This is of course not the case. The increase to 7% was simply a further reduction of the economic rights that Spain had granted the Claimants' installations under RD 661/2007, in order to attract the investment.

### (c) Real origin of the 7% Levy

588. The Regulatory Dossier reveals that the 7% Levy measure was designed to target RE installations. This is particularly evident from the Regulatory Dossier's analysis of the expected income from the tax, which is reproduced below:

---

960 **Exhibit C-183**, Regulatory Dossier, Law 15/2012, tax measures for energy sustainability, 14 September 2012, p. 3.

961 **Exhibit C-183**, Regulatory Dossier, Law 15/2012, tax measures for energy sustainability, 14 September 2012, p. 4.

962 As outlined below, it is clear from the Regulatory Dossier that Spain was fully aware that RE installations would be negatively affected by the measure more than ordinary regime generators.

963 **Authority CL-88**, *Ioan Micula, Viorel Micula and others v The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 525 ("[i]*n other words, for a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors*").

964 See above, section 7.3.

965 **Exhibit C-183**, Regulatory Dossier, Law 15/2012, tax measures for energy sustainability, 14 September 2012, p. 13.

"The taxable event of the tax shall be constituted by the total amount received (including premiums, incentives, and other complements) by the taxable person for the production measured in busbars, for every facility, in the taxable period.

The annual collection provided for every one of the technologies, corresponding to the average prices of the same, is the following:

| | 2011 | INCOME TOTALS | TAX | |
|---|---|---|---|---|
| TECHNOLOGY | ENERGY (GWh) | Millions € | % | **TOTAL VALUE Millions €** |
| Nuclear | 53,928 | 2,696 | 6.0% | **161.8** |
| Hydraulic | 27,650 | 1,383 | 6.0% | **83.0** |
| Coal | 46,427 | 2,321 | 6.0% | **139.3** |
| Diesel | 7,491 | 375 | 6.0% | **22.5** |
| Combined | 55,074 | 2,754 | 6.0% | **165.2** |
| **Total** | **190,570** | **9,529** | | **571.7** |

| | 2011 | INCOME TOTALS | TAX SUMMARY | |
|---|---|---|---|---|
| TECHNOLOGY | ENERGY (GWh) | Millions € | % | **TOTAL VALUE Millions €** |
| Biomass | 2,391 | 282 | 6.0% | **16.9** |
| Cogeneration | 30,720 | 3,418 | 6,0% | **205.1** |
| Wind | 41,388 | 3,773 | 6.0% | **226.4** |
| Photovoltaic | 7,360 | 2,755 | 6.0% | **165.3** |
| Hydraulic <10MW | 3,747 | 335 | 6.0% | **20.1** |
| Hydraulic >10MW | 1,501 | 132 | 6.0% | **7.9** |
| Residue | 3,038 | 250 | 6.0% | **15.0** |
| Thermoelectric | 1,776 | 515 | 6.0% | **30.9** |
| **Total** | **91,922** | **11,460** | | **68.6** |

"[966]

589. Thus, the Regulatory Dossier expressly states that the taxable base of the 7% Levy will include all incentives and premiums. The figures set out in the two tables above make it clear that, in its intention and effect, the 7% Levy targets RE installations:

– **Ordinary Regime**:

- The first table shows that the total electricity generated and sold to the market in 2011 by Ordinary Regime installations was 190,570 GWh.
- The amount of tax expected to be received from Ordinary Regime installations was EUR 571.7 million, or EUR 3 million per GWh.

[966] **Exhibit C-183**, Regulatory Dossier, Law 15/2012, tax measures for energy sustainability, 14 September 2012, p. 13.

– **Special Regime**:

- The second table shows that the total electricity generated and sold to the market in 2011 by Special Regime installations was far smaller, at 91,922GWh.

- The amount of tax expected to be received from Special Regime installations was significantly larger, at EUR 687.6 million, or EUR 7.48 million per GWh.

590. That the 7% Tax was devised as a disguised tariff cut, becomes all the more obvious when one recalls that the lower taxation payment that must be borne by Ordinary Regime installations (i.e. conventional power plants) is mitigated by the nature of their business model. As Brattle explains, Ordinary Regime installations receive no incentives because their levelised costs are far cheaper than RE installations and are harmful to the environment.[967] Ordinary Regime investors did not invest on the basis that they would be entitled to any incentives; they simply sell their electricity at the market price. Consequently, once the tax measures took effect, all Ordinary Regime installations could simply raise the price at which they offered to sell electricity to the market.[968] By contrast, Special Regime installations could not (except in part for those opting for the Premium) increase the revenues they receive because their revenues are fixed by the Government. Therefore, not only were Special Regime installations targeted to pay more than Ordinary Regime installations, Ordinary Regime installations could pass on the economic effect measures but Special Regime installations could not.

591. Thus, the 7% Levy was intended to be predominantly financed by RE installations, even though these installations produce less than half of the electricity that is generated and sold to the market by the Ordinary Regime. Evidently, the 7% Levy was targeted at the premiums and incentives that the Government had committed to pay RE installations. In other words, it primarily served as a backdoor tariff cut.

592. In light of the above, the 7% Levy should not be considered a *bona fide* tax, but rather a disguised tariff cut.

---

[967] Brattle Regulatory Report, paras. 42-45. As Brattle explains "*a coal-fired power station sells its electricity at the same price as any other power station in Spain's "power pool" even though the coal-fired power station likely generates more pollution and does not offer the same policy benefits as renewable energy sources like wind.*"

[968] First Moreno Statement, para. 66. See also **Exhibit C-173**, Paper to the Investment Advisory Committee– six-month review after closing of Project Greco dated 11 March 2013, p. 5 ("*The new initiative has the following effects: i) renewable energy producers cannot benefit from future wholesale electricity price increases. In fact we were of the view that electricity prices would increase in the long term (mainly as a result of increasing energy demand and higher fossil fuel prices) and that the market based remuneration scheme would allow to capture part of that upward trend, and ii) the possibility of benefiting from the expected pass-through of the 7% electricity generation tax, and mitigate partially the impact of that measure is eliminated*.")

**(d) The 7% Levy is part of a scheme to deprive the Claimants of their rights under the ECT**

593. Importantly, the Claimants do not challenge the 7% Levy as a discrete measure in isolation. It is only the first of interconnected measures that together deprived the Claimants of the rights to which their installations were entitled under RD 661/2007. Article 21 of the ECT does not require the Tribunal to turn a blind eye to one element of a multi-pronged strategy to treat investors unfairly. The 7% Levy must be considered in light of the full regulatory assault to which Spain subjected the Claimants' investment.

594. This is clear from the assessment of taxation measures by other investment-treaty tribunals. The tribunal in *Quasar v Russia* held that an analysis of whether a tax amounts to a breach of a treaty obligation requires "*a comprehensive assessment of the factual circumstances that have led to the loss of which a claimant complains*".[969] Quoting with approval the *dictum* in *RosInvest v Russia*, the tribunal then stressed that its task was to view the respondent's measures in their totality and consider the cumulative effect they had on the claimant.[970]

595. Similarly, the 7% Levy is only one of the measures implemented by Spain that harmed the Claimants' investment. The 7% Levy was implemented in December 2012, shortly followed in February 2013 by the elimination of the Premium and the change in the inflation adjustments provided for under RD 661/2007. In July 2013, Spain then dismantled the RD 661/2007 regulatory regime in its entirety, which was followed by an 11-month period of uncertainty until the Government put in place the specific economic parameters under the New Regime, in June 2014.[971] The 7% Levy was therefore part of a number of measures aiming at restricting and ultimately eliminating the Claimants' rights under RD 661/2007. The 7% Levy was not a normal tax as part of the Government's ordinary process of revenue-raising.

596. The nature of this conduct also demonstrates why the *Plama* case, on which Spain relies,[972] is fully distinguishable from the present case. The tribunal in *Plama* did not carry out a thorough analysis of the taxation measures at issue because it found "*no action by* [the] *Respondent which comes anywhere near to being unfair or inequitable*".[973] This was on the following grounds:

> "When Claimant purchased the shares of Nova Plama and negotiated its Debt Settlement Agreement, it was or should have been aware of the taxation treatment that would be accorded to debt reduction by Bulgarian law. It could

---

969 **Authority CL-137**, *Renta 4 S.V.S.A, Ahorro Corporacion Emergentes F.I., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L v The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012, para. 181.

970 **Authority CL-137**, *Renta 4 S.V.S.A, Ahorro Corporacion Emergentes F.I., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L v The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012, paras. 184-185.

971 Memorial, paras. 255-261.

972 Counter-Memorial, para. 129.

973 **Authority CL-63**, *Plama Consortium Limited v The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 267.

not have had any legitimate expectation that it would be treated otherwise. It had Ernst & Young, one of the world's leading tax advisory firms, advising it on its acquisition."[974]

597. Thus, the claimant in *Plama* complained of its treatment under a provision of Bulgarian taxation law that had been in place both when it made its investment and when it carried out, or ought to have carried out, its due diligence on the applicable legal framework.[975] On that basis there could have been no disguised taxation measure introduced in bad faith and in breach of the ECT. This is fundamentally different from the present case. First, the 7% Levy was implemented *after* the Claimants made their investment. Secondly, as noted above, the 7% Levy was introduced as part of a series of actions by the Government that were intended to roll back the binding Government incentives that had induced the Claimants to invest.

### 19.4 A State's characterisation of a measure as a tax under its domestic law is not dispositive

598. In light of Spain's focus on the characterisation of the 7% Levy under Spanish law, it is necessary to clarify the significance this has, if any.

#### (a) The labelling of a measure as a tax is irrelevant

599. The mere fact that Spain has characterised the 7% Levy as a tax under its own internal law is not determinative as to whether Article 21 is applicable. If the contrary were true, any State could frame unfair and inequitable measures as taxes and avoid any consequences for breaching its investor-protection obligations under the ECT. This would make it far too easy for States to eviscerate the plain meaning of treaty protections and circumvent the requirement to act in good faith, which ought to pervade Government conduct.

600. The *Yukos* tribunal made clear why it is that a State merely labelling a measure as a tax could not automatically lead to the application of the ECT tax carve-out:

> "To find otherwise would mean that the mere labelling of a measure as 'taxation' would be sufficient to bring such measure within the ambit of Article 21(1) of the ECT, and produce a loophole in the protective scope of the ECT. Since the claw-back in Article 21(5) of the ECT relates only to expropriations under Article 13 of the ECT, a State could, simply by labelling a measure as 'taxation', effectively avoid the control of that measure under the ECT's other protection standards. It would seem difficult to reconcile such an interpretation with the purpose of Part III of the ECT."[976]

601. Unsurprisingly, this is supported by numerous authorities. The *Yukos* tribunal stressed that prior authorities "*neither say nor imply that any measure which the authorities based on a taxation*

[974] **Authority CL-63**, *Plama Consortium Limited v The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.
[975] **Authority CL-63**, *Plama Consortium Limited v The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008., paras. 267-268.
[976] **Authority CL-157**, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, Case PCA No. AA 227, Final Award, 18 July 2014, para. 1433.

*law or regulation would by definition be regarded as a taxation measure and therefore justify the application of the carve-out*".[977]

602. This reiterates the holding of the tribunal in *Quasar v Russia*:

> "It is no answer for a state to say that its courts have used the [word] 'taxation' – any more than the word 'bankruptcy' – in describing judgments by which they effect the dispossession of foreign investors. If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation. When agreeing to the jurisdiction of international tribunals, states perforce accept that those jurisdictions will exercise their judgment, and not be stumped by the use of labels."[978]

603. Consequently, the fact that Spain has labelled the 7% Levy as a taxation measure under its internal law does not mean that the Article 21 exemption applies if the taxation label amounts to the "*dressing up* [of] *adverse measures*" that breaches binding investment protections.[979] As noted above, the funds levied through the Law 15/2012 are simply channelled through the State Budget and then returned to the electricity system to contribute to its costs. This is to give the measure the appearance of a tax. Thus, Spain's assertions that the text of Law 15/2012 states that it is a tax is not sufficient for Article 21(1) to apply.

**(b) Compliance with domestic law is irrelevant; a State cannot rely on its own law to evade international liability**

604. Equally, Spain's confirmation that the 7% Levy is in compliance with its domestic law is of no effect.[980] Spain emphasises that:

> "Law 15/2012 is part of the domestic law of the Kingdom of Spain. In particular, Law 15/2012 is a domestic law passed by the Parliament of the Kingdom of Spain (comprised of the Congress of Deputies and Senate) in accordance with the corresponding ordinary legislative procedure provided for in the Spanish Constitution and the rest of the Spanish legal system."[981]

605. That Spain's emphasis on its own domestic law is misplaced naturally follows from the general proposition that domestic law is not applicable to the dispute between the Parties. First, Article 26(6) of the ECT requires that the present dispute be determined in accordance with the provisions of the ECT and international law, not Spain's domestic law. Secondly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the

---

[977] **Authority CL-157**, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, Case PCA No. AA 227, Final Award, 18 July 2014., paras. 1433 and 1441.

[978] **Authority CL-137**, *Renta 4 S.V.S.A, Ahorro Corporacion Emergentes F.I., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L v The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012, para. 179.

[979] **Authority CL-137**, *Renta 4 S.V.S.A, Ahorro Corporacion Emergentes F.I., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L v The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012.

[980] Counter-Memorial, paras. 150-152.

[981] Counter-Memorial, para. 150.

characterisation of that conduct as wrongful by international law. This axiomatic rule of law is set out in Article 23 of the ILC Articles.[982] Thus, for example, it is trite law that "*a State cannot adduce… its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force*".[983] Accordingly, Spain's submissions as to its internal law are meaningless for the present dispute.

**(c) The definition of tax under international law does not demonstrate that the 7% Levy is *bona fide***

606. Spain contends in the alternative that the 7% Levy falls within the definition of tax under international law. Spain summarises its submission as follows:

> "In view of all the above decisions, the concept of tax under international law that the Arbitral Tribunals have repeatedly used has a number of defining characteristics that can be summarized as follows:
>
> - That the tax is established by Law,
>
> - That such Law imposes an obligation on a class of people, and
>
> - That such obligation implies paying money to the State for public purposes."[984]

607. Spain contends that the 7% Levy satisfies each limb of this three-pronged test and, as a result, falls within the definition of tax under international law.[985] Irrespective of whether or not this test does correctly reflect the definition of a tax under international law, these submissions are of no relevance to the issue in dispute. As to the first limb of the test, the Claimants do not deny that the 7% Levy was imposed through Spanish law. This does not, however, mean that the 7% Levy is *bona fide* as explained above. This is nothing more than a re-hash of Spain's argument under Spanish law and therefore must fail. As to the second limb, the Claimants do not deny that the 7% Levy imposes an obligation on a class of persons (i.e. owners of electricity-generation installations). This does not alter, however, the fact that they are improperly designed to target and impact only RE installations.

608. As to the third limb, Spain's assertion that the funds received from the 7% Levy are part of the General State Budget demonstrates nothing. The fact that Spain has taken the money from the levies to increase its finances is not evidence that the measure is *bona fide*.[986] If it were

[982] **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, Article 23.

[983] See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion,* 1932, PCIJ Series A/B, No. 44, p. 4 as referred to in **Authority CL-99**, International Law Commission's Draft Articles on the Law of Treaties with Commentaries, 1 January 1966, Commentary, para. 2.

[984] Counter-Memorial, para. 179.

[985] Counter-Memorial, paras. 179-194.

[986] See for example, **Authority CL-9**, *Amoco International Finance Corporation v The Government of the Islamic Republic of Iran et al*, 15 Iran-United States Claims Tribunal 189, Award No. 310-56-3, 14 July 1987, para. 145.

otherwise, then any taxation measure by a State, no matter how egregiously abusive in nature, would qualify as being *bona fide*. Indeed, every tax increases the funds of the State and so, on Spain's reading, all taxes are *bona fide*, even those that were the subject of the *Yukos* claim.

609. Spain's position is all the more disingenuous given that the funds from the 7% Levy are not in fact applied for the general purpose of managing the budget of the Spanish State. On the contrary, as noted above, Spain confirms that the funds collected from the 7% Levy "*will be allocated each year in the Laws on the Spanish General State Budgets to finance the costs of the electricity sector*".[987] In other words, the money from the 7% Levy is being used to pay down the Tariff Deficit and consequently to finance the Spanish electric system. The 7% Levy has exactly the same declared purpose as the tariff cut that Spain itself is responsible for creating. That cannot be considered *bona fide*.

610. Spain's final submission concerning the 7% Levy is that the EC has ruled that: (a) the 7% Levy is a tax; and (b) the 7% Levy is in conformity with EU law.[988] Spain supports its assertion with a heavily-redacted document of termination of the *EU Pilot* procedure, which expressly states that:

> "Based on the information currently available, there is insufficient evidence at this time to state that there is an infraction of EU Law concerning this EU Pilot. Nevertheless, the Commission reserves the right to renew legal actions related to this matter in the event of the emergence of new information that allows us to conclude the existence of an infraction."[989]

611. This submission not only carries little weight, it also has no relevance to the issue in dispute. The Claimants do not allege that the 7% Levy is not a *bona fide* tax measure because it infringes the tax provisions of EU law. It is not a *bona fide* tax measure because it is a backdoor tariff cut targeting RE installations. In any event, as mentioned above,[990] the EC's *EU Pilot Project* supports the Claimants' contention since it considered that Law 15/2012 "*does not pursue any 'particular purpose'*".[991]

---

[987] Counter-Memorial, para. 190.

[988] Counter-Memorial, paras. 195-203.

[989] **Exhibit R-85**, Record sheet from EU Pilot procedure 5526/13/TAXU concerning TVPEE (Spanish tax on the value of electricity generation) (confidential).

[990] See above section 7.3.

[991] **Exhibit C-185**, Request for information of the European Commission to Spain regarding Law 15/2012, "EU pilot 5526/13/TAXU", undated, para. 10.

# PART V: REPARATION

## 20. INTRODUCTION AND OVERVIEW

612. As set out in Part V of the Memorial, the Claimants seek restitution of the legal and regulatory regime under which they made their investments or, in the alternative, damages. Spain has not, at least expressly: (a) objected to the fair market value standard; [992] (b) sought to contest the application of the ILC Articles and the related public international law principles; or (c) questioned the relevance of the investment-treaty jurisprudence relied on by the Claimants.[993] These matters were treated fully in the Claimants' Memorial and need not be repeated here.[994]

613. As explained by Brattle in its first Quantum Report, the DCF method is the appropriate method to assess the fair market value in the circumstances because "[p]*roducing electricity is a relatively simple business, because the demand for electricity and its long-run value are subject to analysis and reliable modelling based on readily available data.*"[995] Brattle compares the cash flows due to the Claimants under the New Regulatory Regime (the **Actual scenario**) with the cash flows that would have been due to the Claimants had the Disputed Measures not been enacted (the **But For scenario**). Taking the difference between the two scenarios, Brattle assesses the Claimants' lost cash flows at EUR 123.9 million[996] (excluding interest and a tax gross-up).[997]

614. Spain's response on damages is fivefold:

(a) First, Spain seeks to re-litigate liability.[998] As that is not an issue going to damages, it is only briefly addressed below together with the fact that Spain relies on unparticularised arguments (section 21).

(b) Secondly, Spain disputes the appropriateness of the DCF method adopted by Brattle; its arguments are without merit (section 22).[999]

(c) Thirdly, Spain contends that the Claimants would have already obtained a "*reasonable return*" as a result of the sale of the assets in 2016 and, therefore, the claim is speculative;

---

992 Spain relies solely on extracts from Ripinsky and Williams', Marboe's and Sabahi's treatises on damages in international investment law as well as irrelevant investment-treaty decisions. As will be developed below, these do not support Spain's position (far from it).

993 Memorial, paras. 473-492.

994 Memorial, para. 473-481.

995 Brattle Quantum Report, para. 54; Memorial, section 16.2.

996 Brattle Rebuttal Quantum Report, Table 1, p. 10.

997 The pre-award interest calculated by Brattle is EUR 9 million (Brattle Rebuttal Quantum Report, paras. 7 and 36). The tax gross up calculated by Dutch qualified tax lawyers is EUR 41,316,667 which brings the Claimants' total damages to EUR 165,316,667 (see section 28).

998 Counter-Memorial, paras. 1051-1053 and 1059-1061.

999 Counter-Memorial, paras. 1065-1092.

this is based, however, on Accuracy's calculations which are misleading and erroneous (section 23).

(d) Relying on Accuracy, Spain submits that an asset-based valuation is preferable in this case.[1000] The Accuracy Expert Report opines that the Tribunal should use an asset-based valuation (**ABV**) to assess damages.[1001] However, the RAB analysis amounts to nothing more than a denial of liability (section 24).

(e) Spain offers an alternative damages calculation based on the DCF method,[1002] asserting that "*the value of Claimant's investment has been increased by 0.7 million euros thanks to the measures*".[1003] The Claimants explain the errors in Accuracy's methodology that lead to this equally erroneous result and why Brattle's DCF valuation is to be preferred. The Claimants also explain why Spain and Accuracy are wrong to take issue with a select number of assumptions that underpin Brattle's analysis and with the allegedly "*speculative*" results of that analysis (section 26).

615. A central theme of Spain's case is that it bears no liability to the Claimants because: (a) the RD 661/2007 regime was pegged to a so-called "*reasonable return*"; and (b) the Disputed Measures continue to offer that "*reasonable return*". The Claimants' expectations being so limited, there is no basis upon which to find a breach of the ECT. The Claimants have already explained in section 5.1 above the fallacy of this argument and will not re-address it here. Spain appears to argue in the alternative that, even if the Disputed Measures were in breach of the ECT, the Claimants have suffered no loss because they continue to receive this "*reasonable return*" under the New Regime.[1004] Spain has not offered any alternative damages claim based on the "*reasonable return*" (i.e. a target rate of return of 7.398%[1005] pre-tax) under the New Regime. Spain argues that this rate of return should apply to plants that were commissioned under the RD 661/2007 regime and asserts, without any analysis, that the Claimants continue to achieve this target rate of return.

616. Assuming *arguendo* that the Tribunal were minded to follow Spain's line of reasoning,[1006] the Claimants develop in this Reply Memorial an alternative damages claim, based on the concept of "*reasonable return*" (the **Alternative Claim**), but removing the most harmful retroactive effects of the New Regime. The Alternative Claim assumes that the Claimants are entitled to a "*reasonable return*" (rather than the RD 661/2007 tariffs as in the primary claim) and calculates

[1000] Counter-Memorial, para. 1054. Accuracy Expert Report, Section V.
[1001] Accuracy Expert Report, paras. 110-134.
[1002] Counter-Memorial, paras. 1093-1098; Accuracy Expert Report, paras. 136-170.
[1003] Counter-Memorial, para. 1095.
[1004] Counter-Memorial, para. 1060.
[1005] For simplicity, subsequent references to this rate will be rounded to 7.4%.
[1006] The Government's intention to lower the rate of return even further in the future regulatory period, to around 4.2%, is notorious (see also paras. 261). On this fact alone, Spain's argument based on the "reasonableness" of a target rate of return of 7.4% must fail.

damages within the framework of the New Regime. For the purposes of the calculation, Brattle adjusts for the retroactive nature of the New Regime. For example, rather than adopting the 7.398% pre-tax target return, it adjusts the target return to reflect the (higher) "*reasonable returns*" contemplated by Spain when it enacted RD 661/2007 (see section 26).

617. In the Memorial, the Claimants included a claim for tax gross up, that would reflect the taxes payable in the Netherlands on an award of damages. The tax gross-up figure has been calculated by Dutch counsel and accounts for EUR 41.283 million. Spain's reasons for taking issue with the tax gross-up claim are misplaced (section 27). The final point of disagreement concerns the rates of pre- and post-award interest. We explain why the Claimants' position is to be preferred (section 28).

## 21. SPAIN'S CONTINUED DENIAL OF LIABILITY AND OTHER PRELIMINARY MATTERS

618. Spain has advanced a number of objections in its Counter-Memorial, but has failed to develop them in a cogent way and has instead scattered them throughout both the damages section of the Counter-Memorial and the Accuracy Expert Report. The Claimants have, therefore, been compelled to reconstruct Spain's arguments (to the extent this was possible) in order to submit this Reply Memorial. Prior to providing a brief summary of Spain's arguments, the Claimants wish to bring two matters to the Tribunal's attention.

### 21.1 Denial of liability

619. First, Spain argues that the Claimants' damages are "*completely and absolutely speculative*".[1007] Spain's assumption is as follows: because the Claimants could only ever expect a "*reasonable return*" under RD 661/2007, or so the argument goes, and they are still receiving a "*reasonable return*" under the New Regime, Spain has no liability under the ECT.[1008] This argument has already been addressed above in section 5.1. Suffice to say here that the Claimants were promised a tariff that would remain unchanged for the operational lifetime of the RE plants, and not a "*reasonable return*". Even if the Tribunal were to find that the Claimants' legitimate expectations were limited by this so-called objective measure of a "*reasonable return*", the Claimants have not received (and will not receive) a "*reasonable return*" under the New Regime so that (a) Spain still incurs liability; and (b) the Claimants have suffered losses for which they must be compensated. As explained by Brattle in the Rebuttal Quantum Report, it is wrong to suggest that the return implicit in the tariff offered under the RD 661/2007 regime and the target

1007 Counter-Memorial, Part IV(A), para. 1057.
1008 Counter-Memorial, paras. 1058 -1063.

return under the New Regime are the same (see section 24). On the contrary, the New Regime has reduced the rate of return that was implicit in RD 661/2007.[1009]

620. The same goes for Spain's expert, Accuracy, which analyses the Claimants' claim on the basis that they were only entitled to a "*reasonable return*".[1010] Accuracy criticises Brattle's damage calculation based on a DCF approach because it is "*detached from the fact that investment is being made in a regulated market and it denies the power of the regulator to eliminate the windfall profits*".[1011] It further explains that its economic analysis is based on the following approach:

> "Our general approach in determining potential damages in this case in (i) identifying, from an economic point of view, what the legitimate expectations of an investor investing in a regulated market are, and (ii) verifying whether such expectations are met at two points in times [sic]: at the time of the investment and after the measures."[1012]

621. As Brattle explains,[1013] Accuracy's assumption is wrong and its approach amounts to a denial of liability. The Claimants' case is not that they are entitled to receive a "*reasonable return*" but rather that they were entitled to receive the tariff support under RD 661/2007 throughout the lifetime of the project.

**21.2 Reliance on unparticularised arguments**

622. Secondly, Spain has included a "*catch-all*" sentence at paragraph 1055 of the Counter-Memorial, superficially taking issue with several aspects of the Claimants' damages case:

> "On the other hand, we must exercise full reserve regarding the formulation of subsequent objections to the calculation of the requested compensation, including: the incorrect nature of the various parameters considered; the contributory fault of the Claimant; the Flow-Through of the hypothetical damages; the incorrect determination of the valuation dates considered for the FET standard; the inadmissible immunity to business risk; or the necessary discounts for marketability, amongst others."[1014] (emphasis added)

623. None of their points are subsequently developed, let alone explained, by Spain. The issues apparently challenged by Spain at paragraph 1055 are set out immediately below. To the extent possible, the Claimants provide a brief response and/or cross-reference to the relevant part of their submissions where the issue is addressed.

---

1009 Brattle Rebuttal Quantum Report, para. 183.
1010 Accuracy Expert Report, paras. 10(c), 28, 87 (a) and 203(c).
1011 Accuracy Expert Report, para. 14.
1012 Accuracy Expert Report, para. 16.
1013 Brattle Rebuttal Quantum Report, paras. 101-103.
1014 Counter-Memorial, para. 1055.

(a) The Claimants' adoption of 20 June 2014 as the date for assessing their damages. Spain disagrees with this date without offering any legal basis for doing so or providing any alternative date. Spain completely ignores the Claimants' detailed explanation for adopting this date.[1015] For its part, Accuracy also uses 20 June 2014 for its damages calculations.

(b) The '*incorrect nature of the various parameters considered'*. This argument is not explained in the Counter-Memorial. The Claimants understand these "*parameters*" to be a reference to the criticisms that Accuracy makes on the assumptions that Brattle has adopted in the Brattle Quantum Report.[1016] These criticisms are addressed in Section VIII of Brattle's Rebuttal Quantum Report and section 25 below.

(c) The "'*Flow-Through' of the hypothetical damages*". Again, this point is not further developed or explained and is difficult to understand.

(d) The contributory fault of the Claimants. Yet again, this argument is not properly developed so the Claimants are unable to understand (and address) Spain's point. Generally, the concept of contributory fault operates to reduce the damages owing by a respondent-State on the grounds that the claimant has caused (or contributed) to a part of those damages. It is possible – albeit unclear – that this issue relates to Spain's argument that the Claimants were excessively speculative. To the extent this is the case, the Claimants address the issue in more detail below at section 23.

(e) The "*inadmissible immunity to business risk*". This has not been properly particularised. To the extent Spain is saying that the ECT should not work as an insurance policy against business risk, this is of course not what the Claimants are arguing.

(f) The "*necessary discounts for marketability, amongst others*". This is a bare assertion without any legal or factual support. As Brattle explained in its Quantum Report, the Claimants fully owned the Wind Farms.[1017] Applying a control premium would only lead to increasing Bridgepoint's damages. Indeed Brattle has applied an illiquidity (or marketability) discount.[1018] If Spain takes issue with that discount, it has not explained on what basis.

624. If Spain were to develop these points in a cogent manner in its Rejoinder, this should not be countenanced by the Tribunal. It is implicit in Procedural Order No. 1 that a rejoinder is

[1015] Memorial, paras. 495-507.
[1016] Accuracy Expert Report, para. 137.
[1017] Brattle Quantum Report, para. 143, footnote 115.
[1018] Brattle Quantum Report, paras. 143-150; Appendix R.

submitted by way of rebuttal only and should not be used to raise new arguments. Crucially, the Claimants would have no opportunity to address these arguments other than in oral submissions. The need to abide by fundamental rules of procedure, in particular due process, dictates that these arguments be disregarded.

625. We turn now to Spain's arguments concerning compensation, which we address in the order set out at paragraphs 614 to 6.

## 22. THE DCF METHOD IS THE APPROPRIATE VALUATION METHOD

626. Before addressing Spain's arguments, it is useful briefly to summarise Brattle's valuation of the Claimants' damages and its use of a DCF method in that context. Brattle's valuation, carried out as at June 2014, comprises two main elements. The first element is the Claimants' Lost Historical Cash Flows, incurred between December 2012 (when the first Disputed Measures were implemented) and 20 June 2014.[1019] This portion of Brattle's analysis does not require a DCF method. Brattle simply compares what the plants would have earned, but for the Disputed Measures, to what the plants actually earned (by reference to actual data) with the Disputed Measures in place. The difference between the two scenarios amounts to the Lost Historical Cash Flows. The total lost cash flows to the Wind Farms is EUR 20.6 million.[1020]

627. The second element of Brattle's valuation is to calculate the Claimants' Lost Future Cash Flows. Brattle adopts the so-called adjusted present value method, which is a type of DCF method that seeks to value the asset, project debt and financing impacts separately, so as to yield a more accurate valuation. To calculate the Claimants' Lost Future Cash Flows, there are four steps. First, Brattle values the Base NPV, which is the net present value of the Project Companies' reasonably expected revenues (net of operating costs and any capital expenses), assuming no debt.[1021] This first step also applies a haircut to the revenues, to account for regulatory risk (which is comparatively higher in the Actual scenario than in the But For scenario). Those revenues are then discounted to June 2014. Secondly, Brattle derives the Adjusted NPV by taking into account the so-called "*financing side-effects*" of holding debt, i.e. the costs and benefits of the debt.[1022] Thirdly, Brattle subtracts the net present value of the debt from the Adjusted NPV to obtain the Final Equity Value of the Wind Farms.[1023] In the final step, Brattle attributes a percentage of that Final Equity Value to the Claimants based on their specific interests in the Wind Farms, and applies an 18% illiquidity discount for the lack of marketability of the Claimants' investments.[1024]

---

1019 Memorial, paras. 509-511.
1020 Brattle Rebuttal Quantum Report, Table 1, p. 10.
1021 Memorial, paras. 512(a) and 515-522.
1022 Memorial, paras. 512(b) and 523-524.
1023 Memorial, paras. 512(c) and 525-527.
1024 Memorial, paras. 512(d) and 528-530.

628. In the Rebuttal Quantum Report, Brattle has amended the damages estimate to account for:

(a) the impact of the New Regime on the management fees earned by Bora Wind Energy Management, which is 100% owned by one of the Claimants, Watkins (Ned) B.V.;[1025] and

(b) the updated prejudgement interest calculation, based on the evolution of Spanish bond rates since the completion of the Brattle Quantum Report.[1026]

629. The Claimants' updated claim for damages is EUR 123.9 million, excluding interest and a gross-up for tax.[1027]

630. This section explains why the use of a DCF methodology adopted by Brattle to assess the fair market value of the Claimants' investments with and without the Disputed Measures is appropriate. As developed below, the DCF method is appropriate because future cash flows can be predicted with sufficient certainty.

**22.1 Spain and its expert's arguments**

631. Spain and its expert assert that the DCF method should be rejected in this case.[1028] Despite acknowledging the "*broad application of the DCF method*", Spain considers that in the present circumstances, there are numerous features that weigh against its use.[1029] As explained in more detail below,[1030] all relevant stakeholders (<u>including Spain</u>) have applied the DCF method in this same context. Spain conveniently fails to mention its own use of the DCF method to (a) develop cash flow forecasts to attract investors in RE in Spain in 2005;[1031] (b) design the tariff regime under RD 661/2007;[1032] and (c) design the New Regime whereby a "*series of annual tariffs* [would] *over the expected life of an asset…generate cash flows with a cumulative discounted net present value equal to the Regulatory Asset Base*".[1033] In many ways, the Tribunal's analysis could stop here.

632. Spain and its expert argue that:

---

1025 Brattle Rebuttal Quantum Report, paras. 33-34.
1026 Brattle Rebuttal Quantum Report, para.35.
1027 Brattle Rebuttal Quantum Report, Table 1, p10.
1028 Counter-Memorial, paras. 1066-1073.
1029 Counter-Memorial, para. 1068.
1030 See para. 647 below.
1031 Brattle Rebuttal Quantum Report, para. 127. As Brattle explains, "[t]*he 2005 renewable energy plan listed relevant cost, operating parameters and required returns, and then estimated the levelised cost of electricity. This implicitly involved forecasting cash flows over expected plant lifetimes*" (referring to **Exhibit C-75**, Government of Spain, Ministry of Industry, Tourism and Commerce and IDAE, "*The Spanish Renewable Energy Plan 2005-2010*", August 2005, p. 141).
1032 Brattle Rebuttal Quantum Report, para. 128. See also, **Exhibit C-203**, Memoria Económica for RD 661/2007, 21 March 2007, p. 18.
1033 Brattle Rebuttal Quantum Report, para. 129.

(a) the valuation of the Claimants' claim pursuant to a DCF approach produces unrealistic results and is speculative;[1034]

(b) there is a large disparity between, on the one hand, the amount actually invested (and the risk assumed) and, on the other, the fair market value;[1035]

(c) the DCF approach is inadequate because the investment was made in a regulated market and it therefore fails to "*take into consideration the expectations of an investor*" in such a regulated market;[1036]

(d) there is a high level of uncertainty associated with the damages calculation. This uncertainty is derived from (i) cash flows being dependent on volatile and unpredictable external elements, such as the pool price;[1037] and (ii) forecasts being made over an excessive period of time[1038];

(e) no alternative valuation methods have been examined;[1039] and

(f) the sanity or reality checks of the DCF conducted by the Claimants is "*fictitious*" and "*imaginary*".[1040]

633. Spain and its expert are wrong on all points. Their overreaching argument, and the only one that they actually develop, is that the DCF valuation is speculative and produces, in this particular case, unrealistic results. As explained below, this assertion is wrong as DCF is widely recognised as the most adequate method to calculate the fair market value of an income-producing asset (see section 22.2), especially in a regulated market (see section 22.4). This is confirmed by the reality checks conducted by Brattle.[1041]

634. More importantly, whether or not a DCF method is appropriate reduces to a single consideration: the certainty of future cash flows. Ripinsky and Williams, to whom Spain and its expert extensively refer, state: "[t]*he review of case law shows that the key factor in whether the DCF method will be accepted by a tribunal in a specific dispute is the amount of evidence demonstrating the likelihood of projected cash flows actually being realized*".[1042] Therefore, issues of duration (of the projection and the predictability of the cash flows), to the extent they are relevant factors at all, all go to the question of whether the future cash flows determined by

---

1034 Counter-Memorial, section V.C.; Accuracy Expert Report, sections III and IV.2.
1035 Counter-Memorial, para. 1072(d)., Accuracy Expert Report, paras. 97-102.
1036 Accuracy Expert Report, sections IV.I and IV.3.2.
1037 Counter-Memorial, para. 1072(b), Accuracy Expert Report, paras. 80-81.
1038 Counter-Memorial, para. 1072(c).
1039 Accuracy Expert Report, para. 106 *et seq.*
1040 Counter-Memorial, paras. 1076.
1041 See section IX, Brattle Rebuttal Quantum Report.
1042 **Authority CL-61**, S Ripinsky & K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008), p. 211 (emphasis added).

the expert are likely to eventuate. They are therefore addressed in that context below (see section 3.3).

635. In an attempt to bolster its arguments, Spain cites a decision of the Spanish Supreme Court, which allegedly takes issue with the DCF method, as though this were somehow relevant to this arbitration.[1043] It is well established that the internal law of the host State has no relevance to the wrongfulness of an act attributable to that State under an international instrument such as the ECT.[1044] Treaty claims are to be determined on their own terms, separately from any domestic-law claims.[1045] Therefore, the Tribunal need not take into account any decisions of national law when considering the appropriate method for reparation, which is a question to be determined solely by reference to public international law and the ECT standard of fair market value.

### 22.2 Investment-treaty jurisprudence generally favours a DCF approach in ascertaining fair market value

636. The Claimants submit that the standard of compensation required by the ECT in the present case for both an unlawful expropriation and breaches of the ECT other than expropriation is based on the "*fair market value*"[1046] of the investment or the price a willing buyer would pay a willing seller for the investment in question in an "arm's length" transaction.[1047] Spain does not dispute this standard.

637. The DCF method is "*almost universally used and accepted by both the business and academic community in valuing income-producing assets*".[1048] It has been confirmed by numerous investment-treaty tribunals to be the standard approach for calculating the fair market value of an investment for the purpose of compensation for breaches of international law.[1049] The main

1043 Counter-Memorial, para. 1064.

1044 **Authority CL-4**, Vienna Convention, Article 27; **Authority CL-27**, ILC Articles, Article 32; **Authority CL-111**, *SGS Société Générale de Surveillance SA v The Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Award on Jurisdiction, 6 August 2003; **Authority CL-123**, *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008; **Authority CL-129**, *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, Award, ICSID Case No. ARB/08/2, 18 May 2010; **Authority CL-46**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 146; **Authority CL-132**, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group Ltd v The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010; and **Authority CL-113**, *GAMI Investments, Inc. v The United Mexican States*, UNCITRAL, Final Award, 15 November 2004.

1045 **Authority CL-101**, *Asian Agricultural Products Ltd. v The Republic of Sri Lanka*, Final Award, ICSID Case No. ARB/87/3, 27 June 1990.

1046 Memorial, paras. 476-477.

1047 Memorial, para. 489: "[a]*n arm's length transaction takes place 'between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power'*".

1048 **Authority CL-117**, C McLachlan, L Shore & M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007), p. 322.

1049 See for example, **Authority CL-84**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 708; **Authority CL-53**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 385; **Authority CL-38**, *CMS Gas v Argentina*, Award, 12 May 2005, para. 416; and **Authority CL-57**, *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 416.

advantage of the DCF method is that it establishes fair market value in "*the most conceptually correct manner – as present worth of future benefits*".[1050]

638. By definition, projecting future cash flows requires a degree of conjecture. Tribunals adopting the DCF approach expressly acknowledge this inherent uncertainty but minimise any speculative elements by carefully analysing the underlying assumptions and parameters. For example, despite the uncertainties of the new (and not entirely clear) regulatory environment, the tribunal in *CMS v Argentina* adopted the DCF method to value the damages to the claimants' share in a gas transportation and distribution company.[1051] After openly acknowledging the uncertainties, the tribunal embarked on a detailed DCF analysis, stating that "*estimates need not be arbitrary or analogous to a shot in the dark; with the appropriate methodology and the use of reasonable alternative sets of hypotheses, it is possible to arrive at figures which represent a range of values which can be rationally justified*".[1052]

639. In short, as noted by McLachlan, Shore and Weiniger:

> "… the DCF approach is becoming so widely accepted because it is, put simply, the best method for valuing lost profits. The critics who complain that it produces excessive levels of compensation are perhaps not paying sufficiently close attention to how the method is operated in practice. The DCF method, properly employed, reduces speculation because it forces claimants to explain and quantify each individual area of their claim. Differences between the parties can thus be highlighted and speculative valuations can be dismissed.
>
> It would be wrong to dismiss the method because, wrongly applied, previously 'it has been used to justify valuations which reach beyond the "*fanciful*" to "*wonderland proportions*"".[1053]

640. While the Claimants accept that there are, of course, circumstances where the DCF method is not appropriate, that is clearly not the case here. The investment-treaty cases referred to by the Respondent in which tribunals found that the DCF methodology was not suitable are unhelpful to its case. First, these cases concern a small minority compared to the vast majority of cases in which, as explained above, the DCF approach has been considered as the most appropriate

1050 **Authority CL-61**, S Ripinsky & K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008), pp. 200 and 211: "*If one really wishes to estimate the market value of an investment, then one should use most common and accepted methods to reach that value, and the DCF method is an appropriate method*". See also, **Authority CL-117,** C McLachlan, L Shore & M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007), p. 322: "*The value of an income-producing capital asset can only be ascertained by valuing the cash the asset is expected to generate in the future*".

1051 **Authority CL-38**, *CMS Gas v Argentina*, Award, 12 May 2005.

1052 **Authority CL-38**, *CMS Gas v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 420. See also, **Authority CL-77**, *Joseph Charles Lemire v The Republic of Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 248: "[w]*hile the existence of damage is certain, calculating the precise amount of the compensation is fraught with much more difficulty, inherent in the very nature of the* "*but for*" *hypothesis. Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is to make an informed and conscientious evaluation, taking into account all the relevant circumstances of the case, not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings*".

1053 **Authority CL-117**, C McLachlan, L Shore & M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007), pp. 332-333.

method to evaluate energy producing companies. More importantly, in these cases, the DCF approach was rejected because of the lack of sufficient production records. The circumstances of these cases are far removed from those of this case.

641. For example, the Respondent extensively relies on the ICSID case *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*[1054] to prove that the DCF would not be suitable. In that case, the tribunal held that the respondent was liable for expropriation and unlawful restrictions on the exportation of gold and went on to consider the fair market value of the claimant's mining projects. The tribunal first remarked the that DCF approach is the preferred method for quantifying the fair market value of an enterprise:

> "Valuations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established. The Tribunal agrees that, where the circumstances for its use are appropriate, forward looking DCF has advantages over other, more backwards looking valuation methods."[1055]

642. The tribunal then noted that none of the valuations submitted by the parties could be "labelled" a DCF valuation and that this was the result of the specific circumstances of the case:

> "[t]he special characteristics surrounding Rusoro […] make the use of the DCF Approach inappropriate."[1056]

643. The tribunal therefore rejected the DCF method in favour of a combination of three valuation methods because of very specific characteristics in this case. In particular, the tribunal observed that (a) 75% of Rusoro's cash flows derived from facilities that had yet to be built; (b) the gold price was very volatile – the tribunal pointed out that since the 1970s, gold prices had ranged between USD 200/oz and USD 600/oz with two significant peaks where prices hit up to USD 1838/oz; (c) there was no certainty that Rusoro would be able to secure the financing needed to develop its business plan; and (d) the gold sector was very regulated at the time of making the investment, making it difficult to predict future cash flows or to construct a But For scenario.[1057] None of these specific circumstances are present here.

644. Spain also relies on *Gemplus, S.A. v. United Mexican States*,[1058] which is equally inapposite. In that case, the tribunal rejected the DCF methodology because of the lack of significant and reliable track record at the valuation date (24 June 2001). The tribunal observed that "*the Concessionaire was not operating as a going concern in the form envisaged at the time of the*

---

[1054] **Authority CL-153**, *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, ICSID Case No.ARB(AF)/12/5, Award, 22 August 2016 ***(Rusoro Mining Limited v The Bolivarian Republic of Venezuela)***.

[1055] **Authority CL-153,** *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, para. 758.

[1056] **Authority CL-153,** *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, paras. 784-785.

[1057] **Authority CL-153,** *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, paras. 655 and 785.

[1058] **Authority CL-132**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award (**Gemplus, S.A. v. United Mexican States**), 16 June 2010, para. 13.70.

*Concession Agreement*", because (a) the claimant had barely progressed beyond start-up operations (it was fully operative only for five weeks); (b) half of its activities as a going concern had been suspended during the relevant period; and (c) it was not operating independently given governmental interventions.[1059] The tribunal concluded that:

> "The Tribunal accepts the Respondent's submissions to the effect that the status of the Concessionaire as a business, during the period from August/September 2000 up to the relevant valuation date of 24 June 2001, was far too uncertain and incomplete to provide any sufficient factual basis for the DCF method."[1060]

645. The same is true for another case, which Spain does not rely on: The ECT decision in *Khan Resources B.V. v Mongolia*.[1061] In this case, the tribunal held that the respondent had breached the FET provision of the ECT and went on to consider the fair market value of the claimant's shareholding, as the appropriate standard for ensuring full reparation under the *Chorzów Factory* standard.[1062] Ultimately, the tribunal rejected the DCF method for measuring the fair market value of the claimants' shareholding in the mine, in favour of contemporaneous offers made for that shareholding.[1063] The tribunal agreed that "*in the case of a mine with proven reserves, the DCF method is often considered an appropriate methodology for calculating fair market value*".[1064] On the facts of that case, however, "*there* [were] *a number of additional factors and uncertainties*"[1065] that rendered the DCF method unattractive. The tribunal observed that the standard of proof required for the certainty of future cash flows was not met (without specifying the standard that applied). In particular, there were the following question marks over the claimant's investment: (a) how the project would have been financed; (b) whether the claimant was "*capable of bringing the* [project] *into production itself*" or whether "*a further strategic partner would have been brought into the business*"; (c) whether the claimant would have held onto its investment through to production or would have sold it; and (d) whether certain steps would have eventuated to finalise the joint venture and the commercial terms of the project. The tribunal concluded that:

> "the level of certainty required for the DCF method to be used has not been attained. In particular, it is far from certain: (i) whether the mine would actually have reached production; (ii) if it did, on what terms the parties would have participated in the venture; and (iii) whether the Claimants would still have been involved in the [project] at all."[1066]

---

1059 **Authority CL-132**, *Gemplus, S.A. v. United Mexican States,* 16 June 2010, para. 13.70.
1060 **Authority CL-132** *Gemplus, S.A. v. United Mexican States*, para. 13.71.
1061 **Authority CL-146**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia*, UNCITRAL (***Khan Resources v Mongolia***), Award on Merits, 2 March 2015.
1062 See also, Memorial, para. 471.
1063 **Authority CL-146**, *Khan Resources v Mongolia*, Award on Merits, 2 March 2015, para. 390.
1064 **Authority CL-146**, *Khan Resources v Mongolia*, Award on Merits, 2 March 2015, para. 391.
1065 **Authority CL-146**, *Khan Resources v Mongolia*, Award on Merits, 2 March 2015, para. 392.
1066 **Authority CL-146**, *Khan Resources v Mongolia*, Award on Merits, 2 March 2015, para. 393.

646. All of these cases stand in stark contrast to the facts of this case where, as at the date of valuation:

(a) The Wind Farms were (and had been for a number of years) fully operational. Their construction was finalised between 2006 and 2010 and operations began between May 2006 and January 2011, which is more than sufficient to constitute a reliable and sufficient track record. This is indeed undisputed by the Respondent and its expert.[1067]

(b) The Wind Farms were fully financed through (i) project finance agreements; (ii) shareholders' undertaking agreements; (iii) intragroup loan agreements and profit participative loan agreements; and (iv) comfort letters,[1068] so that there can be no doubt on the financial viability of the project.

(c) The future financial results of the Wind Farms as at the valuation date were not affected by uncertainties regarding demand given the priority of dispatch they enjoyed under the RD 661/2007 regime. Likewise, as Brattle explains, there was clarity as to the prices that the plants would obtain for their production.[1069] The regulatory regime, therefore, provided sufficient predictability as to the future cash flows of the Wind Farms.

647. The DCF method has also come to dominate the valuation of power stations. No investor would invest in power stations without a proper DCF valuation; all the relevant parties who have valued Spanish RE assets used it, including the investors,[1070] lenders providing project finance,[1071] equity analysts[1072] and, crucially, Spain itself.[1073] Indeed, Spain developed cash flow forecasts to attract potential investors in concentrated solar power and wind, notably in the PER 2005-2010.[1074] The Claimants prepared DCF analyses before making their investments in Spain.[1075] Brattle also notes that it has used the DCF method "*in all cases where* [they] *have valued power stations, either for investment decisions or to measure damages in international arbitrations*".[1076]

## 22.3 Future cash flows are sufficiently certain

648. One of Spain and its expert's arguments is that there is too much uncertainty regarding the future cash flows due to the Claimants and the DCF method is therefore unreliable.[1077] Spain and its expert do not, however, consider that the DCF method is inappropriate because the Wind Farms

1067 Brattle Quantum Report, para. 31.
1068 Memorial, para. 215 and **Exhibit BQR-43**, Debt Facilities Overview.
1069 Brattle Quantum Report, paras. 72-74.
1070 **Exhibit BQR-3**, The Renewables Infrastructure Group ("TRIG"), IPO Prospectus 2013, p. 105.
1071 **Exhibit BQR-43**, Debt Facilities Overview.
1072 **Exhibit BQR-44**, Comparable transactions.
1073 Brattle Rebuttal Quantum Report, paras. 121-122.
1074 Brattle Rebuttal Quantum Report, paras. 127-128; **Exhibit C-75**, Government of Spain, Ministry of Industry, Tourism and Commerce and IDAE, "*The Spanish Renewable Energy Plan 2005-2010*." August 2005, p. 141.
1075 Brattle Rebuttal Quantum Report, para. 124, **Exhibit BQR-40.2**, Bridgepoint 2014 Investor Model.
1076 Brattle Quantum Report, para. 53.
1077 Counter-Memorial, para. 1072 (c); Accuracy Expert Report, paras. 80 and 104-105.

have an insufficient performance record. Therefore, the Claimants take it that the fact that the Wind Farms have sufficient track record must be considered common ground.

649. Spain instead contends that this uncertainty is derived from the fact that (a) cash flows are dependent on volatile and unpredictable external elements, such as the pool price; and (b) forecasts are made over an excessive period of time.[1078] Spain, however, fails to elaborate on either of these reasons. Its expert's argument on the certainty of the Wind Farms' cash flows is no more helpful in understanding the argument. Accuracy merely relies on an extract of *Kantor*'s treaty and an abstract example given by this author[1079] (that is examined by Brattle)[1080] to state that the DCF method is inappropriate in this case because forecasts deviate from the reality. In other words, neither Spain nor its expert provides any cogent explanation as to why the future cash flows would be too uncertain in this case to allow a DCF calculation.

650. In addition, this argument is irreconcilable with Spain's contention on liability that the investors are obtaining a "*reasonable return*", which is at the low rate of approximately 7.4% pre-tax (i.e. 5.6% after-tax), implying that their investments are at low risk. For example, Spain states that:

> "…the framework that we encounter in the Current scenario under current legislation is stable, more predictable and with a lower risk."[1081]

651. However, in the context of compensation, Spain changes tack, and argues that there is high uncertainty, implying high risk. Spain and its expert's argument that the DCF method is speculative[1082] is, of course, inconsistent with the argument that the New Regime "*ha*[s] *brought stability to the market and confidence to investors*".[1083]

652. As Spain fails to give any explanation at why the future cash flows would be uncertain, we consider below the standard of proof used by tribunals to establish the certainty of future cash flows and explain why the Claimants have no difficulty meeting that standard, before considering various factors that may be relevant to the question of certainty in this case, including (a) the operating history of the Wind Farms; (b) the financial viability of the Wind Farms; (c) the forecast horizon; and (d) the conservative nature of Brattle's DCF calculation. The conclusion is clear: the future cash flows have been estimated with sufficient certainty by Brattle to warrant the use of a DCF calculation.

---

1078 Counter-Memorial, paras. 1072 (b) and (c).
1079 Accuracy Expert Report, paras. 104-105.
1080 Brattle Rebuttal Quantum Report, paras. 152-155.
1081 Counter-Memorial, para. 1097. See also VIII.3.
1082 Counter-Memorial, paras. 1085-1092. See also, Accuracy Expert Report, paras. 75, 81 and 109.
1083 Accuracy Expert Report, para. 190.

**(a) Standard of proof for the certainty of cash flows**

653. The majority of tribunals have concluded that international law requires a different standard of proof in relation to the *quantification* of loss as opposed to the *existence* of loss. In other words, once the attribution of the loss to the conduct of the State has been established, a different, less stringent test applies to the calculation of damages.[1084] Investment-treaty jurisprudence is, however, then divided as to the standard of proof applicable to the likelihood of future cash flows.

654. One recent line of authority suggests that, once the claimant has established liability, it is for the tribunal to determine the appropriate quantum:

> "Although it is for the Claimants to prove that they have suffered some damage in order to be awarded compensation, it is for the Tribunal itself to determine the amount of compensation. This is necessarily a matter of the Tribunal's informed estimation in the light of all the evidence available to it."[1085]

655. On this view, which the Claimants submit is correct, once the claimant establishes liability and harm, it is for the tribunal to assess the damages due (if any) on the basis of the evidence before it. Almost invariably, conflicting evidence will be submitted by opposing parties. What this implies is that the standard of proof required must be no higher than the balance of probabilities, as otherwise the tribunal's task of basing its assessment on the best evidence before it would become impossible.

656. Indeed, the general tendency, as highlighted by recent jurisprudence, has been to consider the standard as being akin to the balance of probabilities.[1086] For example, the tribunal in *Lemire v Ukraine* noted that:

> "…it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; <u>the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages</u>. Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination the Claimant only needs to provide <u>a basis upon which the</u>

---

[1084] See for example, **Authority CL-98** *Sapphire International Petroleums Ltd. v The National Iranian Oil Company* (1963) 35 ILR 136, Arbitral Award, 15 March 1963, p. 187; **Authority CL-77**, *Joseph Charles Lemire v The Republic of Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, paras. 246-249; **Authority CL-130**, *Mohammad Ammar Al-Bahloul (Austria) v The Republic of Tajikistan*, SCC Case No. V (064/2008), Award, 8 June 2010, para. 39; **Authority CL-88,** *Micula v Romania*, Award, 11 December 2013, paras. 1008-1010; **Authority CL-138**, *Khan Resources v Mongolia*, Award on Merits, 2 March 2015, para. 375.

[1085] **Authority CL-147**, *Tidewater Investment SRL and Tidewater Caribe, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 164.

[1086] **Authority CL-138**, *Khan Resources v Mongolia*, Award on Merits, 2 March 2015, para. 375.

> Tribunal can, with reasonable confidence, estimate the extent of the loss."[1087] (emphasis added)

657. A smaller number of tribunals, as noted by Ripinsky and Williams, require a claimant to meet a "*rather high*" standard when demonstrating that projected cash flows are likely to be realised.[1088] In those cases, tribunals will look to historical data to satisfy the standard of certainty.[1089] Ripinsky and Williams also note that "*speculation and uncertainty, inherent in any DCF analysis, can be dealt with by taking conservative estimates of cash flow projections and application of a higher discount rate*".[1090] Whether the burden on the Claimants is on the balance of probabilities, or higher, they easily meet it. This is considered in more detail in the paragraphs immediately below.

**(b) The Claimants meet the standard of proof**

658. In the present case, future cash flows in the But For and Actual scenarios can be reliably estimated to a high degree of certainty since Brattle's DCF calculation is mostly based on objective data. For ease of reference, each stage of the DCF calculation is analysed in turn below.

659. Base NPV. In forecasting the Wind Farms' revenues, Brattle relies on production forecasts developed by the Wind Farms in the normal course of business.[1091] The assumptions underlying the Claimants' revenues are supported by those companies' actual revenues until 20 June 2014.[1092] Therefore, there is either no, or only limited, subjective analysis required.

660. For ease of reference, the Claimants reproduce a table included by Brattle in its most recent report, which illustrates the objectivity of the data relied on.[1093]

**Brattle's Table 7: Nature of Brattle's DCF assumptions**

---

1087 **Authority CL-77**, *Joseph Charles Lemire v The Republic of Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 246.

1088 **Authority CL-61**, S Ripinsky & K Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008), p. 211.

1089 **Authority CL-61**, S Ripinsky & K Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008), p. 211.

1090 Authority CL-61, S Ripinsky & K Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008), p. 211.

1091 Brattle Quantum Report, paras. 61-65; Brattle Rebuttal Quantum Report, para. 124.

1092 Brattle Quantum Report, paras. 58-60.

1093 Brattle Rebuttal Quantum Report, Table 7, p.40.

| Assumption | Objective or Subjective | Comments |
|---|---|---|
| Production | Objective | Historical data. Forecasts provided by Claimants. |
| Degradation Index | Objective | Sourced from Claimants' financial models. |
| Inflation Rate | Objective | Market prices of traded inflation swaps. |
| Pool Price | Objective | Futures market prices. |
| Pool Price Indexation | Subjective | Assumed long-term growth at inflation. |
| Historical O&M Costs | Objective | Historical data provided by Claimants. |
| Predicted O&M | Subjective | Actual values indexed to expected inflation. |
| Asset Lifetime | Subjective | Estimate based on investor expectations. |
| Spanish 10-Year Bond | Objective | Market data. |
| Discount Rate | Objective | Derived using standard techniques, based on market data. |
| Regulatory Risk | Objective | Based on market data for Trade Deficit securities. |

661. As this table shows, the calculation of the Base NPV is based predominantly on objective inputs, including the discount rate applied. There are only three subjective inputs. The first is minor and assumes that electricity and gas prices will simply increase with inflation over the long term. The second, which is even more minor, is to assume that the O&M contracts would be renewed on the same terms. The O&M costs themselves are objective and based on the O&M contracts. In addition, Brattle applies this same assumption in both the But For and Actual scenarios, so it does not materially impact Brattle's damages' estimates. As regards lifetime, the assessment of a lifetime of 30 years is based on an independent technical expert report prepared by GL Hassan Ibérica NV GL.[1094] Brattle has also prepared a sensitivity analysis, exploring the impact on the Claimants' damages of varying the underlying assumptions within a plausible range.[1095] As Brattle illustrates, the impact is minimal.[1096]

662. Having defined the parameters for future revenues, Brattle uses the Tariff Deficit Securities and their corresponding ratings in the But For and Actual scenarios as a proxy to quantify how those revenues are affected by regulatory risk.[1097] The use of the Tariff Deficit Securities is an objective measure for assessing the regulatory risk impact of the Disputed Measures on the Wind Farms' revenues.

663. Brattle applies a discount factor to the Wind Farms' revenues (net of regulatory risk) of 4.84%. This is an objectively-derived discount rate. It is calculated using CAPM by reference to (a) a risk-free rate of 2.09% (the published 10-year EURIBOR swap rate); (b) Bloomberg's β of 0.5

[1094] **Exhibit C-47**, Technical Due Diligence Report prepared by GL Garrad Hassan Ibérica dated 26 May 2015, p. 38.
[1095] Brattle Rebuttal Quantum Report, Appendix B.
[1096] Brattle Rebuttal Quantum Report, Appendix B.
[1097] Brattle Quantum Report, paras. 108-109; Brattle Rebuttal Quantum Report, paras. 216 and 223.

for alternative energy producers; and (c) a market-risk premium of 5.5%, derived from "*actual historical performance of stocks relative to short-term government bonds over the long run*".[1098]

664. Adjusted NPV. Brattle's accounting for financing side effects, including the discount rate applied,[1099] is based on objective and actual data. Brattle limits the tax benefit of debt to no more than 30% of EBITDA, which is consistent with RDL 12/2012.[1100]

665. Final Equity Value. The market value of the debt (which – as explained below – operates to reduce the Claimants' damages) is calculated based on objective third-party data, such as Fitch ratings and Bloomberg's published debt yield indices.[1101]

666. In summary, Spain's claim that Brattle's assumptions are speculative appears to have been made in the abstract without any consideration of Brattle's methodology. Moreover, contrary to Spain's arguments and as explained in the paragraphs immediately below, there are no other factors that would suggest that a DCF calculation is inappropriate for lack of certainty.

**(c) Future cash flows were not dependent on the pool price**

667. Spain argues that the volatility of pool prices renders the use of the DCF method inappropriate for lack of certainty.[1102] This argument betrays a fundamental misunderstanding of FIT regimes. As set out in the Brattle Regulatory Report, the volatility of pool prices is one of the reasons for implementing an FIT regime since "*in the absence of financial support provided by the Original Regulatory Regime there would be virtually no wind capacity at all in Spain*".[1103] Electricity prices only play a limited (if any) role in the remuneration provided under such regimes.

668. Under the Fixed Tariff option under RD 661/2007, cash flows are completely independent from the pool price. As Brattle explains, its model assumes that in the But For scenario, the Wind Farms would have opted for the Fixed Tariff during their entire useful lives because it was in their best interest at the Valuation Date.[1104] Under the Premium option, only a fraction of the revenues is dependent on pool price. Moreover, in light of the cap and floor mechanism, the potential upside (or downside) related to the development of pool prices would be limited.

669. In short, to suggest that the potential volatility of pool prices renders the DCF method inappropriate is wrong.

---

1098 Brattle Quantum Report, paras. 97-99 and 106-107.
1099 Brattle Quantum Report, para. 132.
1100 Brattle Quantum Report, para. 131.
1101 Brattle Quantum Report, paras. 222-223.
1102 Counter-Memorial, para. 1072(b).
1103 Brattle Regulatory Report, para. 46.
1104 Brattle Quantum Report, para. 72. The Claimants valued the pool price plus Premium option more than the Fixed Tariff option when they made their investment.

**(d) The forecast horizon is reasonable**

670. Spain objects to "[t]*he long-term nature of the forecasts*".[1105] Spain does not further explain the rationale of its argument and the Accuracy Expert Report does not refer to, let alone support, this argument.

671. In any event, as explained above, the future cash flows to the Claimants are not difficult to predict. Spain also recognised this when it implemented the new remuneration system, whereby it guaranteed a "*reasonable return*" for investment during a regulatory lifetime assessed for each type of facility (20 years for wind facilities).[1106] In other words, if Spain is able to guarantee a "*reasonable return*" during 20 years, this means that the forecast horizon can be easily predicted.

**22.4 DCF methodology is appropriate in a regulated market**

672. Spain's expert argues that the DCF approach is not appropriate in the context of an investment made in a regulated market. It states that:

> "a) Discounted Cash-Flows (DCF), the one used by Brattle. Brattle's DCF is detached from the fact that the investment was made in a regulated market monitored by a regulator whose mission is to ensure that this regulated market remains sustainable while providing remuneration that is sufficient without being excessive. Using this method, any scenario, including one implicating windfall profits, may be valid for calculating a claim."[1107]

673. Relying on the *Rusoro* case, Accuracy further argues that:

> "The Rusoro award is in agreement with our position on the fact that the level of regulation is significant when it comes to determining whether the DCF is applicable for calculating a claim. In this case, as we have already explained, the investment is framed in a highly regulated market."[1108]

674. This argument is entirely unsupported. Accuracy merely relies on an extract from the *Rusoro* case.[1109] The tribunal, however, made clear in the award that, even in a highly-regulated market, a DCF method would be appropriate as long as future cash flows were specifically certain:

> "The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty."[1110]

675. As explained earlier (see paras. 641 to 644), there were a number of reasons why, in the specific circumstances of Rusoro, the tribunal considered that future cash flows were too uncertain, none

---

[1105] Counter-Memorial, para. 1072.
[1106] Counter-Memorial, para. 1016.
[1107] Accuracy Expert Report, para. 83.
[1108] Accuracy Expert Report, para. 103.
[1109] **Authority CL-153**, *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, para. 758.
[1110] **Authority CL-153**, *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, para. 759.

of which are present here. Contrary to the Claimants, Rusoro did not benefit from any representations from Venezuela that it would be exempted from regulatory changes. The tribunal indeed observed:

> "The Bolivarian Republic never made any representation vis-à-vis Rusoro, either before or after the investment, that Rusoro would somehow be exempted from the application of the general exchange control regime. Claimant never developed a legitimate expectation that in due course Venezuela would not adopt more restrictive legislation, and that tolerance of the Swap Market would continue sine die. "[1111]

676. As explained above, the Claimants benefited from clear stability commitments on which they legitimately relied when investing; namely Article 44.3 of RD 661/2007 and Article 5.3 of RD 1614/2010. The Rusoro case is simply inapposite.

**22.5 Questions of "disproportion" between the amount invested and the amount claimed are irrelevant**

677. Spain argues that there is a disparity between the amount that the Claimants invested and the amount they claim in damages.[1112] Spain again cites Ripinsky and Williams for the proposition that some tribunals have rejected the DCF method when there is "[a] *large disparity in the amount actually invested and the FMV claimed*".[1113] The authors cite two cases where the so-called "*disparity*" factor was considered relevant:[1114] *Wena Hotels v Egypt*[1115] and *Tecmed v Mexico*.[1116]

678. Neither of these cases advances Spain's case. Below, the Claimants briefly summarise each case before identifying the three grounds on which they can be distinguished.

679. In *Wena Hotels v Egypt*, the tribunal considered a claim for expropriation and breach of the fair and equitable treatment arising out of Egypt's forced takeover (and subsequent vandalism) of two of the claimant's hotels. At the time of the eviction, the claimant had operated the hotels for less than 18 months and had not completed certain renovations at one of the two hotels. The tribunal held that (a) the claimant's assets had been expropriated and Egypt had failed to provide prompt and adequate compensation; and (b) Egypt had breached the FET provision of the relevant investment treaty. The claimant sought damages for lost profits, lost opportunities and reinstatement costs. Relying on the decisions in *SPP v Egypt* and *Metalclad Corporation v The United Mexican States*, the tribunal rejected the DCF method proposed by the claimant primarily

---

1111 **Authority CL-153**, *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, para. 758, para. 532.
1112 Counter-Memorial, para. 1072(d).
1113 Counter-Memorial, para. 1073.
1114 **Authority CL-61**, S Ripinsky & K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008), pp. 206-207.
1115 **Authority CL-22**, *Wena Hotels v Egypt*, Award, 8 December 2000, para. 123.
1116 **Authority CL-33**, *Tecmed v Mexico*, Award, 29 May 2003, para. 186.

because it was too speculative on the facts before it.[1117] In particular, the tribunal noted that (i) there was an insufficiently "*solid base on which to found any profit…or for predicting growth or expansion of the investment made by Wena*";[1118] and (ii) the ability for Wena to fund the renovation and operation of the hotels was in question.[1119] As a final comment, the tribunal noted the disparity between the amount claimed and the amount invested.[1120]

680. In *Tecmed v Mexico*, the tribunal had to assess the fair market value of the claimant's landfill. The expropriation clause provided that the valuation criteria fell to be determined under Mexican law, which created a *lex specialis* for the measure of damages that displaced principles of public international law. The relevant-Mexican law provision provided that compensation should indemnify the "*commercial value of the expropriated property*".[1121] Against that background, the tribunal concluded that a DCF method was not appropriate. The tribunal was concerned with (a) the limited history of operation of the landfill; (b) the "*difficulties in obtaining objective data allowing for application of the* [DCF] *method*"; and (c) the fact that future cash flows were dependent on future investments being made. In short, the likelihood of future cash flows arising at all, let alone of the magnitude claimed, was in serious doubt. The tribunal also noted that the great disparity between the amount invested and the amount claimed meant that the relief sought was "*likely to be inconsistent with the legitimate and genuine estimates on return on the Claimant's investment at the time of making the investment*".[1122]

681. It is immediately apparent that neither of these cases bears any resemblance to the facts of this arbitration. They can be distinguished on the following grounds.

682. First, in each case, the tribunal's primary concern was the certainty of future cash flows; the claimants in those cases did not discharge their burden of showing that the cash flows were likely to be realised. That the tribunals' key consideration was the certainty of future cash flows is consistent with Marboe who, having cited the same two decisions, states that:

> "[f]rom a valuation perspective, [the disparity argument] is, however, not persuasive. The amounts invested and the value of the investment are not always in a proportional relation. On the contrary, if an investment turns out to be particularly promising the host State could be motivated to expropriate it or to otherwise impair it. Great care must therefore be taken not to link the amount of compensation or damages closely to the investment actually undertaken, if the investment has good future prospects."[1123]

---

1117 **Authority CL-22**, *Wena Hotels v Egypt*, Award, 8 December 2000, paras. 123-124.
1118 **Authority CL-22**, *Wena Hotels v Egypt*, Award, 8 December 2000, para. 124.
1119 **Authority CL-22**, *Wena Hotels v Egypt*, Award, 8 December 2000, para. 124.
1120 **Authority CL-22**, *Wena Hotels v Egypt*, Award, 8 December 2000, para. 127.
1121 **Authority CL-33**, *Tecmed v Mexico*, Award, 29 May 2003, para. 187.
1122 **Authority CL-33**, *Tecmed v Mexico*, Award, 29 May 2003, para. 186.
1123 **Authority CL-68**, I Marboe*, Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2009), para. 5.262.

683. The Claimants have already shown that their future cash flows, with and without the Disputed Measures, are sufficiently certain. The Claimants' investments are a far cry from the investments in *Wena Hotels* and *Tecmed*. In *Tecmed*, objective data concerning future cash flows was not available and those future cash flows were dependent on the claimant making further investments in the long term. In *Wena*, there was a serious question mark over Wena Hotels' ability to fund the renovation and operation of the hotels going forward. In the present case, future cash flows are stable and predictable, the Claimants having invested based on a regulated tariff provided by law. Moreover, the Wind Farms were commissioned and fully operational by the time the Disputed Measures were rolled out. Finally, notwithstanding the significant financial impact of the Disputed Measures, the Wind Farms continue to operate and supply electricity to the national grid.

684. Secondly, the disparity between the amount claimed and the amount invested in both *Wena Hotels* and *Tecmed* was significant, although that disparity was not, of itself, sufficient reason to reject a DCF method. In any event, there is no disparity here. There is a striking difference between what the claimants in *Wena Hotels* and *Tecmed* had invested, as compared to the respective amount claimed. In *Wena Hotels*, the amount claimed represented more than seven times the amount invested and, in the case of *Tecmed*, 13 times. By contrast, the amount claimed here represents 1.36 times the amount invested, or 2.8 times if the sale price is included. As Ripinsky and Williams observe:

> "By the very nature of the entrepreneurial activity, the sum total of investments is normally lower than the value of a business created as a result. To create a business, in addition to money, an investor usually contributes other ingredients such as management skills, know-how and technology, which add value to the investment and are of particular importance in areas such as energy, infrastructure or construction, frequently featuring in investor-State arbitrations. It is not abnormal for a business's FMV to exceed the invested amount several times over."[1124] (emphasis added)

**22.6 The DCF method is an appropriate valuation methodology for the case at hand**

685. Investment-treaty jurisprudence favours the adoption of the DCF method for assessing the fair market value of a claimant's losses. The key question when applying the DCF method is whether future cash flows are, on the balance of probabilities, sufficiently certain to support the methodology. As explained above, Brattle's model is based on predominantly objective inputs, all of which can be tested against objective market data (something which Accuracy has, to date, failed to do).

[1124] **Authority CL-61**, S Ripinsky & K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008), pp. 230-231. See also, pp. 200 and 211.

686. Brattle's careful and objective construction of its DCF model is further enhanced by the adoption of conservative assumptions. Indeed, Accuracy's own DCF valuation (which is considered in more detail in paragraph 748 below) confirms this. In particular, Accuracy's cash flow projections are identical to those of Brattle, as it uses the same model and the main differences between Brattle and Accuracy's DCF arise as a result of three isolated disagreements which are unrelated to the certainty of cash flows: one is related to the approach used to quantify the assets in the actual scenario and the other one to the perception of regulatory risk in both scenarios. The third one is related to lifetime. Furthermore, Brattle assumes a lifetime of 30 years and Accuracy 25 years. The similarity between the forecasts is proof of the relative predictability of cash flows for wind farms and confirms the reasonableness of using the DCF method to compute fair market values and damages in this arbitration.

687. Brattle's choice of DCF methodology is also supported by the fact that all relevant parties adopted (and continue to adopt) the DCF method to assess the value of RE assets in Spain – including other investors, lenders and accountants who calculate the asset impairments.[1125] Moreover, as already mentioned above, Spain itself relied on the DCF method when designing RD 661/2007 (and the New Regime).[1126]

## 23. THE CLAIMANTS' CLAIM IS NOT SPECULATIVE

688. Spain alleges that the Claimants' claim is speculative. In particular, Spain makes four assertions on the alleged speculative nature of the claim: the Claimants (a) have "*disposed of* [their] *entire investment, obtaining a substantial capital gain*";[1127] (b) have obtained an investment return that was even greater than expected;[1128] (c) base their claim "*on an unrealistic valuation of the assets that lacks any foundation*";[1129] and (d) are "*attempting to offer the Tribunal a Current scenario that is absurd and irrelevant, considering that the investment was disposed of in 2016 for a specific, determined price*".[1130]

689. These assertions are notably based on Accuracy's calculations that the Claimants would obtain an "*excessive*" internal rate of return (**IRR**) on their investment, should they be awarded damages.[1131] According to Accuracy, the Claimants would have already obtained a capital gain on their investment of 11.2% when they sold their assets,[1132] so an award of damages in the amount claimed would allow them to make an IRR of 23.2%.[1133]

---

1125 Brattle Rebuttal Quantum Report, para. 124.
1126 Brattle Rebuttal Quantum Report, para. 127.
1127 Counter-Memorial, para. 1086(a).
1128 Counter-Memorial, para. 1086(b).
1129 Counter-Memorial, para. 1086(c).
1130 Counter-Memorial, para. 1086(d).
1131 Counter-Memorial, paras. 1085 and 1092.
1132 Counter-Memorial, paras. 1088-1089.
1133 Accuracy Expert Report, Section III.4.

690. Accuracy's calculations are wrong, as are the conclusions they (and Spain) draw. In this section, the Claimants will first clarify the relevant concepts (section 23.1), then explain why Accuracy's IRR calculations are erroneous (section 23.2). We also show that the But For IRRs (i.e. the damages claimed) are not speculative or excessive and are consistent with both Spain's promises and the Claimants' expectations at the time of the investment (section 23.3).

### 23.1 Preliminary observations in respect of IRR

691. Three preliminary observations need to be made in relation to IRRs. First, as Brattle observes, "*returns actually achieved rarely equal the returns originally expected*".[1134] The returns demanded by investors represent all the risks involved in a project at the time an investment is made, some of which will resolve favourably and some of which will materialise. In its first Regulatory Report, Brattle explains that when an investor expects a certain return, that return is the average outcome of two outcomes of equal likelihood. For instance, if the investor is expecting a return of 10%, this means that the investor expects to receive 0% if the risks anticipated materialise, and 20% if all the risks resolve favourably.[1135] Indeed, Brattle notes:

> "Regulatory regimes must allow investors to retain the 20% when risks resolve favourably, to compensate for the risks that investors incur of earning 0%.
>
> It is needlessly punitive and ultimately counterproductive if, upon witnessing an investment that has in fact earned 20%, the Government steps in to change the rules, reducing the returns to a target of 10%."[1136]

692. In this specific case, as Brattle observes, none of the operational risks that the Claimants could reasonably have anticipated materialised:

> " … risks have generally resolved favourably for the Claimants' plants. We understand that all eight wind farms encountered no major problems since 2012 during construction, that the equipment has performed well since in, them, entered into service, and that production has been consistent. Claimants also purchased the winds assets in the middle of the Eurozone Sovereign Debt Crisis, when Spanish interest rates were high and thus valuations significantly depressed. Due to the actions of the Eurozone authorities, notably the European Central Bank, Spanish interest rates have since declined significantly, thereby reducing discount rates for Spanish assets and raising valuations."[1137] (emphasis added)

693. Therefore, but for the Disputed Measures, the Claimants would have received a higher return than they expected.

---

1134 Brattle Rebuttal Quantum Report, para. 44.
1135 Brattle Regulatory Report, paras. 178-179.
1136 Brattle Regulatory Report, paras. 178-179.
1137 Brattle Rebuttal Quantum Report, para. 45.

694. Secondly, Spain and Accuracy ignore a fundamental distinction between the IRRs in their calculations and valuations at equity levels. Returns at project level (the **project IRRs**) and returns at shareholder level (the **equity IRRs**) are obviously different. The former ignore the project's financing structure (and only consider construction costs and free cash flows), while the latter takes that structure into account by focusing on equity investments and equity cash flows.[1138] This distinction is completely ignored by Accuracy when assessing the reasonableness of the returns obtained by the Claimants, at equity levels.[1139]

695. As Brattle explains, the presence of debt magnifies the impact of any changes in asset value onto equity investors, with the degree of magnification varying with leverage.[1140] As the Claimants were equity holders in the Wind Farms, Brattle notes that they "*could expect relatively small changes in the value of the projects to be magnified onto them, thus generating larger swings in the equity IRRs than in the underlying project IRRs*."[1141]

696. Finally, returns can be calculated in two distinct ways. Returns can be computed assuming that the investment is held until the end of its useful life (**long-term holding IRRs**) and the investor receives all of the equity flows over time.[1142] Returns can also be calculated assuming that the investment is sold at a given point in time, cashing out the fair market value of the assets through a sale (**exit IRRs**).[1143] Factors impacting the fair market value of the asset such as interest rate movements will be accounted for in the exit IRR, as these will have a significant impact on the exit value, but not in the long-term holding IRR, as they will not influence underlying cash flows.[1144] Brattle notes that "[b]*etween May 2012 and February 2016, Spanish Sovereign bond yields declined from 6.5% to 1.6%*",[1145] which automatically leads to an increase in exit IRRs, all other things being equal.

### 23.2 Accuracy's and Spain's calculations and assertions are erroneous

697. First, there are a number of issues with Accuracy's calculations. Accuracy claims that the Claimants have already achieved an equity IRR of 11.2% upon selling the Wind Farms.[1146] The 11.2% figure results from a simple calculation comparing the price of acquisition of the Wind

---

1138 Brattle Rebuttal Quantum Report, para. 47.

1139 Brattle Rebuttal Quantum Report, para. 47.

1140 Brattle illustrates this impact with the following example: a home costs EUR 100,000 and is financed by both cash (EUR 20,000) and a mortgage (EUR 80,000). The capital structure thus reflects 20% of equity and 80% of debt. A 10% change in house prices would have a disproportionate impact on the equity investment. A 10% rise in house prices would imply a rise in the value of the house to EUR 110,000, which in turn would imply that the EUR 20,000 equity investment would have risen in value to EUR 30,000 (i.e. a 50% gain), whereas a 10% house price decline would prompt a 50% loss in the EUR 20,000 equity investment; Brattle Rebuttal Quantum Report, paras. 48 and 49.

1141 Brattle Rebuttal Quantum Report, para. 50.

1142 Brattle Rebuttal Quantum Report, para. 51.

1143 Brattle Rebuttal Quantum Report, para. 51.

1144 Brattle Rebuttal Quantum Report, figure 1 and para. 53. Brattle explains that "[l]*ong-term holding and exit IRRs can differ significantly if there is a shift in underlying interest rates, as has occurred in Spain between 2012 and either our June 2014 valuation date or the Claimants' ultimate sale of the assets in 2016. The reason is that the shift in interest rates impacts the exit value, but not the underlying cash flows*".

1145 Brattle Rebuttal Quantum Report, para.55.

1146 Accuracy Expert Report, Section III.1.

Farms of EUR 91 million and the sale price achieved by the Claimants of EUR 133 million. It stresses that "*the sale of the plants already secured a profit of 11.2% for the Claimants*".[1147] Spain claims that the "*return obtained by the facilities of the Claimant exceeds the reference rates, and therefore no damage to the investments can be argued*".[1148] This brings Spain nowhere as there is no such thing as "*reference rates*". In fact, Spain intends to argue that the 11.2% is above the "*reasonable return*" of 7.4% provided under the New Regime.

698. The Claimants' case is that they were not promised a "*reasonable return*" of 7.4% under RD661/2007 but a tariff that would remain unchanged for the operational lifetime of the RE plants (see section 21.1). Spain's argument therefore amounts to a denial of liability.

699. In support of its claim, Spain argues that when the Claimants used a cost of equity of 10.5% in their "mid-case scenario" when they decided to commit to the investment, this cost of equity can be equated to the IRR the Claimants expected.[1149] This is not the case. The Claimants have never used this rate as a reference for what the return they could expect on (and of) their investment, and Spain does not submit any evidence that the Claimants did.

700. In fact, this cost is only reported in a stand-alone table of the 2011 model of the Financial Models for Claimants' Assets;[1150] but it is not referred to or used anywhere else in the model. Moreover, as explained by Brattle, the mid-case scenario cost of equity does not take into account several factors that would raise this estimate, notably the lack of liquidity of the Claimants' interests or the fact that the 10.5% mid-case cost of equity assumes a 45% level of debt financing, far from the 79% level of debt financing of the Claimants' investment.[1151]

701. If expected IRRs were considered relevant by the Tribunal (which, in the Claimants' case, they should not, given their legitimate expectation on a euro/kWh remuneration), then Brattle has computed the correct IRR. The IRR implied by the combination of the EUR 91 million acquisition price paid by the Claimants in August 2011 and the equity cash flows predicted by the Claimants' own model. Brattle then combines the purchase price with the Claimants' own cash flow forecasts, thereby obtaining an equity holding IRR of 15.1%.[1152] As a result, an equity holding IRR of 15.1% would be a much more relevant figure with which to compare the equity holding IRRs computed by Brattle in the Actual and the But For scenarios, which represent what the Claimants have obtained and what they would have obtained But For Spain's measures, as will be discussed below.

---

1147 Accuracy Expert Report, paras. 47(a) and 56.
1148 Counter-Memorial, para. 1085.
1149 Counter-Memorial, para. 1089.
1150 **BQR-40.3**, (model 2011), tabs WACC – I and WACC – T.
1151 Brattle Rebuttal Quantum Report, paras.76-77.
1152 Brattle Rebuttal Quantum Report, para. 78.

702. Secondly, Accuracy seeks to "[assess] *the return that shareholders would obtain if the Tribunal awarded the Claimants the claim for €128.8 million calculated by Brattle*". To do this, Accuracy adds Brattle's Quantum Report's damages estimate on top of the sale price actually achieved by the Claimants (the difference between the Actual and the But For scenario in June 2014 plus pre-award interest, of EUR 128.8 million, added to the EUR 133 million sale price and the equity cash flows of Brattle's Calibrated 2016 DCF Model) to raise their return on investment to 23.2%, far above what the Claimants originally expected.[1153] Accuracy alleges that the Brattle's But For value involves a "*windfall profit*" or "*super profit that is out of place in a regulated market*", since the EUR 187 million plus capitalised historical shareholder cash flows of EUR 19 million is 2.27 times higher than Bridgepoint's initial 2012 investment of EUR 91 million.[1154] This makes no sense.

703. To reach this conclusion, Accuracy ignores three straight-forward financial effects that explain the emergence of a market value to initial investment premium, namely:

(a) the unanticipated reduction in interest rates between 2012 and 2014, which would have prompted a valuation gain under the Original Regulatory Regime, thereby directly benefiting equity investors;[1155]

(b) the project companies' significant project finance debt obligations, the presence of which magnifies the valuation impact associated with the interest rate reduction onto the value of the Claimants' equity;[1156] and

(c) the impact of scheduled debt repayments, which the Claimants expected to repay by using the majority of the cash flows generated by the project companies, on the expected evolution of equity value. As a result of the Claimants' repayment, the outstanding debt would "*decline faster than the overall asset value, which would reflect the present value of the forecast project free cash flows*".[1157] Such dynamic logically implies an increase in the equity value over time.[1158]

704. Brattle shows the overall impact of these three financial effects on the value of the Claimants' equity in the But For scenario and found an overall value of EUR 518.8 million, equivalent to 1.2 times the initial investment amount of EUR 431.1 million (EUR 90.9 million of equity investment plus EUR 340.2 million of outstanding debt).[1159] Brattle concludes, therefore, that

---

[1153] Accuracy Expert Report, para. 71.
[1154] Accuracy Expert Report, paras. 60-64.
[1155] Brattle Rebuttal Quantum Report, para. 86.
[1156] Brattle Rebuttal Quantum Report, para. 87.
[1157] *Ibid*., para. 90.
[1158] *Ibid*.
[1159] *Ibid*., para. 89.

the increase in equity value implied in its damages analysis "*is reasonable and not representative of 'windfall profits'*".[1160]

705. Finally, Spain contends that the Claimants "*inflate* [their] *figures by undervaluing the Current price* [i.e. the Actual Value] *with an estimate of future cash flow*", rather than using the value of the sale in 2016 of the Wind Farms, because "*the reasonable value of the assets was determined by the actual market at €133 million (2016) rather than €96.9 million*".[1161] Brattle explains, however, that, as part of the reality checks, it updated its DCF model in the Actual scenario "*to reflec prevailingt pool price expectations and macroeconomic conditions in February 2016, when the Claimants sold the wind parks*".[1162] This allows for the most accurate valuation of the Wind Farms by disregarding the predictions of higher pool price of the seller and the buyer at time of the transaction, which would have only served to raise damages.[1163] In contrast, Accuracy's approach "*introduces a serious inconsistency [*in respect of pool prices*]*", thereby "[contaminating] *the resulting measure of difference between the scenarios*".[1164]

706. Thus, Spain's conclusions as well as Accuracy's calculations and conclusions are misleading. As we demonstrate in the following sub-section, and as Brattle explains, the level of returns implied by its damages valuation "*is entirely consistent with both the Claimants' original expectations and the level of returns anticipated by Spain for wind plants under RD 661/2007*".[1165]

**23.3 The returns computed by Brattle are consistent with the Claimants' expectations and Spain's promises**

707. To illustrate the reasonableness of the Claimants' claim for damages in the light of the Claimants' expected returns, the Claimants compare the IRR that they actually made under the New Regime with (a) what Spain expressly promised they would make under the Original Regulatory Regime; and (b) what they expected to earn when making their investment. To that end, Brattle computes the equity IRRs (both exit and holding) and the project IRRs (both exit and holding) under the Actual scenario and under the But For scenario. The Claimants stress again that IRRs calculations are irrelevant to their damage claim. The purpose of this exercise conducted by Brattle is therefore simply to show the reasonableness of their damage claim.

708. The Claimants' IRRs are summarised in Brattle's Table below:

---

1160 *Ibid*., para. 91.
1161 Accuracy Expert Report, para. 69.
1162 Brattle Rebuttal Quantum Report, para. 92.
1163 *Ibid*., para. 94, Brattle Quantum Report, para. 156. The Claimants' 2016 model forecasted higher pool prices than those predicted by the Claimants at the Valuation Date.
1164 Brattle Rebuttal Quantum Report, para 96.
1165 Brattle Rebuttal Quantum Report, para. 83.

**Brattle's Table 5: Summary of IRRs vs. Expectations (after tax)**

| | But-For | Actual | Expected Values |
|---|---|---|---|
| **Equity Returns** | | | |
| Exit IRR | 32.5% | 11.2% | |
| Holding IRR | 13.7% | 7.0% | 15.1% from Bridgepoint Investor Model |
| **Project Returns** | | | |
| Exit IRR | 13.2% | 6.0% | |
| Holding IRR | 8.3% | 5.6% | 7 - 8% Spain's Expectations |

Sources and Notes:
See notes for Table 3 and Tables P – Equity and Project IRRs.
For Spain's expected project returns, see:
Exhibit **C-203**, Regulatory Dossier of RD 661/2007, Memoria Económica, from the General Directorate of Energy Policies and Mining, 21 March 2007, Section 3.2.1.
Exhibit **BRR-41**, CNE, Report 3/2007 on the Proposal of Royal Decree that Regulates the Electric Power Generation under the Special Regime and Specific Technologies under the Ordinary Regime, 14 February 2007, p. 22.

709. As noted by Brattle, the IRRs reflect two distinct patterns:

(a) Both exit and holding equity IRRs exceed the project-level equivalents which reflect the impact of financial leverage at the wind projects (i.e. debt financing levers up the returns at equity level).

(b) Both equity and project-level exit IRRs exceed the underlying holding IRRs, which is due to the reduction in interest rates between 2012 and 2016.[1166]

**(a) The IRRs under the Actual scenario**

710. In the Actual scenario, Brattle calculates an equity exit IRR of 11.2% that reflects the EUR 91 million paid by the Claimants to purchase the equity in the Wind Farms in 2012 and EUR 133 million sale price obtained in 2016. The 11.2% IRR is consistent with the figure put forward by Accuracy. If the EUR 133 million sale price in 2016 is replaced with the underlying series of cash flows the investors would have earned, had they not sold the assets, the equity return falls to 7%.[1167] This return corresponds to the equity holding IRR. The equity holding IRR of 7% is the pertinent return to compare with the equity holding IRR of 15.1%, which is the return that the Claimants expected to obtain when making their investment (see para. 700). In other words, Accuracy's conclusion that the investment's return was "*higher than expected*"[1168] based on a

[1166] Brattle Rebuttal Quantum Report, para. 64.
[1167] The underlying series of cash flows is calculated by updating Brattle's June 2014 DCF analysis to reflect interest rates, inflation and operating expectations prevailing in February 2016, and then updating the assumed pool price forecast to generate a February 2016 equity valuation of EUR 133 million in the Actual scenario; see Brattle Rebuttal Quantum Report, para. 40.
[1168] Accuracy Expert Report, paras. 55-56.

comparison between the 11.2% equity exit IRR in the Actual scenario and a "mid-case" cost of equity of 10.5% is totally misleading.

711. Turning back to the comparison of relevant equity holding IRRs, the equity holding IRR of the Actual scenario of 7% falls well below the equity holding IRR of 15.1%, expected by the Claimants. More relevantly, the actual project holding IRR of 5.6% is far below the 7-8% expected by the Claimants when making their investment. Spain thus fell short of its promises by implementing detrimental measures which deprived the Claimants of the returns they could expect to make under the previous regime.

712. Importantly, Accuracy's conclusion ignores the implications for the damages analysis of the low interest rate environment as at February 2016.[1169] As pointed out by Brattle:

> "the correct approach is to analyse the project-level holding IRRs implied by the damages analysis and compare them to the long-term project-level returns anticipated by Spain for wind investments when it designed the RD 661/2007 FITs in the first place."[1170]

**(b) The IRRs under the But For scenario**

713. In order to obtain the Claimants' IRR in the But For scenario, Brattle does not confine itself, in contrast with Accuracy's simplistic calculations, to add the damages award to the 11.2%. Instead, Brattle computes the IRR directly implied by the 2016 sale of the Wind Farms in the But For scenario.[1171] Brattle uses the same Calibrated 2016 DCF Model to estimate the additional cash flows and sale proceeds that the Claimants could have expected in the But For scenario over and above those actually received. This shows that the Claimants would have obtained an extra EUR 74 million through a February 2016 sale in the absence of the Disputed Measures.[1172]

714. Brattle obtains an equity holding IRR of 13.7% and an equity exit IRR of 32.5% in the But For scenario. As shown above, the cash flows underlying the 2016 sale price now imply a long-term equity holding IRR of only 7.0%, compared to the Claimants' alleged initial expectations of 15.1%.[1173] Moreover, the equity holding IRR of 13.7% falls below the 15.1% return. This is explained by the fact that pool prices and inflation have turned out below the Claimants' original expectations.[1174]

715. The equity holding IRR in the But For scenario implied by the damages analysis is, therefore, consistent with the equity holding IRR originally expected by the Claimants, whereas the Actual

[1169] Brattle Rebuttal Quantum Report, para. 39.
[1170] Brattle Rebuttal Quantum Report, para. 80.
[1171] Brattle Rebuttal Quantum Report, para. 63.
[1172] Brattle Rebuttal Quantum Report, para. 72.
[1173] Brattle Rebuttal Quantum Report, para. 80.
[1174] Brattle Rebuttal Quantum Report, para.80-81.

scenario shows that the measures implemented with the New Regime substantially deprived the Claimants of returns they expected to obtain under the Original Regulatory Regime.

716. Finally, Brattle calculates a project holding IRR of 8.3%, and a project exit IRR of 13.2% in the But For scenario.[1175] The Spanish Government envisaged an after-tax project return of 7% in 2007 for the fixed FIT option under RD 661/2007, and a range of 5% to 9% for the pool plus Premium, and the CNE believed that wind projects would earn an average after-tax return of 8% under RD 661/2007.[1176] The project holding IRR of 8.3% in the But For scenario is, therefore, consistent with the project-level returns originally anticipated by Spain, whereas the Actual scenario (with a project exit IRR of 6.0% and a project holding IRR of 5.6%) involves a significant reduction.[1177]

717. This analysis confirms that Accuracy has significantly understated the Claimants' original expectations. It also confirms that the actual investment return of 11.2% earned by the Claimants through the sale of the Wind Farms in 2016 was in fact below the Claimants' original expectations, in spite of the unanticipated interest rates decrease between 2012 and 2016.[1178] Project-level IRRs in the Actual scenario are also below what Spain considered reasonable under RD661/2007. In addition Brattle's But For scenario generates holding IRRs consistent with both the Claimants' original expectations and the level of returns anticipated by Spain for wind plants under RD 661/2007.[1179]

718. The Claimants' claim for damages is, therefore, supported by a sensible economic analysis that is both fair and accurate. It is neither "*speculative*" nor "*rash*", but to the contrary founded on rational economic assumptions and straightforward calculations, whereas Spain's attempts to discard the Claimants' claim invariably fall short as illogical and ill-founded.

## 24. THE ASSET-BASED METHOD IS INAPPROPRIATE

719. Although Spain provides a "subsidiary" DCF valuation of damages assessed on a DCF basis,[1180] Spain's primary position is that an asset-based valuation (**ABV**) method should be used to assess the Claimants' damages. Spain argues that this is appropriate in circumstances where there is "*a capital-intensive business, with a significant asset base*", with no intangible assets to assess.[1181] The Claimants explain why such an approach would be wrong here and amounts to a denial of liability, in section 24.1 and section 24.2.

---

[1175] Brattle Rebuttal Quantum Report, para. 80-81.
[1176] Brattle Rebuttal Quantum Report, para. 81.
[1177] Brattle Rebuttal Regulatory Report, para. 81.
[1178] Brattle Rebuttal Quantum Report, para. 83.
[1179] Brattle Rebuttal Quantum Report, para. 83.
[1180] See section 25.3(e) below for a comparison of Brattle's and Accuracy's DCF valuations.
[1181] Counter-Memorial, para. 1072(a).

720. Brattle addresses Accuracy's asset-based valuation of damages in section VII of the Brattle Rebuttal Quantum Report, which the Claimants summarise in section 24.3.[1182]

**24.1 The ABV method is inappropriate**

721. Spain and its expert argue that the ABV approach is:

(a) "*less speculative and simpler*" than an income-based approach such as the DCF method;[1183]

(b) "*particularly appropriate*"[1184] where, as here, the investments were acquired near the valuation date;[1185] and

(c) applicable since the Claimants' investments "[are] *a capital-intensive business, with a significant asset base*", with no intangible assets to assess.[1186]

722. As to (a), this has already been addressed above. The assumptions underlying Brattle's DCF calculation are, for the most part, objective. Spain's argument that the ABV method is "*less speculative*" is therefore moot. As to the alleged ease of adopting the ABV method, as compared to the DCF method, that is nothing but a bare assertion. In support, Spain simply refers to Accuracy's report when Accuracy's ABV is nothing more than a simplified DCF, as will be shown below. As Brattle explains, Accuracy's ABV "*analogises the remuneration to the Claimants' wind plants as a 25-year stream of constant annual cash flows, and then values the plants by discounting these annual cash flows back to present value*".[1187]

723. As to (b), Spain appears to have overlooked that the Claimants acquired their investment in 2011.[1188] That acquisition cannot be said to be "*near*" the valuation date of June 2014. In any event, Spain cites no authority in support of its argument on the reliance of that temporal proximity of an investment with the valuation date for an ABV method.

724. As to (c), it is unclear what the basis of this last assertion is. The Claimants are therefore unable to address it in detail other than to reject its relevance.

725. More generally, Accuracy's reliance on the ABV approach to value the fair market value of the Claimants' investments in Spain is highly unusual and without support in investment-treaty jurisprudence. Neither Spain nor Accuracy cites any ECT decision that supports the use of ABV

1182 Accuracy Expert Report, paras. 115-135.
1183 Counter-Memorial, para. 1080.
1184 Counter-Memorial, para. 1082.
1185 Counter-Memorial, para. 1082.
1186 Counter-Memorial, para. 1072(a).
1187 Brattle Rebuttal Quantum Report, para. 166.
1188 Memorial, paras. 195-213.

for the simple reason that none exists. The Claimants are aware of two cases where the concept of regulated asset base (**RAB**) (which serves as a basis for the ABV) was referred to, but in both cases the DCF method was agreed between the parties and the concept of the RAB was discussed in the context of appropriate inputs for the DCF model.[1189]

726. The Respondent cites the decision in *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*[1190] to support its argument that an asset-based valuation would be more appropriate. As explained above, in this case the tribunal used, as an alternative to the DCF valuation method, a combination of three methodologies, namely the "maximum market value", the "book value" and the "adjusted investment valuation".[1191] The tribunal used an alternative valuation method to the DCF approach because the circumstances of the case made it impossible to predict future cash flows with sufficient certainty. The tribunal therefore first considered whether the DCF would be appropriate in this case, before considering other valuation methods. Furthermore, the tribunal criticised the book valuation method, considering that it failed to take into account the increase of the price of gold companies or the developments of mining properties:

> "The Book Valuation is a number which derives directly from Rusoso's audited balance sheet; it represents a conservative criterion, frequently found in the valuation of enterprises, including in the Nationalization Decree; the shortcoming is that it does not reflect the increase in the price of gold and gold mining companies between investment and expropriation, nor the development of the mining properties carried out under Rusoro's watch; setting off pros and cons the Tribunal gives it a weighting of 25%."[1192]

## 24.2 Accuracy's ABV amounts to a denial of liability

727. Upon closer examination, this method is simply a way for Spain to (a) deny liability; and (b) assert that no damage was suffered. It is not a bona fide alternative to assessing the fair market value of the Claimants' investments. As Brattle explains:

> "[T]he Claimants do not seek compensation for potential errors in assessing efficient investment costs. The Claimants object to the entire switch from the promised tariffs under the Original Regulatory Regime, towards separate standard installations and efficient cost levels for different types and different commission years of wind plants, and to the reduction in the allowed return relative to levels deemed reasonable when Spain established the Original Regulatory Regime. Accuracy's implementation of the ABV approach does not address any of these claims.

---

1189 See **Authority CL-143**, *TECO Guatemala Holdings LLC v Guatemala,* ICSID Case No. ARB/10/17, Award, 19 December 2013, paras. 722-741; **Authority CL-136**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v The Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, paras. 1281-1317.

1190 **Authority CL-153**, *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, ICSID Case No.ARB(AF)/12/5, Award, 22 August 2016.

1191 **Authority CL-153**, *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, ICSID Case No.ARB(AF)/12/5, Award, 22 August 2016, para. 787 *et seq*.

1192 **Authority CL-153**, *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, ICSID Case No.ARB(AF)/12/5, Award, 22 August 2016, para. 789.

Accuracy's ABV method to calculate damages therefore contains many implicit regulatory assumptions: (i) that the allowed return under the New Regulatory Regime is reasonable; (ii) that investors were entitled to nothing more under the Original Regulatory Regime than a reasonable return comparable to that under the New Regulatory Regime; (iii) that all plants would in fact have the same costs as the allegedly efficient "standard installations" specified in the June 2014 Ministerial Order, and that actual production would match Spain's projections for the relevant standard installation. Most of the assumptions above imply that the Tribunal will accept the New Regulatory Regime. Accuracy's ABV calculation leaves the Tribunal with no useful guidance if the Tribunal disagrees with its views on regulation, and finds that Spain is liable for the alleged treaty violations."[1193]

728. The ABV method therefore altogether ignores the Claimants' case on liability: that Spain promised (and the Claimants expected) a stable FIT regime for the entire operational life of the Wind Farms. After the Claimants had relied on that promise, made significant investments in equity (based on the stable revenue streams that were expected under RD 661/2007) and entered into long-term swap arrangements for the Claimants' debt, Spain withdrew that regime. The ABV method does not account for that switch in regime as it assumes a different regime was in place at the time the Claimant made their investment. This is evident from Accuracy's conclusion that for the Wind Farms, "*there was no negative financial impact of the Measures for the Claimants*".[1194] This is pure fiction as their own cash flows calculations in the But For and Actual scenarios show.[1195]

729. In short, the Claimants submit that Accuracy's ABV approach is inappropriate and should be rejected in favour of the Claimants' DCF method.

### 24.3 Accuracy's ABV is filled with errors

730. Accuracy's ABV is a simplified DCF. Accuracy uses the ABV approach to assess the NPV of the Wind Farms in But For scenario and Actual scenario. Accuracy's ABV is largely inspired by the New Regime which, as mentioned above, sets two elements to calculate the remuneration received by RE plants: a cost basis for standard installations costs (i.e. a regulated asset base or RAB), and a target return calculated on the basis of such standard costs.[1196]

731. The Claimants however observe that, despite having considered that Brattle's DCF would be inadequate, Accuracy in fact proposes an alternative valuation which is no more than a simplified DCF. Indeed, as Brattle explains:

"Accuracy's supporting workpapers explicitly construct the series of annual cash flows and discount them at an assumed discount rate to derive an estimate of

[1193] Brattle Rebuttal Quantum Report, paras. 110-111.
[1194] Accuracy Expert Report, para. 170(a).
[1195] Accuracy Expert Report, paras. 117 *et seq.*
[1196] Accuracy Expert Report, para. 120.

value in both the But-For and Actual scenarios. Accuracy's ABV approach is not therefore a separate method, but just a simplified DCF. Accuracy does not therefore provide the Tribunal with a choice of alternative valuation methodologies, but merely with a choice of alternative DCFs…"[1197]

732. The only difference between Accuracy's simplified DCF model and Brattle's is that while Brattle uses different assumptions in order to make a realistic forecast of cash flows, Accuracy merely assumes that the Wind Farms will generate a constant stream of annual cash flows. This means that Accuracy assumes that (a) the production of the Wind Farms will remain constant; (b) the production would be the same as that assumed by Spain for the standard installations; (c) the pool price fluctuations would have no impact on the remuneration; (d) the operating costs would be the same as that assumed in the standard installations; and (e) inflation would not have an impact on annual cash flows. In other words, Accuracy uses a DCF, but a much simpler version than that of Brattle. It is also wrong.

733. In addition, Brattle identifies four implementation errors that distort the result of Accuracy's ABV:

(a) first, Accuracy takes into account annual cash flows from the period prior to the Disputed Measures;[1198]

(b) secondly, the assumed RAB in the But For scenario is based on the historical costs and not the standard costs, as is the case in Actual scenario;[1199]

(c) thirdly, Accuracy erroneously assumes that the "*reasonable return*" under the Actual scenario equals the June 2014 discount rate of 7.06% before tax, whereas, under RD 661/2007, Spain had represented that a return of 7% to 8% after tax was reasonable. Therefore, the 7.4% return of the Actual scenario, which is pre-tax, is obviously not comparable. The 7% to 8% after-tax return equates to between 9.3% and 10.7% pre-tax;[1200] and

(d) fourthly, Accuracy applies the same discount rate to both the Actual and But For scenarios in its ABV but assumes a different discount rate for each scenario in its subsidiary DCF valuation, which results from the higher regulatory risk applied in the But For scenario. Accuracy does not provide any reasons for this inconsistency. Brattle therefore applies its own discount rate in both scenarios.[1201]

---

1197 Brattle Rebuttal Quantum Report, para. 175.
1198 Brattle Rebuttal Quantum Report, paras. 180-181.
1199 Brattle Rebuttal Quantum Report, para. 182.
1200 Brattle Rebuttal Quantum Report, para. 183.
1201 Brattle Rebuttal Quantum Report, para. 184.

734. The errors above allows the following comparison between Accuracy's and Brattle's damage calculations:

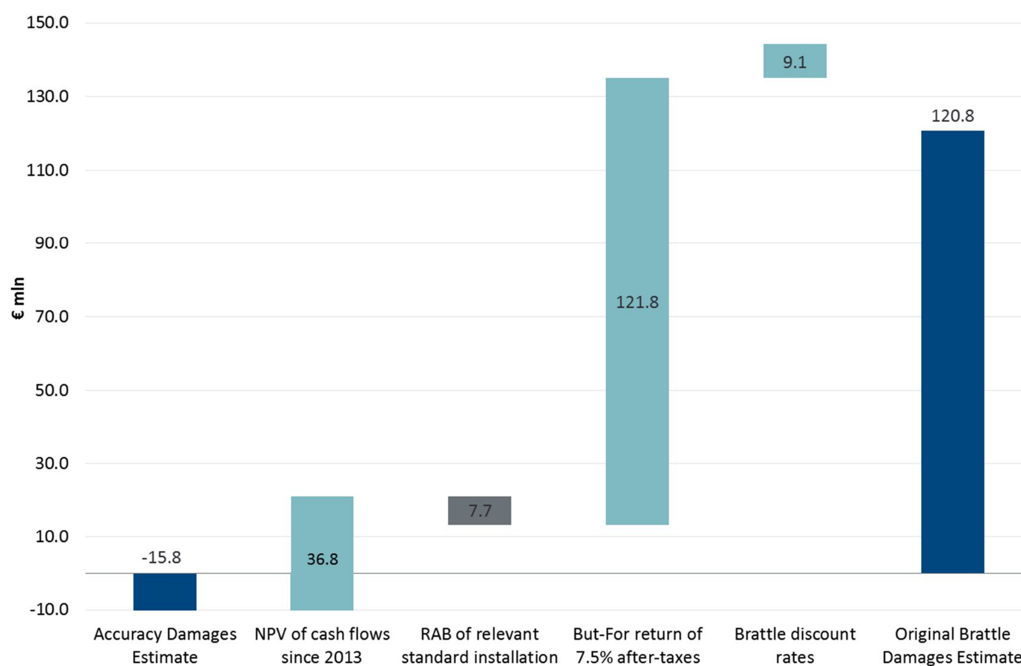



**Figure 3: Corrections to Accuracy's ABV**

## 25. BRATTLE'S DCF VALUATION IS TO BE PREFERRED

735. As an alternative to its RAB-based valuation, Accuracy also presents an "*alternative calculation of the measures*' *impact with the corrected DCF*".[1202] Despite recognising a significant reduction in cash flows to the Wind Farms in the Actual compared to the But For scenario, Accuracy concludes that no damages are payable. This is not credible.

736. In this section, we begin by explaining that Brattle's valuation is conservative (section 25.1) and consistent with market evidence (section 25.2). We then explain the errors in Accuracy's DCF calculation and why Brattle's valuation is more appropriate (section. 25.3).

### 25.1 Brattle's DCF calculation is conservative

737. Accuracy argues that Brattle's valuation is based on subjective hypothesis and is speculative.[1203] Accuracy does not, however, identify those allegedly subjective parameters, suggest any alternatives or produce any sensitivity analysis to support its argument. The Claimants have already shown above that the DCF calculation of Brattle was based on objective hypothesis (see

---

1202 Accuracy Expert Report, section VI.
1203 Accuracy Expert Report, para. 81.

para. 660). To illustrate the impact of changing various assumptions in Brattle's damages analysis, Brattle has produced its own sensitivity analysis and modified parameters such as electricity production, rates of inflation, pool prices, asset lifetimes and discount rates.[1204] As this sensitivity analysis shows, the plausible ranges of outcomes are relatively narrow.

738. Moreover, Brattle adopts conservative assumptions. For example:

(a) Brattle opts for an asset β of 0.5, which was at the top of Bloomberg's range for alternative energy producers. As Brattle highlighted in its Quantum Report, a higher β:

> "translates into a higher discount rate, which reduces the present value of the Claimants' investments in the But For scenario. The higher rate will also tend to reduce the value of investments in the Actual scenario, but to a lesser extent, therefore reducing the total damage estimate."[1205]

(b) Brattle applies the same 18% discount for lack of marketability in both the But For and Actual scenarios, even though the higher risk in the Actual scenario would suggest that the discount should be higher.[1206] Applying a higher discount in the Actual scenario would have increased the Claimants' damages.

739. It is therefore disingenuous for Spain and Accuracy to suggest that the assumptions adopted in Brattle's analysis are inherently subjective and produce speculative damages. On the contrary, Brattle has adopted conservative assumptions, the reasonableness of which are confirmed by a sensitivity analysis.

**25.2 Brattle's DCF calculation is consistent with recent market transactions**

740. In its first Quantum Report, Brattle confirmed the reasonableness of its DCF valuation by reference to market evidence. Brattle identified seven transactions that took place under the RD 661/2007 regime, which can be used as comparators for the valuation in the But For scenario.[1207] To ensure comparability of market evidence with the But For valuation, Brattle's analysis took into account and adjusts for the age of the plants, the movements in interest rates between June 2014 and the period from which the market evidence derives (2007 to 2012), and the differences in capacity between the various plants.[1208] For the Actual scenario, Brattle considered four transactions involving Spanish wind assets and an equity analyst's valuation of various wind assets belonging to Iberdrola.[1209] Brattle corrected these results for the IT-code

[1204] Brattle Rebuttal Quantum Report, Appendix B.
[1205] Brattle Quantum Report, para. 105.
[1206] Brattle Quantum Report, paras. 149-150. As Brattle explains, some analysts suggest that a marketability discount should not apply to large equity holdings, such as those held by the Claimants. Brattle's application of the 18% marketability discount in both scenarios is therefore conservative, as not applying a marketability discount in either scenario would increase damages.
[1207] Brattle Quantum Report, section V.G.2, Appendix S.
[1208] Brattle Quantum Report, para. 159.
[1209] Brattle Quantum Report, section V.G.3, Appendix T.

characteristics of each plant (level of support and remaining lifetime) and the movements in interest rates during the relevant period.[1210] The analyses show that Brattle's DCF model is consistent with market evidence under both the RD 661/2007 regime (But For scenario) and the New Regime (Actual scenario).[1211]

741. Accuracy takes issue with these transactions, arguing that they are not comparable because (a) the sample of transactions is too small; (b) Brattle has failed to take into account the shareholdings of these assets and therefore the majority premium or minority discount; (c) some assets involved REs other than wind plants; and (d) the plants subject to these transactions had distinct characteristics. As Brattle explains, these criticisms are without basis.

742. First, Brattle points out that "*comparable transactions are not perfect*" and this is the reason why it uses a DCF to assess the value of the investment and comparable transactions only as a cross-check.[1212] Secondly and in any event, Brattle explains that Accuracy's criticisms should be rejected, because (a) "[w]*hile discounts/premiums are theoretically possible in some situations, they are unlikely to be highly significant in the context of Spanish wind and renewable assets*"; (b) although certain transactions did not involve only wind assets, they did involve portfolios comprising at least 50% of wind farms which make them relevant for comparison purposes; and (c) the fact that the plants had distinct characteristics is precisely the reason why Brattle makes a number of corrections and adjustments before comparing them.[1213]

### 25.3 Mistakes and inaccuracies in Accuracy's DCF calculation

743. The Claimants note that Accuracy's DCF valuation of the Claimants' Wind Farms is based on cash flows that are remarkably similar to those in Brattle's valuation.[1214] Despite this similarity in cash flows, Accuracy arrives at an extraordinary damages valuation of EUR 0.7 million when Brattle values them at EUR 123.9 million. The reason for this gap is the various mistakes made by Accuracy, who (a) takes an unsuitable and inconsistent reference point to calculate the Claimants' investment market value in the Actual scenario; (b) makes the extraordinary assumption that regulatory risk is lower in the Actual scenario than in the But For scenario; (c) ignores the actual lifetime of the plants; and (d) makes other minor errors.

---

[1210] Brattle Quantum Report, para. 164.
[1211] Brattle Quantum Report, paras. 162 and 166.
[1212] Brattle Rebuttal Quantum Report, para. 237.
[1213] Brattle Rebuttal Quantum Report, paras. 239-240.
[1214] As noted above, the similarity of cash flows contradicts Spain's position about the unsuitability of the DCF methodology in this case. It is also common ground between the experts that cash flows are higher in the But For scenario than in the Actual scenario, which means that there has been real harm to the Claimants.

**(a) Accuracy's erroneous reference point in the Actual scenario**

744. The main difference between Accuracy's and Brattle's DCF models derives from Accuracy's calculation of the Claimants' investment value in the Actual scenario. In order to obtain the value of the Claimants' equity on the Valuation Date, Accuracy does not calculate the discounted cash flows of the Wind Farms under the New Regime. Instead, Accuracy takes the sale price achieved by the Claimants in February 2016, EUR 133 million, and makes some adjustments to derive a value as at the Valuation Date of EUR 124.1 million.[1215] These adjustments are however minor: Accuracy simply applies a discount rate of 0.49%, corresponding to the 1- to -2-year Spanish Bonds, and deducts the Claimants' equity cash flows forecasts.[1216] In other words, apart from these two minor adjustments, Accuracy's DCF calculation in the Actual scenario assumes the Claimants' expectations as at February 2016.

745. In the But For scenario, on the other hand, Accuracy makes a DCF valuation reflecting the Claimants' expectations on the Valuation Date. Accuracy's Actual scenario and But For scenario are therefore inconsistent as they rely on completely different assumptions and cannot be usefully compared. As Brattle explains:

> "…Accuracy continues to use its own June 2014 DCF model to value the Claimants' interests in the But For scenario. Accuracy's DCF model reflects June 2014 expectations about inflation, pool prices and taxes, Accuracy's assumption about a 25-year useful life and Accuracy's discount rate assumptions. However, all these assumptions were inconsistent with those used in the Claimants' financial model prepared in relation to the 2016 transaction and used to solicit bids."[1217]

746. To illustrate these inconsistencies, Brattle highlights the main differences between Accuracy's Actual scenario, based on the Claimants' expectations as at February 2016, and its But for scenario, based on the Claimants' expectation as at the Valuation Date:

(a) The pool prices: Accuracy's Actual scenario is based on the Claimants' optimistic forecasts in 2016 of pool prices' growth at 4% whereas Accuracy's (and Brattle's) But For scenario is based on forecasts of an annual growth of 2%.[1218] The result of this over-optimistic forecast is to offset the harm of the New Regime.

(b) The useful life: Accuracy's Actual scenario is based on the Claimants' 2016 model assumption of a 30-year lifetime of the Wind Farms while Accuracy's But for scenario uses a 25-year lifetime. As Brattle explains, "[t]*he assumed additional 5-years of*

---

[1215] Accuracy Expert Report, para. 152.
[1216] Accuracy Expert Report, paras. 141-151.
[1217] Brattle Rebuttal Quantum Report, para. 193.
[1218] Brattle Rebuttal Quantum Report, para. 195.

*operation in the Actual scenario represent an offset to damages in Accuracy's calculation*".[1219]

(c) The tax rate: Accuracy's Actual scenario assumes a tax rate of 25%, reflecting the rate's decrease between 2014 and 2016, and its But For scenario assumes a 30% corporate tax rate, which was the rate in force at the Valuation Date. This inappropriate and selective use of hindsight in the Actual scenario serves to offset the impact of the new regime.[1220]

(d) The discount rate: Accuracy's Actual scenario implicitly assumes interest rates as at the date of the transaction, whereas Accuracy's But For scenario assumes market conditions as at June 2014. This difference has a significant impact on the damages as Spanish interest rates decreased heavily between June 2014 and February 2016. Again, by inappropriately changing the relevant assumptions between the But For scenario and the Actual scenario, Accuracy offsets the impact of the New Regime on the Claimants' equity.[1221]

747. These somewhat obvious manipulations completely undermine Accuracy's DCF. It is necessary, of course, to compute damages as at February 2016 but this needs to be done in a consistent way. Brattle has conducted this exercise, and shifted the valuation date to February 2016. The result of the damages assessment as at February 2016 is EUR 120.9 million, which is nearly identical to the damage claim computed in the Brattle Quantum Report of EUR 120.8 million, and close to the current damage claim, which includes the damages to Bora Wind; of EUR 123.9 million.[1222]

**(b) Accuracy's regulatory risk analysis is without basis**

748. Another important difference between the experts' models flows from their choice of discount rates, which in turn arises from differing approaches to regulatory risk.

749. Unlike Brattle, Accuracy makes the extraordinary assumption that regulatory risk should be lower in the Actual scenario than in the But For scenario.[1223] This is demonstrably false.

750. Accuracy, like Brattle, uses the CAPM model to derive the discount rate.[1224] In the end, Accuracy assumes a slightly higher discount rate for June 2014, at 5.30%,[1225] than Brattle's, at 4.84%. Accuracy uses a long-term interest rate of 3.5%, which it calculates by using a combination of its own assessment of inflation expectation of 1.5% and its own assessment of a

1219 Brattle Rebuttal Quantum Report, para. 196.
1220 Brattle Rebuttal Quantum Report, para. 197.
1221 Brattle Rebuttal Quantum Report, para. 198.
1222 Brattle Rebuttal Quantum Report, paras. 201-202.
1223 Brattle Rebuttal Quantum Report, para. 207.
1224 Accuracy Expert Report, para. 160.
1225 Accuracy Expert Report, para. 160.

"standardised interest rate" of 2%.[1226] In contrast, Brattle uses the 20-year Euribor swap rate (2.09%).[1227] Accuracy then uses a β of 0.4%, while Brattle uses a β of 0.5%, and a market risk premium of 4.50%, while Brattle uses a more conservative rate of 5.50%.

751. First, Accuracy's factoring of regulatory risk into the discount rates instead of applying a regulatory haircut to the cash flows is inappropriate. As explained by Brattle in its first Quantum Report, regulatory risk only affects the revenues but costs remain unchanged. By applying a discount rate to equity cash flows (which include costs), Accuracy erroneously considers that regulatory risk would also reduce costs:

> "Applying a probabilistic haircut directly to revenues ensures that the DCF analysis accurately reflects the potential economic impact of a future change in financial support. Reduced financial support would affect plant revenues while leaving costs largely unaffected, squeezing investor returns between reduced revenues and fixed operating costs. In contrast, it would be less accurate to model regulatory risk simply by raising the discount rate applicable to equity cash flows, as a higher discount rate would absurdly imply a reduction in the present value of projected future costs as well."[1228]

752. Secondly, with regard to the regulatory risk premium, Brattle uses a risk premium of 0.5% for both scenarios, which it derives from the rating of Tariff Deficit securities and the prevailing yields on the bonds of the FADE Funds as of June 2014.[1229] Accuracy uses the same results as Brattle for the Actual scenario. However, in the But For scenario, Accuracy departs from Brattle and applies an additional risk premium of 2.2% that it reaches by assuming that the Tariff Deficit securities would be rated BBB- in the But For scenario (instead of A+ retained by Brattle). Accuracy's explanation for doing so is that the New Regime has reduced risks taken on by RE plants as compared to the RD 661/2007 regime:

> "Unlike Brattle, we believe the But For scenario should take into account the continuous degradation of the sustainability of the System, and therefore an increasing probability of default (partial or total), while the Actual scenario should take into account the observed gradual recovery of credibility of the system."[1230]

753. This is entirely inappropriate. Accuracy's position that the regulatory risk should be higher in the But For scenario than in the Actual scenario is based on the premise that in the But For world, the Spanish electricity system would continue to be unsustainable due to the accumulated Tariff Deficit and Spain would have in any event had to take measures adversely affecting the Claimants' investments. As Brattle explains, "[t]*he implicit assumption is that there was no*

---

1226 Accuracy Expert Report, para. 160(a).
1227 Brattle Rebuttal Quantum Report, para. 211.
1228 Brattle Quantum Report, para. 114.
1229 Brattle Rebuttal Quantum Report, para. 214.
1230 Accuracy Expert Report, para. 163.

*other way for Spain to solve the Tariff Deficit than the Disputed Measures*".[1231] This proposition is unsupported and does not engage with the alternative solutions to the Tariff Deficit identified by Brattle[1232] or by the CNE.[1233] Brattle's proposition is supported by contemporaneous market commentary, which confirms that the Disputed Measures increased the perception of regulatory risk in Spain and that the New Regime has inherent uncertainties that hinder its ability to attract investors.[1234]

754. More fundamentally, Accuracy in effect discounts the Claimants' damages for a possible breach of the FET standard by Spain, which is an inappropriate denial of liability. As Brattle explains, "[a] *damages award will be required if the Tribunal finds that the Disputed Measures breached Spain's obligations to investors. Reducing the award for the risk that Spain would violate the law does not quantify the damages necessary to make the Claimants whole from the harm of Spain's violation of the law*".[1235]

**(c) Lifetime**

755. The final significant difference between the Parties' DCF models is the lifetime of the Wind Farms. Accuracy assumes a useful life of 25 years for the Wind Farms,[1236] while Brattle assumes a 30-year useful life for the Wind Farms.[1237]

756. Brattle's assumptions of a 30-year lifetime is based on an independent technical due diligence report prepared by GL Hassan Ibérica NV GL which considered that, provided there was proper maintenance, "*it is possible to extend the service life of a wind project to 25 or 30 years*".[1238] In order to address the need for enhanced maintenance after 20 years, Brattle assumes an increase in maintenance costs after 20 years in its model.[1239] In light of the above, the assumption of 30 years is reasonable.

**(d) Minor mistakes**

757. In addition to the corrections referred to above, Brattle identifies four other minor mistakes, which it has corrected: (a) use the 10-year bond yields instead of the Spanish 1-year bond yield to roll forward pre-June 2014 cash flows in both scenarios; (b) re-include the financial incomes earned by the plant on any cash balances from both scenarios; (c) use the book value instead of

[1231] Brattle Rebuttal Quantum Report, para. 219.
[1232] Brattle Regulatory Report, section IX.B.
[1233] **Exhibit C-166**, CNE Report on the Spanish Electricity Sector, 7 March 2012, see, for example, p. 59.
[1234] Brattle Rebuttal Quantum Report, paras. 220-221, referring to **Exhibit BRR-135**, Moody's Investors Service, "Regulatory risk for EU renewables investors greatest in Spain, Italy", 5 October 2015, p. 1.
[1235] Brattle Rebuttal Quantum Report, para. 222.
[1236] Accuracy Expert Report, para. 267.
[1237] Brattle Rebuttal Quantum Report, paras. 204–206 and 229(d).
[1238] **Exhibit C-47**, Technical Due Diligence Report prepared by GL Garrad Hassan Ibérica dated 26 May 2015, p. 38.
[1239] Brattle Rebuttal Quantum Report, 205.

the market value of the net financial debt; and (d) re-include all the side effects associated with the financing.[1240]

**(e) Summary of corrections to Accuracy's DCF calculation**

758. The cumulative effect of the corrections to Accuracy's five mistakes described above is shown in Figure 5. The impact of these corrections raises Accuracy's damages estimate to EUR 120.8 million, equivalent to Brattle's damages estimate for the plants. Brattle explains these corrections in detail in Section VIII of its Rebuttal Quantum Report.

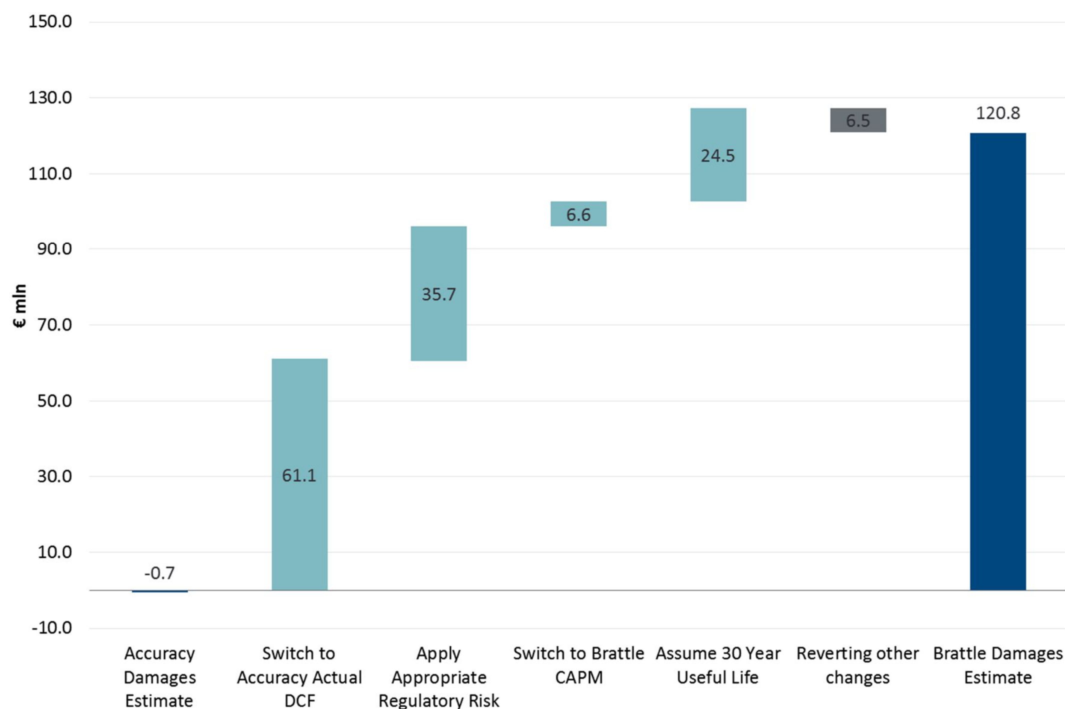



**Figure 5: Corrections to Accuracy's DCF**

## 26. THE CLAIMANTS' ALTERNATIVE DAMAGES CALCULATION

### 26.1 Introduction and Overview

759. Even if the Tribunal were to find that the Claimants' legitimate expectations were limited by a "*reasonable return*", the Claimants have still suffered damage and are entitled to compensation. Under this alternative approach, it is common ground between the Parties that the Claimants expected a "*reasonable return*", as distinct from a FIT at a stable level over the lifetime of the plants. In the paragraphs below, the Claimants set out Brattle's methodology for assessing the

[1240] Brattle Rebuttal Quantum Report, paras. 206 and 209(e).

fair market value of the Claimants' investments with and without the Disputed Measures within the "*reasonable return*" paradigm.

760. The Claimants emphasise that this alternative claim is being constructed with the benefit of hindsight. The documents upon which Brattle relies to derive the key parameters for the calculation were not available at the time the Claimants made their investment. Indeed, the documents that form the basis of this alternative claim were produced within the confines of this arbitration and are internal Spanish documents, in particular an internal document prepared by the Ministry in March 2007 (see section 4.2).[1241] For the purposes of this alternative claim, the Claimants create a hypothetical scenario that, by definition, did not exist at the time the Claimants invested and could not therefore inform their legitimate expectations concerning RD 661/2007.

## 26.2 The Principles underlying the Alternative Claim

761. Three principles underpin the Alternative Claim. Each principle seeks to rectify a distinct aspect of the retroactivity introduced by Spain in the New Regime. First, and fundamentally, the Alternative Claim does not accept Spain's ability to reduce the percentage target return compared to the levels that it considered reasonable when establishing the Original Regime, and apply that new, lower target return to installations that had already been commissioned under the RD 661/2007 regime (section (a)).[1242] Secondly, the Alternative Claim also does not accept Spain's ability to reduce the Claimants' future returns on account of revenues that the companies had earned prior to the introduction of the New Regime; in other words, there is no claw-back under the Alternative Claim (section (b)). Finally, the Alternative Claim seeks partially to reverse the New Regime's reduction of efficient costs targets from the levels that were implicit in RD 661/2007 (section (c)). These three aspects of the Alternative Claim are discussed immediately below.

### (a) The "*reasonable return*"

762. Brattle's first adjustment in the Alternative Claim is to remove the New Regime's retroactive reduction in return, by raising the target return to levels implicit in RD 661/2007.

763. The "*reasonable return*" that underpinned RD 661/2007 was not expressly identified at the time. Brattle uses contemporaneous documents, among others the Ministry Report on the draft RD 661/2007,[1243] to assess the "*reasonable return*" implicit in RD 661/2007. According to this document, investors in wind facilities would on average earn a 7% after-tax return if they opted

[1241] **Exhibit C-203**, Memoria Ecónomica for RD 661/2007, 21 March 2007.
[1242] Brattle Rebuttal Quantum Report, paras. 254-258.
[1243] **Exhibit C-203** Memoria Economica for RD 661/2007, 21 March 2007, p. 18.

for the "*regulated tariff option*".[1244] By contrast, the New Regime's 7.4% pre-tax return (i.e. 5.5% post-tax return for wind) is unreasonably low.

764. As noted above, via the New Regime, Spain imposed a retroactive reduction in return on installations that were commissioned under RD 661/2007.[1245] Brattle removes this retroactivity and assumes that the Claimants' plants were entitled to earn what Spain considered reasonable at the time: 7% after-tax for the Fixed Tariff option for the Wind Farms. The removal of this retroactivity not only makes economic sense; it is also the most appropriate way to afford meaning to the stability commitments upon which the Claimants relied when investing; namely, Article 44.3 of RD 661/2007 and Article 5.3 of RD 1614/2010 (see further section 4.3 above).

**(b) The retroactive claw-back of past returns under the New Regime**

765. Secondly, the New Regime "*grants an allowed return of 7.4% before taxes. Reflecting the legal assumption that Spain was not entitled to retroactively reduce the allowed return to wind projects, we update the allowed return in the But-For scenario to be 10% pre-taxes, which equates to 7.5% after-taxes*".[1246] In this way, Spain effectively claws back allegedly excessive returns earned in previous years under the Original Regulatory Regime.[1247] To avoid this, Brattle assumes that "[t]*he Alternative Tariff per MWh would apply to all wind plants that obtained the same tariff under RD 661/2007, regardless of their year of installation*", as promised under Article 44.2 of RD 661/2007.[1248]

**(c) The cost targets**

766. Finally, as we explain in this section, Brattle reverses the New Regime's reduction in the cost targets that underpinned RD 661/2007.

767. Under RD 661/2007, investors had a choice between a single Fixed Tariff and a Premium FIT for all wind plants.[1249] This implies that the regime was based on a single and implicit target for all wind plants.[1250] Spain never published those cost targets. In economic terms, the RD 661/2007 regime is properly described as a "marginal plant" system; as explained by Brattle "*investors*

[1244] **Exhibit C-203**, Memoria Economica for RD 661/2007*,* 21 March 2007, p. 19. At the time it examined draft RD 661/2007, the CNE considered that returns achievable under that legislation (if enacted) would be in the region of 7.2%-11% after-tax (see paras. 247and 379 above and **Exhibit C-217**, CNE opinion on the resolution adopted by the CNE Board of Directors on 14 February 2007, approving the report on the RD 661/2007, 8 March 2007, p. 8).

[1245] Brattle Rebuttal Regulatory Report, paras. 7 and 70.

[1246] Brattle Quantum Report, para. 183.

[1247] Brattle Rebuttal Regulatory Report, paras. 107 *et seq*.

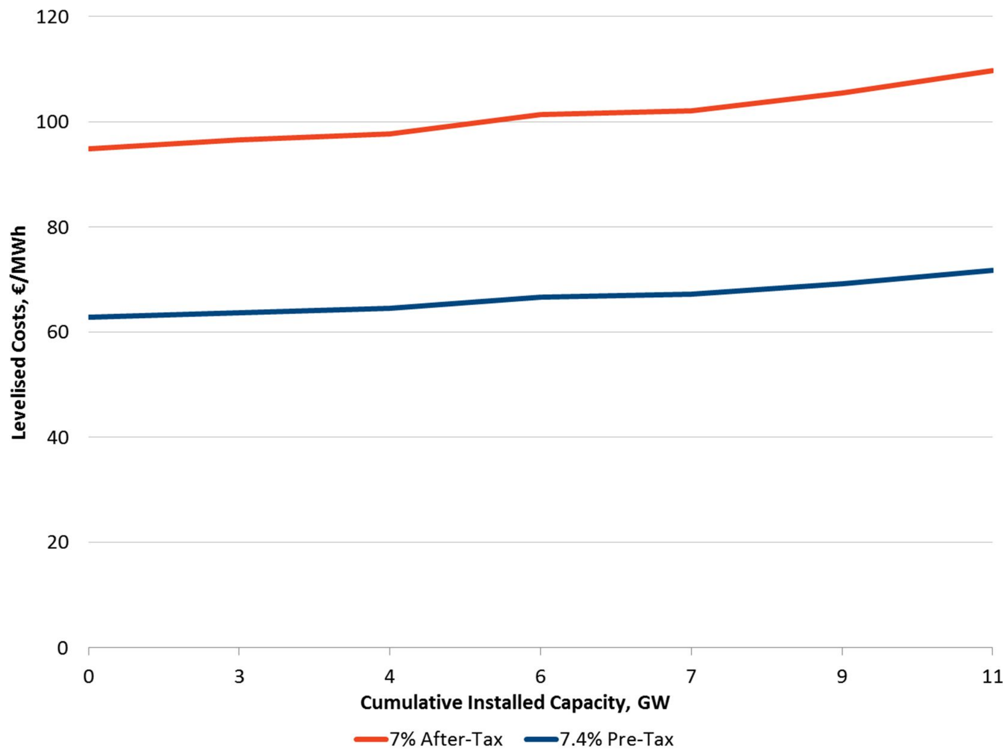
[1248] Brattle Rebuttal Quantum Report, para. 255. See **Exhibit C-44**, RD 661/2007 of 25 May 2007, Article 44.2: "*The values of the tariffs, premiums, supplements and lower and upper limits to the hourly price of the market which derive from any of the updates covered in the preceding point shall be applicable to all of the facilities in each group, regardless of the date of commissioning of each facility*" (emphasis added).

[1249] Albeit the investors also had the right to choose between the Fixed Tariff option and the Premium option.

[1250] Brattle Rebuttal Regulatory Report, para.102.

*would only build projects if they thought they could match or outperform the marginal plant*".[1251] The New Regime departed from the single cost target principle and established a large number of cost targets, depending on the type of installation, its efficiency, and its year of commissioning. Under the New Regime, there are a total of 46 different IT codes for wind.

768. Brattle's figure 7 below compares the levelised costs of various plants under RD 661/2007 regime and the New Regime. As Brattle explains, the red line assumes a 7% after-tax return, and "*shows the levelised costs per MWh for the various standard installations in the 2014 Ministerial Order*".[1252] The line slopes upward because "*the figure organises the plants from left to right in order of increasing levelised costs*".[1253] The blue line shows "*the equivalent levelised cost calculations, but assuming only a 7.398% return before taxes, which as indicated above is equal to 5.5% after taxes*".[1254] As Brattle explains, the blue line "*shows Spain's reduction in the return target has effectively shifted the entire curve downwards*".[1255]




Source: Lapuerta-Caldwell Workpapers, Tables V – Fixed FITs for Wind Plants.

**Brattle's Figure 7: Fixed FITs for Wind Plants**

---

[1251] Brattle Rebuttal Quantum Report, para. 264.
[1252] Brattle Rebuttal Quantum Report, para. 265.
[1253] Brattle Rebuttal Quantum Report, para. 265.
[1254] Brattle Rebuttal Quantum Report, para. 266.
[1255] Brattle Rebuttal Quantum Report, para. 266.

### 26.3 Brattle's Valuation Methodology

769. Brattle adopts the DCF method to assess the Claimants' damages under the Alternative Claim. As with the primary claim, Brattle takes the difference between the fair market value of the Claimants' investments under the But For and Actual scenarios as at June 2014 to estimate the Claimants' damages. Under the But For scenario, Brattle forecasts the future cash flows that the Project Companies would have received based on the "*reasonable return*" offered under RD 661/2007.

770. Consistent with the principles underpinning the Alternative Claim discussed above, Brattle makes certain changes to the But For scenario adopted in the primary claim. Save for those adjustments to the But For scenario (explained immediately below), the methodology outlined in Brattle's Quantum Report (for the primary claim) remains the same.[1256] In particular, the Actual scenario used in the Alternative Claim is identical to that adopted in the primary claim.

771. Brattle adopts the following assumptions in the alternative But For scenario:

(a) the single FIT for wind provides a return for the marginal plant on the system,[1257] equal to 7.0% after-tax for wind;[1258]

(b) the single FIT assumes a 20-year useful life for the efficient marginal plant, consistent with the approach of RD 661/2007. No prior remuneration earned under the Original Regulatory Regime was considered; and

(c) in place of the assumptions of pool prices and inflation adopted in Ministerial Order IET/1045/2014, Brattle adopts the inflation and pool price projections from its first report as they are more reasonable than those used by Spain, for the reasons explained in such report.[1259]

### 26.4 Combined effect of the three principles

772. For the purposes of the Alternative Claim, Brattle constructs a supply curve that combines the reversal of the New Regime's three retroactive elements described in the preceding sections.

773. Brattle assesses the Claimants' damages under two Scenarios (see also Brattle's Table 12 below):

---

[1256] As to which, see Memorial, section 16.

[1257] To identify the marginal plant for wind, we focus on the set of standard installations that Spain has deemed efficient (under the New Regime) and that have been commissioned since the passage of RD 661/2007. Plants commissioned in 2011 represent the marginal plant – the most expensive efficient standard installations in terms of levelised costs.

[1258] Brattle Rebuttal Quantum Report, para. 255.

[1259] Brattle Quantum Report, para. 226. Brattle Rebuttal Quantum Report, para. 257.

(a) **Scenario 1**: This scenario measures damages by reference to the marginal plant, i.e. the most expensive, efficient type of wind plant entering the system after the passage of RD 661/2007. As explained by Brattle, "[t]*he resulting FIT per MWh exceeds the one that actually applied under the Original Regulatory Regime, and as a result the damages under Scenario 1 are similar to the damages under the Primary Claim in which the Claimants' plants are entitled to the continued receipt of the FITs under the Original Regulatory Regime*".[1260]

(b) **Scenario 2**: This scenario computes the FIT with reference to the actual IT-code now assigned to each of the Claimants' Wind Farms. Brattle's calculations (a) accept Spain's estimated parameters except for the "*reasonable return*", which remains 7% after taxes like in Scenario 1, (b) avoid retroactivity and (c) apply to every MWh of production like the FITs under RD661/2007.[1261] As explained by Brattle, "[t]*he per MWh FIT derived under Scenario 2 is somewhat lower than under Scenario 1 because Spain has estimated lower efficient standard costs for the IT-codes assigned to the Claimants' plants than for the marginal wind plant*".[1262]

774. The result of the alternative claim is summarised in the table below:

**Brattle's Table 12 - Alternative Damages Estimate for Wind Farms**

| | Past Damage to Bridgepoint € mln [A] | June 2014 Fair Value of Bridgepoint Interest: But For € mln [B] | June 2014 Fair Value of Bridgepoint Interest: Actual € mln [C] | Future Damage to Bridgepoint € mln [D] [C]-[B] | Bridgepoint Impact € mln [E] [A]+[D] | Bridgepoint Impact % [F] [E]/[B] |
|---|---|---|---|---|---|---|
| Primary Claim | -21 | 190 | 86 | -103 | -124 | -65% |
| ***7% After-Tax Return; 20 Years of Regulatory Life*** | | | | | | |
| Scenario 1: FIT Based on Marginal Plant IT-Code | -30 | 251 | 86 | -165 | -195 | -78% |
| Scenario 2: FIT Based on Own IT-Code | -20 | 186 | 86 | -100 | -120 | -64% |

Source: Lapuerta-Caldwell Workpapers, Tables O – Updated Financial Model.

775. In sum, even under the Alternative Claim, substantial damages are owed to the Claimants. This is because, even in a "*reasonable return*" paradigm, the Original Regime and the New Regime are materially different, with the latter having introduced measures that have significantly harmed the Claimants.

## 27. APPLICABLE RATE OF INTEREST

776. Spain does not dispute that the Claimants are entitled to pre-award and post-award interest by reference to Spain's borrowing rate. The differences relate to the rate at which said interest should be computed.

---

1260 Brattle Rebuttal Quantum Report, para. 269(a).
1261 Brattle Rebuttal Quantum Report, para. 269(b).
1262 Brattle Rebuttal Quantum Report, para. 269(b).

### 27.1 Pre-award interest

777. The Claimants explained the reasons for awarding pre-award interest in their Memorial.[1263] Spain does not contest that the principle of full reparation requires that interest be paid on any damages awarded. Nor does Spain take issue with any of the authorities cited or with the proposition that interest should be compounded and paid on a "*commercial rate established on a market basis*".[1264]

778. For pre-award interest, Brattle considers that a commercial rate established on a market basis is the yield on Spanish Government 10-year bonds, i.e. on average 1.16% between June 2014 and November 2016.[1265] Spain, for its part, relies on Accuracy's report to claim that the appropriate rate to use is a risk-free rate.[1266]

779. Accuracy considers that the "risk free asset" should be "*the rate on the Spanish 4 to 5 year bonds*"[1267] on the basis that it is the time that will lapse between the date of valuation and the Award. This position is unsupported by authority and is simply wrong.

780. The ECT calls for the application of a "*commercial rate established on a market basis*"[1268], and the Spanish 10-year borrowing costs are the best proxy for that. Spain itself used the 10-year borrowing rate when it defined the parameters of the New Regime in the June 2014 Order[1269] (presumably because Spain considers that this rate is a reasonable reference point for the commercial financing costs for RE installations).

### 27.2 Post-award interest

781. As explained in the Memorial, post-award interest serves the dual purpose of ensuring prompt compliance and preventing unjust enrichment.[1270] The Claimants have therefore requested a rate higher than 1.16% for post-award interest. Spain does not dispute that post-award interest is payable on an award of damages, but claims that "*punitive interest*" is inappropriate.[1271] Spain supports its position by reference to the ILC Articles, which provide, at Commentary to Article 36, that:

---

1263 Memorial, paras. 535-537.
1264 Memorial, para. 537; **Exhibit C-1**, Energy Charter Treaty, September 2004, Article 13; Brattle Quantum Report, para. 187.
1265 Memorial, para. 537.
1266 Counter Memorial, para. 1100.
1267 Accuracy Expert Report, para. 174.
1268 Memorial, para. 537; **Exhibit C-1**, Energy Charter Treaty, September 2004, Article 13; Brattle Quantum Report, para. 187.
1269 **Exhibit C- 53**, Order EIT/1045/2014 of 16 June 2014, approving the remuneration parameters of standard installations that apply to specific installations for the production of electricity from renewable energy sources, co-generation and waste, 20 June 2014, Preamble.
1270 Memorial, para. 538; **Authority CL-61**, S Ripinsky and K Williams, *Damages in International Investment Law*, (British Institute of International and Comparative Law, 2008), p. 389; **Authority CL-68**, I Marboe, *Calculation of Compensation and Damages in International Investment Law*, (Oxford University Press, 2009), paras. 6.246 and 6.283.
1271 Counter-Memorial, paras. 1101-1107.

> "Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character."[1272]

782. Here, Spain fails to distinguish between the nature of compensation itself, which includes the damages awarded and pre-award interest, and the distinct nature and purpose of post-award interest. This distinction was aptly explained by the tribunal in *Pezold v Zimbabwe* in the following terms:

> "It is well known that Pre- and Post-Award interest serve separate functions. Pre-Award interest is granted in order to ensure full reparation (see *Articles on State Responsibility*, p. 235, CLEX-274)…Post-Award interest serves a different purpose, namely 'to serve as an effective incentive to comply with the terms of the judgment or award as expediently as possible'."[1273]

783. The tribunal in *Gold Reserve v Venezuela* elaborated in similar terms on why the distinct nature of post-award interest means that it ought to be higher than pre-award interest:

> "As requested by Claimant, the Tribunal may also determine a different interest rate to apply to post-Award interest than that applied to pre-Award interest. This is because the purpose of post-Award interest is arguably different – damages become due as at the date of the Award, and from this time, Respondent is essentially in default of payment. As such, the Tribunal considers that continuing to apply a risk-free interest rate would be inappropriate."[1274]

784. The payment of post-award interest at a higher rate than pre-award interest is thus not inconsistent with the ILC Articles, and is regarded by arbitral tribunals as appropriate under public international law. The Claimants submit that a rate higher than 1.16% remains apposite in the circumstances.

## 28. TAX GROSS-UP

785. As noted in the Memorial,[1275] to achieve full reparation of the Claimants' harm, the damages should include a gross-up over the amount awarded to account for the tax treatment of the award. This would be equivalent to awarding an amount net of taxes.

786. The Claimants will be seeking payment of the award to Watkins (Ned) B.V., a Dutch entity subject to Dutch corporate income tax. Under Dutch law, damages awarded under this arbitration are treated as a taxable profit and no exemption is available. Profits up to and

---

[1272] *Ibid.*, para. 1103 citing **Exhibit CL-27**, ILC Articles. http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf .

[1273] **Authority CL-159**, *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, para. 943, referring to **Authority CL-68**, I Marboe, *Calculation of Compensation and Damages in International Investment Law*, (Oxford University Press, 2009), para. 6.246.

[1274] **Authority CL-158**, *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 856.

[1275] Memorial, para. 539.

including EUR 200,000 are subject to a 20% statutory rate; for profits beyond that threshold, a 25% rate applies.

787. For the purpose of the tax gross-up calculation, the Claimants have assumed that the arbitration proceeds would be received by Watkins (Ned) B.V. during the tax periods 2018 or 2019.[1276]

788. In order to obtain EUR 123,900,000 net of taxes, the total damages awarded needs to amount to EUR 165,183,333. Upon receipt of this amount, Watkins (Ned) B.V. will pay an amount of EUR 41,283,333[1277] of Dutch corporate income tax, resulting in a net amount of EUR 123,900,000.

789. For the sake of completeness, the Claimants note that the damages would not be treated as profit falling under the Dutch participation exemption (*deelnemingsvrijstelling*), according to which all benefits – positive as well as negative – that a corporate taxpayer derives from a qualifying participation in a subsidiary are exempt from corporate income tax.[1278]

790. Indeed, the Dutch tax authorities take the position that payments resulting from arbitration awards paid to a Dutch shareholder in respect of a loss of value of a sold subsidiary constitute taxable income for the recipient and do not fall within the scope of the Dutch participation exemption.[1279] This position has been repeatedly confirmed by Dutch courts.[1280]

791. For example, in 2016, the Court of Gelderland held that a compensation payment received by a Dutch company from the Government of Poland was not exempt from corporate income tax under the participation exemption.[1281] In that case, the Polish government was held liable for breach of contract and consequently of the Bilateral Investment Treaty between the Netherlands and Poland, for having disallowed the Dutch company to expand its participation in a joint

---

[1276] **Exhibit C-268**, In -Law dated 21 December 2016, which introduced certain changes to Dutch tax laws (*Belastingplan* 2017, Stb. 2016, 544) (**Exhibit C- 269**) the corporate income tax rate for profits realised during the years 2018 and 2019 up to and including EUR 250,000 has been set at 20% and any excess profits over such amount are subject to corporate income tax at a rate of 25%. Based on that same law dated 21 December 2016, during the tax year 2020 profits up to and including EUR 300,000 are subject to a 20% statutory rate and during the tax year 2021 profits up to and including EUR 350,000 are subject to a 20% statutory rate. Both in 2020 and 2021, any profits in excess of the first bracket are subject to taxation at a rate of 25%.

[1277] EUR 50,000 on the first EUR 250,000 of income at a 20% rate, and EUR 41,233,333 on the remaining EUR 164,933,333 of income at a 25% rate.

[1278] Article 13 of the Dutch corporate income tax act (*Wet op de vennootschapsbelasting 1969*) (**Exhibit C-218**). The participation exemption seeks to prevent double taxation of business profits at different corporate levels within multinational groups and implements the EU Council Directive 90/435/EC as amended by EU Council Directive 2003/123/EC on the common system of taxation applicable in the case of parent companies and their subsidiaries of different Member States.

[1279] Also, from a Decree issued by the Dutch State Secretary of Finance it can be derived that indemnity payments received in respect of a decrease in value of a subsidiary do not fall within scope of the participation exemption (**Exhibit C- 220**, Decree of the Dutch State Secretary of Finance, 12 July 2010, referenced DGB2010/2154M, para. 1.1.1.2.).

[1280] **Exhibit C-267,** Dutch Supreme Court, 6 March 1985, case no. 22 572. See also **Exhibit C-269**, Dutch Higher Court of Amsterdam, 1 June 2005, case no. 04/00604, in which the court specified that a distinction must be made between, on the one hand, a compensation payment received by virtue of non-performance (*wanprestatie*) by a third party, which payment does not fall within the scope of the participation exemption and, on the other hand, benefits that are directly derived from holding a participation, which do fall within the scope of the participation exemption. The distinction follows from the origin of the income (damage inflicted by a third party versus profits generated by the subsidiary).

[1281] **Exhibit C-221,** Court of Gelderland, 17 March 2015, case no. 14/4274.

subsidiary.[1282] As the payment received was regarded to be directly related to this breach of an agreement rather than to holding the participation, it was subject to Dutch corporate income tax in the hands of the Dutch company that received the payment. Therefore, there is no doubt that the damages awarded to Watkins (Ned) B.V. will not be exempt from corporate income tax under the participation exemption principle.

[1282] **Exhibit C-221,** Court of Gelderland, 17 March 2015, case no. 14/4274.

## PART VI – PRAYER FOR RELIEF

792. The Claimants repeat the relief set out at paragraph 540 of the Memorial and also ask the Tribunal to dismiss all of Spain's jurisdictional objections. In addition to the reservation of rights contained at paragraph 596 of the Memorial, the Claimants also reserve their right to address any discrepancies that the Claimants subsequently discover between the English and the Spanish versions of Spain's Counter-Memorial, the Claimants having relied on the English translation.