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CERTIFICATE

EBL (GENOSSENSCHAFT ELEKTRA BASELLAND) AND TUBO SOL PE2 S.L.

v.

KINGDOM OF SPAIN

(ICSID CASE NO. ARB/18/42)

I hereby certify that the attached documents are true copies of the English version of the Tribunal's Award dated 11 January 2024 and the English version of the Partial Dissenting Opinion of Mr. Bo G.H. Nilsson.

Meg Kinnear
Secretary-General

Washington, D.C., 11 January 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

EBL (GENOSSENSCHAFT ELEKTRA BASELLAND) AND TUBO SOL PE2 S.L.
Claimants

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/18/42

AWARD

Members of the Tribunal
Ms. Jean E. Kalicki, President of the Tribunal
Mr. Bo G.H. Nilsson, Arbitrator
Professor Hélène Ruiz Fabri, Arbitrator

Secretary of the Tribunal
Ms. Luisa Fernanda Torres

Assistant to the Tribunal
Dr. Joel Dahlquist (until 17 February 2023)
Ms. Zsófia Young (since 20 February 2023)

Date of dispatch to the Parties: 11 January 2024

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TABLE OF SELECTED ABBREVIATIONS

1994 Electricity Law	Law 40/1994 of 30 December 1994, on planning of the National Electricity System (published on 31 December 1994)
1997 Electricity Law	Law 54/1997 of 27 November 1997, on the electric power sector (published on 28 November 1997)
2001 Renewables Directive	Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001, on the promotion of electricity produced from renewable energy sources in the internal electricity market, Official Journal of the European Communities Series L 283 (entered into force on 27 October 2001)
2008 Land Lease Agreement	Puerto Errado 2's Land Lease Agreement in Favour of Tubo Sol, Murcia, S.A., 1 May 2008
2009 Renewables Directive	Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009, on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (entered into force on 25 June 2009)
2011 Technical Assessment	"Assessment of the Potential of Thermo-Electric Solar Power, Technical Study, PER 2011-2020," 2011
2013 Electricity Law (or Law 24/2013)	Law 24/2013 of 26 December 2013, on the electricity sector (published on 27 December 2013), repealing and replacing the 1997 Electricity Law
2015 Constitutional Court Judgment	Judgment of the Spanish Constitutional Court, 17 December 2015 (Unconstitutional Appeal 5347/2013)
2017 EC State Aid Decision	Decision of the European Commission of 10 November 2017, regarding the support for electricity generation from renewable energy sources, cogeneration and waste (S.A. 40348 (2015/NN))

2018 Share and Loan Purchase Agreement	Share and Loan Purchase Agreement entered into between IWB Renewable Power, A.G. and EBL, 24 May 2018
Achmea Judgment	Judgment of the CJEU, Case C-284/16, *Republic of Slovakia/Achmea BV*, 6 March 2018
AICIA	*Asociación de Investigación y Cooperación Industrial de Andalucía* (Andalusian Association for Research and Industrial Cooperation)
APPA	*Asociación de Productores de Energías Renovables* (Association of Renewable Energy Producers)
APPA Draft Bill	APPA-Greenpeace Draft Bill on Renewable Energy, 21 May 2009
B. Andrist Statement	Witness Statement of Mr. Beat Andrist, 28 June 2019
B&B	Bartolome & Briones Abogados (EBL's Spanish law firm)
BCG	Boston Consulting Group
BCG Report	BCG Report on "Analysis of Standards for Special Regime Electricity Production Projects," 30 July 2014
C-[#]	Claimants' Exhibit
CENER	*Centro Nacional de Energías Renovables* (National Renewable Energy Centre)
CETA	Comprehensive Economic and Trade Agreement
Charter	European Energy Charter
CJEU	Court of Justice of the European Union
Claimants	EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L.
CL-[#]	Claimants' Legal Authority
Cl. Closing Statement	Claimants' Closing Statement Presentation at the Hearing, 28 July 2021 (CD-6)
Cl. Costs	Claimants' Submission on Costs, 29 October 2021

Cl. Mem. (or Memorial)	Claimants' Memorial on the Merits, 28 June 2019
Cl. Op. Statement	Claimants' Opening Statement Presentation at the Hearing, 22 July 2021 (CD-1.1)
Cl. PHB	Claimants' Post-Hearing Memorial, 29 October 2021
Cl. Reply (or Reply)	Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, 20 March 2020
Cl. Rej. Jur. (or Rejoinder on Jurisdiction)	Claimants' Rejoinder on Jurisdiction, 27 July 2020
CNE	*Comisión Nacional de la Energía* (Spanish National Energy Commission)
CNE Report 3/2007	CNE Report 3/2007 Regarding the Proposed Royal Decree Regulating Electricity Generation in the Special Regime and Specific Technological Facilities Equivalent to the Ordinary Regime, 14 February 2007
CNE Report 30/2008	CNE Report 30/2008 on the Royal Decree Proposal Regulating the Economic Incentives for PV Installations Not Subject to the Economic Regime Defined by Royal Decree 661/2007, 29 July 2008
CNE Report 39/2010	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
CNE Report/2012	CNE Report on the Spanish Electricity System, 7 March 2012
CNE Report 18/2013	CNE Report 18/2013 on the Proposal of Royal Decree which Regulates the Production of Electricity from Renewable Energy Sources, Combined Heat and Power and Residues, 4 September 2013
CNMC	*Comisión Nacional de los Mercados y la Competencia* (Spanish National Commission on Markets and Competition), which replaced the CNE in 2013
Council of Ministers' Agreement	Resolution of 19 November 2009, from the State Energy Secretariat, publishing the Agreement of the Council of Ministers of 13 November 2009 (published on 24 November 2009)

CSP	Concentrated solar power
Cuatrecasas Report	Memorandum on the Regulatory Structure for the "Special Regime" Applicable to Solar Thermal Energy Facilities prepared for Novatec by Cuatrecasas, June 2008
Disputed Measures	The measures which the Claimants argue breach the ECT, consisting of the "Initial Disputed Measures" between 2012 and 2014, and the "Further Disputed Measure" in 2019
EBL or First Claimant	EBL (Genossenschaft Elektra Baselland)
EC	European Commission
ECT	Energy Charter Treaty
EC Application	European Commission's Application for Leave to Intervene as a Non-Disputing Party, 24 May 2019 (filed 29 May 2019)
EC Submission	European Commission's Written Submission, 1 August 2019
EKZ	Elektrizitätswerke des Kantons Zürich
EPC Contract	Engineering, Procurement and Construction Contract for Puerto Errado 2 between TBS PE2 and Novatec GmbH Co KG, 12 June 2009
EU	European Union
EWB	Energy Wasser Bern
EWZ	Elektrizitätswerk der Stadt Zürich
EWZ (Deutschland)	EWZ (Deutschland) GmbH
FET	Fair and Equitable Treatment
Fichtner Analysis	Fichtner Report on Renewable Energy Investment Alternatives, 11 August 2008
Fichtner Due Diligence Report	Fichtner Technical Due Diligence Report on Puerto Errado 2, 19 January 2009
Fichtner Presentation	Fichtner Presentation on Possible Renewable Energy Projects, 25 November 2008

First Accuracy Economic Report	Expert Report of Accuracy, "First Economic Report on the Claimants and their Claim," 30 October 2019
First Brattle Quantum Report	Expert Report of The Brattle Group, "Financial Damages to EBL and TUBO SOL PE2 S.L.," 27 June 2019
First Brattle Regulatory Report	Expert Report of The Brattle Group, "Changes to the Regulation of Concentrated Solar Power Installations in Spain Since December 2012," 27 June 2019
First B&B Report	Preliminary Legal Report by Bartolome & Briones Abogados, 7 January 2009
First CNE Presentation	CNE Presentation on the Legal and Regulatory Framework for the Renewable Energy Sector, 29 October 2008
First Declaration	Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 15 January 2019 (signed by 22 Member States)
FIT	Feed-in tariff
Further Disputed Measure	2019 measure that the Claimants argue breaches the ECT
Hearing	Hearing on Jurisdiction and Merits held 22-28 July 2021
Hungary's Declaration	Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 16 January 2019
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965

ICSID Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings 2006
IDAE	*Instituto para la Diversificación y Ahorro de la Energía* (Institute for the Diversification and Saving of Energy)
ILC Articles	Articles on State Responsibility for Internationally Wrongful Acts of the International Law Commission
Initial Disputed Measures	2012-2014 measures that the Claimants argue breach the ECT
Investment Agreement	Investment Agreement between Tubo Sol Murcia, S.A., EBL, Tubo Sol, Novatec Solar España, S.A. and Novatec Biosol AG, 12 June 2009
IRR	Internal Rate of Return
IWB	Industrielle Werke Basel
Judgment App. 11/2005	Judgment of the Third Chamber of the Supreme Court (App. 11/2005), 20 March 2007
Judgment App. 12/2005	Judgment of the Third Chamber of the Supreme Court (App. 12/2005), 25 October 2006
Judgment App. 13/2006	Judgment of the Third Chamber of the Supreme Court (App. 13/2006), 9 October 2007
Judgment App. 73/2004	Judgment of the Third Chamber of the Supreme Court (App. 73/2004), 15 December 2005
Judgment App. 151/2007	Judgment of the Third Chamber of the Supreme Court (App. 151/2007), 3 December 2009
Judgment App. 152/2007	Judgment of the Third Chamber of the Supreme Court (App. 152/2007), 9 December 2009
June 2014 Order	Order IET/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 (published on 20 June 2014)
July 2010 Agreement	An agreement between the Spanish Government and associations of solar and wind power producers in July 2010

Komstroy Judgment	Judgment of the CJEU (Grand Chamber), *République de Moldavie v. Komstroy LLC*, Case C-741/19, 2 September 2021
Law 2/2011	Law 2/2011 of 4 March 2011, on Sustainable Economy (published on 5 March 2011)
Law 15/2012	Law 15/2012 of 27 December 2012, on tax measures for energy sustainability (published on 28 December 2012)
MFN	Most Favored Nation
Ministry	Ministry of Industry and Energy
New Regime	New remuneration regime for renewable energy producers established by RDL 9/2013 and subsequent measures
Novatec	Novatec Solar GmbH
Opinion 937/2013	Opinion 937/2013 of the Permanent Commission of the Council of State on the Electricity Sector Bill, 12 September 2013
Ordinary Regime	The regime governing conventional, non-renewable energy under the 1997 Electricity Law
PANER	*Plan de Acción Nacional de Energías Renovables de España 2011-2020* (Spain's National Renewable Energy Action Plan for 2011-2020)
PE1	Puerto Errado 1
PE2 or the Plant (sometimes also PE II)	Puerto Errado 2
PER 2005-2010	*Plan de Energías Renovables en España 2005-2010* (2005-2010 Renewable Energy Plan in Spain), August 2005
PFER 2000-2010	*Plan de Fomento de las Energías Renovables en España* (2000-2010 Plan for the Promotion of Renewable Energies in Spain), 19 December 1999
Pre-Assignment Registry	The "Remuneration Pre-assignment Registry Mechanism for Special Regime Facilities" established by Royal Decree Law 6/2009
Preliminary Draft Law	Preliminary Draft Law Establishing, for the Regulatory Period 2020-2025, the Rate of Financial Remuneration for the Activities of

	Transport and Distribution of Electrical Energy and for the Production in the Electrical Systems of Non-Mainland Territories with an Additional Remuneration Regime and Establishing the Reasonable Return for Electrical Energy Production Activities from Renewable Energy Sources, High-Efficiency Cogeneration and Waste With a Specific Remuneration Regime, 9 January 2019
Premium	One of two types of FITs available under RD 436/2004 and RD 661/2007
R-[#]	Respondent's Exhibit
RAIPEE	*Registro Administrativo de Instalaciones de Producción de Energía Eléctrica* (Administrative Register of Electricity Generation Installations)
RAIPRE	*Registro Administrativo de Instalaciones de Producción en Régimen Especial* (Administrative Register of Generation Installations under the Special Regime)
RD	Royal Decree
RD 413/2014	Royal Decree 413/2014 of 6 June 2014, regulating the activity of electric power production from renewable energy sources, cogeneration and waste (published on 10 June 2014)
RD 436/2004	Royal Decree 436/2004 of 12 March 2004, establishing the methodology for the updating and systematization of the legal and economic regime for electric power production in the special regime (published on 27 March 2004)
RD 661/2007	Royal Decree 661/2007 of 25 May 2007, regulating the activity of electricity production under the special regime (published on 26 May 2007)
RD 661/2007 Ministry Announcement	Ministry of Industry, Energy and Tourism's announcement of Royal Decree 661/2007, 25 May 2007
RD 960/2020	Royal Decree 960/2020 of 3 November 2020, regulating the economic regime of renewable energies for electric energy production facilities (published on 4 November 2020)

RD 1578/2008	Royal Decree 1578/2008 of 26 September 2008, on remuneration for the production of electric energy using solar photovoltaic technology for facilities after the deadline for maintaining the remuneration of Royal Decree 661/2007 of 25 May 2007, for such technology (published on 27 September 2008)
RD 1565/2010	Royal Decree 1565/2010 of 19 November 2010, which regulates and modifies certain aspects related to the activity of electricity production under the special regime (published on 23 November 2010)
RD 1614/2010	Royal Decree 1614/2010 of 7 December 2010, regulating and modifying certain aspects relating to the production of electricity based on thermoelectric and wind technologies (published on 8 December 2010)
RD 2366/1994	Royal Decree 2366/1994 of 9 December 1994, on the production of electrical energy by hydraulic and cogeneration facilities, and other facilities supplied by resources or sources of renewable energy (published on 31 December 1994)
RD 2818/1998	Royal Decree 2818/1998 of 23 December 1998, on electricity production installations supplied by renewable energy, waste or cogeneration (published on 30 December 1998)
RDL	Royal Decree Law
RDL 1/2012	Royal Decree Law 1/2012 of 27 January 2012, implementing the suspension of the remuneration pre-assignment procedures and the elimination of economic incentives for new electrical energy production installations based on cogeneration, renewable energy sources and waste (published on 28 January 2012)
RDL 2/2013	Royal Decree Law 2/2013 of 1 February 2013, concerning urgent measures within the electricity system and the financial sector (published on 2 February 2013)
RDL 6/2009	Royal Decree Law 6/2009 of 30 April 2009, which adopted certain measures within the Energy Industry and approved the special rate (published on 7 May 2009)

RDL 7/2006	Royal Decree Law 7/2006 of 23 June 2006, establishing urgent measures in the energy sector (published on 24 June 2006)
RDL 9/2013	Royal Decree Law 9/2013 of 12 July 2013, by which urgent measures are adopted to guarantee the financial stability of the electricity system (published on 13 July 2013)
RDL 14/2010	Royal Decree Law 14/2010 of 23 December 2010, establishing urgent measures for the correction of the tariff deficit in the electricity sector (published on 24 December 2010)
RDL 17/2019	Royal Decree Law 17/2019 of 22 November 2019, on urgent measures for the necessary adaptation of remuneration parameters affecting the electricity system and responding to the termination of the activity of thermal generation plants (published on 23 November 2019)
RDL 23/2020	Royal Decree Law 23/2020 of 23 June 2020, approving measures in the energy sector and other areas for economic reactivation (published on 24 June 2020)
Regulated Tariff	One of two types of FITs available under RD 436/2004 and RD 661/2007
Regulatory Impact Analysis Report	Regulatory Impact Analysis Report of Draft Royal Decree 1614/2010, which regulates and amends certain aspects concerning electricity production using solar energy and wind technologies, 4 November 2010
REIO	Regional Economic Integration Organization
Request for Arbitration	Request for Arbitration, 10 October 2018 (filed 15 October 2018)
Respondent	Kingdom of Spain
Resp. C-Mem. (or Counter-Memorial)	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, 30 October 2019
Resp. C-Mem. Supp. (or Counter-Memorial Supplement)	Respondent's Supplemental Counter-Memorial on the Merits in Relation to the Useful Life of the Puerto Errado 2 Plant, 6 November 2019

Resp. Costs	Respondent's Submission on Costs, 29 October 2021
Resp. Closing Statement	Respondent's Closing Statement Presentation at the Hearing, 28 July 2021 (RD-6)
Resp. Op. Statement	Respondent's Opening Statement Presentation at the Hearing, 22 July 2021 (RD-1)
Resp. PHB	Respondent's Post-Hearing Memorial, 29 October 2021
Resp. Rej. (or Rejoinder)	Respondent's Rejoinder on the Merits and Reply on Jurisdiction, 26 June 2020
RL-[#]	Respondent's Legal Authority
Roland Berger Report	Roland Berger Final Report on "Analysis of Standards for Electricity Production Projects in the Special Regime," 31 October 2014
Second Accuracy Economic Report	Expert Report of Accuracy, "Second Economic Report on the Claimants and their Claim," 25 June 2020
Second B&B Report	Legal Report on Puerto Errado 2 by Bartolome & Briones Abogados, 22 April 2009
Second Brattle Quantum Report	Expert Report of The Brattle Group, "Rebuttal Report: Financial Damages to EBL and TUBO SOL PE2 S.L.," 20 March 2020
Second Brattle Regulatory Report	Expert Report of The Brattle Group, "Rebuttal: Changes to the Regulation of Concentrated Solar Power Installations in Spain," 20 March 2020
Second CNE Presentation	CNE Presentation on Renewable Energy Regulation, 1 February 2009
Second Declaration	Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 16 January 2019 (signed by 5 Member States)
Servert/Nieto CAPEX Report	Expert Report of Dr. Jorge Servert and Mr. José Manuel Nieto, "Central Termosolar Puerto Errado 2: Capital Expenditure Analysis," June 2020

SES	Spanish Electricity System
Shareholders' Arbitration Agreement	Arbitration Agreement, entered into between EBL, IWB Renewable Power, A.G., Tubo Sol Murcia, S.A., EWZ (Deutschland) GmbH, EKZ Renewables S.A., Berna Energía Natural España S.L.U. and Tubo Sol, concerning these arbitral proceedings, 30 August 2018
SPA	Share Purchase Agreement between Tubo Sol Murcia, S.A., EBL and Novatec Biosol AG, 29 December 2009
Special Payment	Special payment introduced by RDL 9/2013, amending Article 30.4 of the 1997 Electricity Law
Special Regime	The regime governing renewable energy under the 1997 Electricity Law
Summary PER 2005-2010	Government of Spain, Ministry of Industry, Tourism and Commerce and IDAE, "Summary of the Spanish Renewable Energy Plan 2005-2010," August 2005
T. Andrist Statement	Witness Statement of Mr. Tobias Andrist, 28 June 2019
Tariff Deficit	Tariff deficit in the Spanish renewable energy system
Tariff Window	The window in which producers were required to register with the RAIPRE in order to enjoy the remuneration regime established by RD 661/2007
Taxation Carve-Out	ECT Article 21 providing that "nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties"
TBSM	Tubo Sol Murcia S.A.
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Third CNE Presentation	CNE Presentation on Renewable Energy Regulation in Spain, 1 February 2010

TMR	*Tarifa eléctrica media o de referencia* (average benchmark or reference tariff) as defined in Article 17 of the 1997 Electricity Law
Trigger Letter	Letter from Allen & Overy on behalf of the Claimants to President Mariano Rajoy, 19 February 2018
Tr. Day [#], [Speaker, if Witness/Expert], [page:line]	Transcript of the Hearing (English) (as revised by the Parties on 24 September 2021)
Tribunal	Arbitral Tribunal constituted on 28 January 2019
Tubo Sol or Second Claimant	Tubo Sol PE2 S.L.
TVPEE	The 7% tax on the value of production of electrical energy introduced in Law 15/2012
VCLT	Vienna Convention on the Law of Treaties
WACC	Weighted average cost of capital

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**"), on the basis of the Energy Charter Treaty, which entered into force on 16 April 1998 for the Kingdom of Spain and Switzerland (the "**ECT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**"). This proceeding is conducted in accordance with the ICSID Rules of Procedure for Arbitration Proceedings in force as of 10 April 2006 (the "**ICSID Arbitration Rules**").

2. The Claimants are EBL (*Genossenschaft Elektra Baselland*) ("**EBL**" or the "**First Claimant**"), a Swiss cooperative;[1] and Tubo Sol PE2 S.L. ("**Tubo Sol**" or the "**Second Claimant**"), a company incorporated in Spain[2] (together, the "**Claimants**").

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

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

5. This dispute relates to measures implemented by the Respondent modifying the regulatory and economic regime applicable to renewable energy projects.

6. The discussion that follows reflects the unanimous views of the Tribunal in certain respects, and the opinion of a majority in others. Specifically, as explained in his separate dissent, Mr. Nilsson joins in this Award on all points regarding jurisdiction (addressed in Section V) and with respect to one of the Claimants' claims on the merits (addressed in Section VII.D(4)c), but disagrees with the majority with respect to other conclusions in Section VII.D.

[1] Cl. Mem., ¶ 2.

[2] Cl. Mem., ¶ 3.

II. PROCEDURAL HISTORY

A. REGISTRATION AND CONSTITUTION OF THE TRIBUNAL

7. On 15 October 2018, ICSID received a Request for Arbitration dated 10 October 2018, from EBL and Tubo Sol against Spain, accompanied by exhibits C-1 to C-40, and legal authorities CL-1 to CL-2 (the "**Request for Arbitration**"). On 19 October 2018, the Centre formulated a question to the Claimants regarding the Request for Arbitration, and the Claimants submitted a response on 22 October 2018.

8. On 8 November 2018, in accordance with Article 36(3) of the ICSID Convention, the Secretary-General of ICSID registered the Request for Arbitration, as supplemented by letter of 22 October 2018, and notified the Parties of the registration. In the Notice of Registration, in accordance with Rule 7(d) of ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "**ICSID Institution Rules**"), the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible.

9. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed to constitute the Tribunal as follows: three arbitrators, one to be appointed by each Party, and the third, presiding arbitrator to be appointed by agreement of the Parties. Pursuant to the Parties' agreed method of constitution, failing an agreement of the Parties on the presiding arbitrator, s/he would be appointed by Secretary-General of ICSID.

10. The Tribunal was composed of Ms. Jean E. Kalicki, a national of the United States of America, President, appointed by agreement of the Parties; Mr. Bo G.H. Nilsson, a national of Sweden, appointed by the Claimants; and Prof. Hélène Ruiz Fabri, a national of France, appointed by the Respondent.

11. On 28 January 2019, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Luisa Fernanda Torres, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

B. THE FIRST SESSION

12. On 11 March 2019, a date agreed by the Parties, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by telephone conference (the "**First Session**").

13. On 21 March 2019, following the First Session, the Tribunal issued **Procedural Order No. 1**. Procedural Order No. 1 embodied the Parties' agreements on procedural matters and the Tribunal's decisions on the disputed issues. It established, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, DC. Procedural Order No. 1 also set out the **Procedural Calendar** for this arbitration.

C. THE NON-DISPUTING PARTY APPLICATION

14. On 29 May 2019, the European Commission (the "**EC**") filed an Application for Leave to Intervene as a Non-Disputing Party dated 24 May 2019 (the "**EC Application**"). The EC Application was communicated to the Parties and to the Tribunal on the same day it was received.

15. On 30 May 2019, the Tribunal invited the Parties to provide (i) their respective responses to the EC Application by simultaneous submission on 10 June 2019; and (ii) any comments on potential adjustment to the Procedural Calendar in Procedural Order No. 1, Annex A that the Parties believed would be warranted if the EC's Application were to be granted.

16. On 10 June 2019, the Parties filed their respective observations on the EC Application. The Respondent's observations were accompanied by legal authorities RL-1 to RL-5.

17. On 2 July 2019, the Tribunal issued **Procedural Order No. 2** concerning the EC Application. The Tribunal (i) authorized the EC to file a written submission limited to 25 pages; (ii) denied the EC's request for access to the record of this proceeding; (iii) denied the EC's request for leave to attend and participate in oral hearings in this case; (iv) denied the Claimants' request that the EC's written submission be conditioned on an undertaking to cover any additional costs sustained by the Parties in responding to that submission; (v) denied the Claimants' request that the EC's written submission be conditioned on an undertaking not to object to enforceability of any award the Tribunal eventually renders; (vi) decided that the Parties were to present their observations on the EC's written submission in the course of their already scheduled pleadings in the Procedural Calendar; and (vii) decided that Section V of the Order would be communicated to the EC, with an instruction that it not communicate the Order to third parties or use it outside of this arbitration.

18. On 1 August 2019, the EC filed its Written Submission, accompanied by exhibits EC-1 to EC-54 (the "**EC Submission**").

D. THE PARTIES' WRITTEN SUBMISSIONS AND PROCEDURAL APPLICATIONS

19. On 28 June 2019, the Claimants filed their Memorial on the Merits (the "**Memorial**" or "**Cl. Mem.**"), accompanied by exhibits C-41 to C-145; legal authorities CL-3 to CL-102; two witness statements by: (i) Mr. Tobias Andrist, and (ii) Mr. Beat Andrist; and three expert reports by: (i) Mr. José Antonio García and Mr. Carlos Lapuerta of the Brattle Group (Regulatory) with exhibits BRR-1 to BRR-205 (the "**First Brattle Regulatory Report**"); (ii) Mr. Richard Caldwell and Mr. Carlos Lapuerta of the Brattle Group (Quantum) with exhibits BQR-1 to BQR-111 (the "**First Brattle Quantum Report**"); and (iii) Mr. Santiago García of Renovetec Ingeniería with exhibits RT-1 to RT-35.

20. On 25 September 2019, the Respondent filed a request seeking an order from the Tribunal authorizing their expert to conduct a site visit to the Puerto Errado 2 Plant ("**PE2**"[3] or the "**Plant**") (the "**Site Visit Request**"). On 30 September 2019, the Claimants filed their observations in response to the Site Visit Request. On 2 October 2019, the Respondent filed reply observations; and on 4 October 2019, the Claimants filed rejoinder observations.

21. On 7 October 2019, the Tribunal issued **Procedural Order No. 3** concerning the Site Visit Request, which *inter alia*, authorized the Respondent's expert site visit to the Plant, while denying its request that its expert be permitted to conduct "interviews" of Plant personnel.

22. On 9 October 2019, pursuant to Procedural Order No. 3, the Parties informed the Tribunal of (i) their agreed date for the Respondent's expert to visit the Plant; and (ii) an agreed extension of the due date for the submission of the Respondent's technical expert report and the section of the Counter-Memorial dependent upon it.

23. On 9 October 2019, following the Parties' joint request, the Tribunal amended the Procedural Calendar (the "**Procedural Calendar – Revision No. 1**").

24. On 30 October 2019, the Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction (the "**Counter-Memorial**" or "**Resp. C-Mem.**"), accompanied by exhibits R-4 to R-234; legal authorities RL-14 to RL-99; and one expert report by Mr. Eduard Saura, Mr. Nicolas

[3] The Plant is sometimes referred to in exhibits with Roman numeral styling ("Puerto Errado II" or "PE II"), but the Parties' pleadings more often use Arabic numeral styling ("Puerto Errado 2" or "PE2"). The Tribunal adopts the later styling for consistency with those pleadings.

Barsalou and Ms. Laura Cózar of Accuracy, with exhibits ACQ-1 to ACQ-55 (the "**First Accuracy Economic Report**").

25. On 6 November 2019, pursuant to the Procedural Calendar, the Respondent filed its Counter-Memorial Supplement on the Lifetime Issue (the "**Counter-Memorial Supplement**" or "**Resp. C-Mem. Supp.**"), accompanied by one expert report by Dr. Jorge Servert, with exhibits JSR-1 to JSR-5 and exhibits JSRC (construction, engineering, general and O&M).[4]

26. On 20 November 2019, the Tribunal received a communication from the Claimants reporting on certain discussions between the Parties regarding a possible site visit to the Plant by the Tribunal and each Party's respective position on the matter.

27. On 25 November 2019, the Tribunal informed the Parties that it did not consider a Tribunal site visit to be needed, although it reserved the right to revisit the issue as the case unfolded further.

28. On 7 January 2020, the President of the Tribunal provided the Parties with an additional disclosure statement.

29. On 13 January 2020, following exchanges between the Parties, the Parties submitted for decision by the Tribunal their respective Redfern Schedules including their Requests, Objections and Replies on Document Production.

30. On 13 January 2020, the President of the Tribunal inquired with the Parties whether they would agree to the appointment of Dr. Joel Dahlquist, a Swedish national, as Assistant to the President of the Tribunal. The Parties confirmed their agreement on 21 January 2020, and Dr. Dahlquist provided his signed Assistant Declaration on the same day.

31. On 14 January 2020, the Respondent asked the Tribunal to strike from the record certain annexes (Annexes 1 to 4) that had been filed together with the Claimants' Redfern Schedule, without prejudice to the Claimants' right to submit them again together with their scheduled Reply.

32. On 14 January 2020, the Tribunal invited the Claimants to submit observations in relation to the Respondent's application above. On 17 January 2020, the Claimants submitted their response.

[4] The accompanying exhibits were: JSR-1 to JSR-5; JSRC-CONS-1; JSRC-ENG-1 to JSRC-ENG-4; JSRC-GEN-1 to JSRC-GEN-8; JSRC-OM-1 to JSRC-OM-2.

33. On 17 January 2020, the Tribunal decided that Annexes 1 to 4 to the Claimants' Redfern Schedule would be preserved "for the limited purpose of addressing issues raised in that Schedule." The Tribunal added, however, that "documents submitted in such fashion will not form part of the evidentiary record for subsequent phases of this case," and that any documents to be considered for the merits "should be marked in due course as exhibits and submitted with the Parties' scheduled memorials."

34. On 29 January 2020, the Tribunal issued **Procedural Order No. 4** on document production.

35. On 20 March 2020, following a joint request by the Parties, the Tribunal amended certain logistical filing requirements contained in Procedural Order No. 1.

36. On 21 March 2020, the Claimants filed their Reply on the Merits and Counter-Memorial on Jurisdiction (the "**Reply**" or "**Cl. Reply**"), accompanied by exhibits C-146 to C-239; legal authorities CL-103 to CL-202; three expert reports by: (i) Mr. José Antonio García and Mr. Carlos Lapuerta of the Brattle Group (Regulatory), with exhibits BRR-206 to BRR-281 (the "**Second Brattle Regulatory Report**"); (ii) Mr. Richard Caldwell and Mr. Carlos Lapuerta of the Brattle Group (Quantum), with exhibits BQR-112 to BQR-137 (the "**Second Brattle Quantum Report**"); and (iii) Mr. Santiago García of Renovetec Ingeniería, with exhibits RT-37 to RT-46; and one tax opinion by Ms. Araceli Saenz de Navarrete of Ernst & Young Abogados S.L.P., with exhibits EYTR-1 to EYTR-16.

37. On 15 June 2020, the Parties informed the Tribunal of an agreed amendment to the Procedural Calendar. On 16 June 2020, the Tribunal took note of the Parties' agreement and invited the Claimants to provide a clarification, which was received on 17 June 2020.

38. On 23 June 2020, following the Parties' joint request, the Tribunal amended the Procedural Calendar (the "**Procedural Calendar – Revision No. 2**").

39. On 26 June 2020, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (the "**Rejoinder**" or "**Resp. Rej**"), accompanied by exhibits R-235 to R-376; legal authorities RL-100 to RL-149; three expert reports by: (i) Dr. Jorge Servert with exhibits JSR and JSRC,[5] (ii) Dr. Jorge Servert and Mr. José Manuel Nieto (the "**Servert/Nieto CAPEX Report**") with exhibits STAC-1 to STAC-19 and STA-1 to STA-14, (iii) Mr. Eduard Saura, Mr. Nicolas Barsalou and Ms. Laura

[5] The accompanying exhibits were: JSRC-GEN-1 to JSRC-GEN-8; JSRC-ENG-1 to JSRC-ENG-4; JSRC-OM-1 and JSRC-OM-2; JSRC-CONS-1; JSRC2-0 to JSRC2-68; JSR-1 to JSR-5; and JSR2-3 to JSR2-7.

Cózar of Accuracy, with exhibits ACQ-56 to ACQ-89 (the "**Second Accuracy Economic Report**"); and one tax opinion by Mr. Eduardo García Espinar of Ashurst LLP.

40. On 27 July 2020, the Claimants filed their Rejoinder on Jurisdiction (the "**Rejoinder on Jurisdiction**" or "**Cl. Rej. Jur.**"), accompanied by exhibit C-240 and legal authorities CL-203 to CL-210.

41. On 31 August 2020, considering the uncertainties related to the COVID-19 pandemic, the Tribunal invited the Parties to confer on the manner in which they wished to proceed in relation to the Hearing scheduled to take place in Paris from 16 to 23 November 2020, including the possibility of convening the Hearing remotely, and asked them to report back to the Tribunal with a joint response.

42. On 8 September 2020, the Parties sent their joint observations to the Tribunal.

43. On 10 September 2020, the Parties informed the Tribunal of an agreed proposal for postponement of the Pre-Hearing Organizational Conference. On the same day, the Tribunal informed the Parties that the Pre-Hearing Organizational Conference was re-scheduled as requested.

44. On 16 September 2020, pursuant to the Procedural Calendar, the Claimants submitted a notice regarding the witnesses and experts they called for examination at the Hearing. On 17 September 2020, the Tribunal wrote to the Parties observing that the Respondent had not yet submitted its notice, and inviting the Respondent to do so as soon as possible. On that same day, the Respondent notified the witnesses and experts it called for examination at the Hearing.

45. On 5 October 2020, the Tribunal held a Pre-Hearing Organizational Conference with the Parties by telephone conference.

46. On 9 October 2020, the Tribunal issued **Procedural Order No. 5** pertaining to the organization of the Hearing. Having heard and considered the Parties' views, in Procedural Order No. 5 the Tribunal ruled, *inter alia*, that the Hearing would proceed remotely by videoconference between 16 and 23 November 2020, subject to one possible exception resulting from the Parties' shared view, concerning a hypothetical situation in which "*new* lockdowns (not presently in place) were

to be declared in Paris or Madrid that would prevent the Parties' respective counsel teams from gathering together on the scheduled dates ...."[6]

47. On 16 October 2020, the Parties jointly wrote to the Tribunal concerning a disagreement regarding the Hearing Agenda. On 20 October 2020, the Tribunal gave further directions to the Parties on this matter.

48. On 20 October 2020, the Tribunal invited the Parties to provide a status update with respect to the potential for restrictions that might trigger the exception contemplated in Procedural Order No. 5, discussed above, ¶ 46. On 23 October 2020, each of the Parties wrote to the Tribunal with an update. On the same day, the Respondent also filed an application concerning amendments to the Hearing Agenda, to which the Claimants responded that day.

49. On 23 October 2020, the Parties jointly wrote to the Tribunal (i) to communicate that both Parties wished to introduce new documents into the record and had agreed on a procedure to deal with applications in that regard; and (ii) to request an extension for the production of the joint electronic hearing bundle. On 26 October 2020, the Tribunal approved the agreed procedure and granted the extension requested.

50. Further to the agreed procedure, on 26 October 2020, both Parties exchanged communications confirming that neither of them opposed the introduction of new documents into the record requested by the other Party.

51. On 27 October 2020, the Tribunal gave further directions to the Parties concerning the agenda for the Hearing, and issued an amended Hearing Agenda.

52. On 28 October 2020, the Respondent filed an application requesting the postponement of the Hearing. On the same day, the Tribunal invited the Claimants to provide their observations. On 30 October 2020, the Claimants provided their response. Further exchanges between the Parties and the Tribunal concerning the matter of adjournment and rescheduling of the Hearing took place on 30 October 2020 and 2, 4 and 6 November 2020.

[6] Procedural Order No. 5, ¶ 20 (emphasis in original).

53. On 6 November 2020, the Tribunal issued **Procedural Order No. 6** concerning the postponement of the Hearing. The Hearing was rescheduled to take place on 22-24 July and 26-28 July 2021, and an updated Hearing Agenda was issued as Annex A.

54. On 30 November 2020, at the request of the Tribunal, the Parties jointly produced the electronic hearing bundle for use at the Hearing (the "**Electronic Hearing Bundle**").

55. On 4 December 2020, the Parties confirmed that the Electronic Hearing Bundle included a number of new documents that the Parties had agreed to introduce into the record, namely: exhibits C-241 to C-247 and R-377 to R-383, and legal authorities CL-211 to CL-213 and RL-150 to RL-157.

56. On 28 April 2021, the Tribunal invited the Parties to confer about the modality of the Hearing scheduled for 22-24 July and 26-28 July 2021.

57. On 4 May 2021, the Parties informed the Tribunal they had agreed to hold the Hearing remotely.

58. On 1 July 2021, arbitrator Prof. Hélène Ruiz Fabri provided the Parties with an additional disclosure statement.

59. On 9 July 2021, the Parties informed the Tribunal that they had agreed to introduce further new documents into the record, namely: exhibits C-248 to C-252, R-384 and R-385, and legal authorities RL-158 to R-160. The Tribunal confirmed the Parties' agreement on the same day.

60. On 14 and 15 July 2021, the Parties introduced their respective new documents into the record, and jointly produced an updated Electronic Hearing Bundle.

E. THE ORAL PROCEDURE

61. The hearing was held on 22-24 July and 26-28 July 2021 by videoconference (the "**Hearing**"). The following persons were present:

Tribunal:

Ms. Jean E. Kalicki	President
Mr. Bo G.H. Nilsson	Arbitrator
Prof. Hélène Ruiz Fabri	Arbitrator

ICSID Secretariat:

Ms. Luisa Fernanda Torres	Secretary of the Tribunal

Assistant:

Dr. Joel Dahlquist	Assistant to the President of the Tribunal

For Claimants:

Counsel	
Ms. Marie Stoyanov	Allen & Overy
Mr. Antonio Vázquez-Guillén	Allen & Overy
Mr. David Ingle	Allen & Overy
Mr. Alexandre Fichaux	Allen & Overy
Mr. Pablo Torres	Allen & Overy
Ms. Lucinda Critchley	Allen & Overy
Mr. Gonzalo Jiménez-Blanco	Allen & Overy
Mr. Gary Smadja	Allen & Overy
Ms. Tatiana Olazabal	Allen & Overy
Party Representatives	
Mr. Tobias Andrist	Party Representative
Mr. Beat Andrist	Party Representative
Mr. Juan Ricardo Rothe	Party Representative
Mr. Yves Grebenarov	Party Representative
Mr. Isaac Hernández Valles	Party Representative
Mr. Josep Enrich	Party Representative
Witnesses	
Mr. Tobias Andrist	EBL
Mr. Beat Andrist (*)	EBL
Experts	
Mr. José Antonio García	Brattle Group
Mr. Carlos Lapuerta	Brattle Group
Mr. Richard Caldwell	Brattle Group
Mr. Francesco Risi	Brattle Group
Mr. Andrés Child	Brattle Group
Ms. Claudia Cuchi	Brattle Group
Mr. Santiago García Garrido	Renovetec
Ms. Araceli Saenz de Navarrete Crespo	Ernst & Young Abogados, S.L.P.

For Respondent:

Counsel	
Mr. José Manuel Gutiérrez Delgado	Abogacía del Estado, Ministerio de Justicia
Ms. Gabriela Cerdeiras Megías	Abogacía del Estado, Ministerio de Justicia
Mr. Alberto Torró Molés	Abogacía del Estado, Ministerio de Justicia
Ms. Ana Fernández-Daza Álvarez	Abogacía del Estado, Ministerio de Justicia
Mr. Juan Quesada Navarro	Abogacía del Estado, Ministerio de Justicia
Experts	
Mr. Eduard Saura	Accuracy

Ms. Laura Cózar	Accuracy
Mr. Nicolas Barsalou	Accuracy
Mr. Alberto Fernández	Accuracy
Mr. Carlos Canga	Accuracy
Mr. Alonso Álvarez de Toledo	Accuracy
Ms. Chloé Pehuet	Accuracy
Prof. Jorge Servert	
Mr. José Manuel Nieto	
Mr. Eduardo Gracia	Ashurst
Mr. Jose Carlos Rodea	Ashurst

Court Reporters:

Mr. Trevor McGowan	Caerus Reporting Ltd.
Ms. Georgina Vaughn	Caerus Reporting Ltd.
Mr. Dante Rinaldi	DR-ESTENO
Mr. Leandro Lezzi	DR-ESTENO
Mr. Rodolfo Rinaldi	DR-ESTENO
Ms. Marta Rinaldi	DR-ESTENO
Mr. Paul Pelissier	DR-ESTENO

Interpreters:

Mr. Jesús Getan Bornn	Interpreter (ENG-SPA)
Ms. Amalia Thaler de Klem	Interpreter (ENG-SPA)
Ms. Anna Sophia Chapman	Interpreter (ENG-SPA)
Ms. Barbara Conte	Interpreter (GER-ENG)
Ms. Barbara Chisholm	Interpreter (GER-ENG)
Ms. Christine Linaae	Interpreter (GER-SPA)
Ms. Birgit Christensen	Interpreter (GER-SPA)

Technical Support:

Mr. Mike Young	Sparq

(*) not present before testimony

62. The following persons were examined during the Hearing:

On behalf of the Claimants:

<u>Witnesses</u>	
Mr. Tobias Andrist	EBL
Mr. Beat Andrist	EBL
<u>Experts</u>	
Mr. José Antonio García	Brattle Group
Mr. Carlos Lapuerta	Brattle Group
Mr. Richard Caldwell	Brattle Group
Ms. Araceli Saenz de Navarrete Crespo	Ernst & Young Abogados, S.L.P.

Mr. Santiago García Garrido	Renovetec

On behalf of the Respondent:

Experts	
Mr. Eduard Saura	Accuracy
Mr. Nicolas Barsalou	Accuracy
Mr. Eduardo Gracia	Ashurst
Prof. Jorge Servert	
Mr. José Manuel Nieto	

63. During the Hearing, the Parties introduced the following materials into the record:

- **Claimants**: Demonstrative Exhibits CD-1 to CD-6[7]
- **Respondent**: Demonstrative Exhibits RD-1 to RD-6[8]

F. THE POST-HEARING PROCEDURE

64. On 4 August 2021, the Parties communicated to the Tribunal their agreed calendar for the procedural steps following the Hearing. The Tribunal approved the Parties agreed calendar on the same day.

65. On 9 August 2021, following an inquiry from the Tribunal, the Parties communicated their agreed calendar for the submission of the Claimants' revised request for relief, pursuant to the discussion at the Hearing.[9] The Tribunal approved the Parties' agreed calendar on 11 August 2021.

66. On 24 September 2021, the Parties jointly submitted their agreed revisions to the Hearing Transcript. On 14 October 2021, the Tribunal confirmed that the revised versions received from the Parties were considered the final versions of the Hearing Transcript.

67. On 24 September 2021, the Claimants submitted their "Revised Prayer for Relief."

68. On 28 September 2021, the Respondent filed an application (i) asking the Tribunal to declare the Claimants' Revised Prayer for Relief as inadmissible; and (ii) seeking authorization from the Tribunal to introduce two new documents into the record: a legal opinion prepared by Clifford Chance and the CJEU Judgment in Case C-741/19, *Republic of Moldova v. Komstroy LLC*, 2

[7] As renumbered in the Consolidated Index provided by the Claimants on 3 August 2021.

[8] On 29 July 2021, pursuant to the discussion at the Hearing, the Respondent provided an amended version of RD-4. *See* Tr. Day 5, 121:4-128:5.

[9] Tr. Day 6, 206:1-18.

September 2021 (the "***Komstroy* Judgment**"). Following an invitation by the Tribunal, on 5 October 2021, the Claimants submitted their observations in response to the Respondent's application, defending their Revised Prayer for Relief and objecting to the Respondent's proposed introduction of both new documents.

69. On 8 October 2021, the Parties communicated to the Tribunal an agreed amendment to the due date for the Post-Hearing Briefs. The Tribunal confirmed the agreed extension on the same day.

70. On 25 October 2021, the Tribunal decided on the Respondent's application dated 28 September 2021 (the "**Tribunal's Ruling of 25 October 2021**"). In particular, the Tribunal (i) took "under advisement Claimants' latest formulation of how it believes any relief in this case should be awarded, as well as Respondent's observations and objections to this formulation"; (ii) dismissed the Respondent's request to introduce a Clifford Chance legal opinion as a new exhibit into the record;[10] and (iii) admitted the *Komstroy* Judgment into the record as a new legal authority, indicating that the Parties were free to address this authority in their scheduled Post-Hearing Briefs.

71. The Parties filed simultaneous post-hearing briefs on 29 October 2021 ("**Post-Hearing Briefs**" or "**Cl. PHB**" and "**Resp. PHB**," respectively). The Claimants' Post-Hearing Brief was accompanied by legal authorities CL-214 to CL-241, and additional translations into English of a number of exhibits already on the record. The Respondent's Post-Hearing Brief was accompanied by legal authorities RL-161 to RL-166.

72. The Parties filed their submissions on costs on 29 October 2021 ("**Cost Submissions**" or "**Cl. Costs**" and "**Resp. Costs**," respectively).

73. On 2 November 2021, the Parties communicated to the Tribunal their agreement that the Post-Hearing Briefs and Cost Submissions would be provided only in English. The Tribunal approved the Parties' agreement on the same day.

74. On 29 November 2021, the Respondent filed a communication complaining that the Claimants' Post-Hearing Brief had increased its claim for damages in this case by €37.2 million. The Respondent argued that the "new calculations [were] inadmissible" and it "request[ed] that they be disregard[ed] by the members of the Tribunal, if any discussion on quantum [was] ever reached."

[10] With respect to this document, the Tribunal explained that it "does not at this juncture accept a need for additional post-hearing evidentiary submissions," but reserved "the right to come back to the Parties in due course should it have specific questions." The Tribunal reverts to this issue further in Section V.E(2) below.

On 1 December 2021, the Claimants provided their observations in response to the Respondent's application.

75. On 1 December 2021, the Tribunal informed the Parties that it had "take[n] note of the Parties' respective positions on this issue," and had "take[n] the matter under advisement."

76. On 19 May 2022, the Respondent filed an application seeking authorization from the Tribunal to introduce six new legal authorities into the record. On 20 May 2022, the Tribunal invited the Claimants to provide their observations on the admissibility of the requested documents. On 30 May 2022, the Claimants submitted their observations in response to the Respondent's application.

77. On 2 June 2022, the Tribunal rejected the Respondent's application dated 19 May 2022.

78. On 22 June 2022, the Respondent filed an application seeking authorization from the Tribunal to introduce two new legal authorities into the record. On 27 June 2022, the Tribunal invited the Claimants to provide their observations on the admissibility of the requested documents. On 1 July 2022, the Claimants submitted their observations in response to the Respondent's application.

79. On 5 July 2022, the Tribunal rejected the Respondent's application dated 22 June 2022.

80. On 7 July 2022, the Respondent filed a communication recording its disagreement with the Tribunal's ruling of 5 July 2022.

81. On 20 December 2022, the Respondent filed an application seeking authorization from the Tribunal to introduce two new legal authorities into the record. On 21 December 2022, the Tribunal invited the Claimants to provide their observations on the admissibility of the requested documents. On 3 January 2023, the Claimants submitted their observations in response to the Respondent's application.

82. On 9 February 2023, the Tribunal rejected the Respondent's application dated 20 December 2022.

83. On 9 February 2023, the President of the Tribunal informed the Parties that Dr. Joel Dahlquist would no longer be able to serve as Assistant to the President of the Tribunal, and inquired whether the Parties would agree to the appointment of Ms. Zsófia Young, a national of Hungary, the United States and Ireland, as Assistant to the President of the Tribunal, in replacement. The Respondent confirmed its agreement on 10 February 2023; and the Claimants confirmed their agreement on 12 February 2023. On 13 February 2023, Ms. Young provided her signed Assistant Declaration and

her appointment to serve as Assistant to the President of the Tribunal took effect on 20 February 2023.

84. On 20 March 2023, the Claimants informed the Tribunal of changes to Tubo Sol's shareholding ownership and structure. On 3 April 2023, the Respondent requested the production of several documents in connection with the recent transactions and requested the Tribunal to grant the Parties time for pleadings in relation to this matter. On 7 April 2023, the Claimants voluntarily produced some of the documents requested and requested that the Tribunal deny the Respondent's other requests for documents and for further time for pleadings. On 18 April 2023, the Tribunal decided to take note of the Claimants' voluntary production and to deny the Respondent's request for further document production and for written submissions with respect to the recent transactions.

85. On 11 December 2023, each Party confirmed the list of representatives that should appear in the cover page of the Award.

86. The proceeding was closed on 12 December 2023.

III. FACTUAL BACKGROUND

87. The following is a summary of the background facts, as pleaded by the Parties or established by the evidence. The summary is not intended as an exhaustive statement of the facts, and is without prejudice to any legal conclusions by the Tribunal, which will be addressed in later sections. Any absence of reference to particular facts or assertions should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered *all* evidence and arguments submitted to it in the course of this Arbitration.

A. THE SPANISH REGULATORY REGIME PRIOR TO EBL'S INVESTMENT

(1) General Framework

88. Before addressing the Spanish regulatory framework for the Spanish electricity system (the "**SES**"), the Tribunal briefly summarizes the hierarchy of the relevant legal framework, according to which no measure may contravene a superior measure in the hierarchy of norms. At the top of that

hierarchy is the 1978 Spanish Constitution,[11] the ultimate interpreter of which is the Constitutional Court.

89. The next sources in the hierarchy are Laws (or Acts), followed by Royal Decree Laws ("**RDL**"). RDLs, which carry the force of Laws, are reserved for cases of "extraordinary and urgent need"[12] and therefore can be enacted without prior consultations, but also are subject to certain conditions and controls.

90. Royal Decrees ("**RD**") are subordinate to Laws and RDLs, and are intended to implement, specify or supplement the same, but can only regulate within the framework established by those hierarchically superior norms.

91. There are also a number of lower-ranking measures, such as ministerial orders and resolutions, which – with one exception, involving a June 2014 order discussed below[13] – do not feature prominently in the present dispute.

92. Further to the internal legislative framework as described above, Spain is also a member of the European Union (the "**EU**"), which means that, among other things, EU regulations and directives are binding on Spain.

(2) Relevant Spanish Regulatory Framework Prior to RD 661/2007

93. Spain's energy policy is shaped by the State's membership in the EU, the policy of which in turn is based on the targets established in the 1997 Kyoto Protocol. Around the time of the Kyoto Protocol, Spain enacted Law 54/1997 (the "**1997 Electricity Law**"),[14] which was subsequently implemented through a number of Royal Decrees.

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[11] C-41/R-7, Spanish Constitution of 1978 (published on 29 December 1978) ("**1978 Constitution**"). The Tribunal notes that when they exist, the Tribunal relies on the English translations of exhibits provided by the Parties. In instances where the Parties have introduced the same factual exhibit twice and the translations provided are different, the Tribunal indicates on which translation it relies. When referring to the Parties' submissions, the Tribunal indicates the version of the exhibit on which each Party relied.

[12] C-41/R-7, 1978 Constitution, Article 86(1).

[13] *See* Section III.F(5) below.

[14] C-10/R-27, Law 54/1997 of 27 November 1997, on the electric power sector (published on 28 November 1997) (version as of 27 January 2008). The Tribunal notes that C-10 (English) and R-27 (English) provide the same translation of the 1997 Electricity Law as in force in January 2008, and C-10 (Spanish) similarly corresponds to the 1997 Electricity Law as in force on 27 January 2008. However, R-27 (Spanish) contains the Electricity Law as in force on 27 December 2013. The citations to C-10 and R-27 in this Award must be understood as referring to the version of 27 January 2008 in C-10 (English), R-27 (English) and C-10 (Spanish).

94. The 1997 Electricity Law itself built on certain principles that had been established in preceding legislation, Law 40/1994 (the "**1994 Electricity Law**").[15] Among other things, the 1994 Electricity Law had recognized as a core principle that the national electricity system would be self-financed and self-sustaining, in the sense that the generation, transmission and distribution of electricity would be "remunerated economically," but that the costs of doing so would be "charged to tariffs paid by users,"[16] without support from external sources of funding. In order to determine user tariffs for these various activities, the 1994 Electricity Law had provided for the Government to establish remuneration parameters based on "objective and non-discriminatory criteria which motivate improvement" in efficiency, and with "[t]he costs granted to the different activities … calculated in a standard manner based on transparent and objective formulas and parameters."[17] The 1994 Electricity Law also built on a concept that had been established shortly before in Royal Decree 2366/1994 of 9 December 1994 ("**RD 2366/1994**"),[18] namely that energy generation could be divided into two different categories, governed by separate regimes: the "**Ordinary Regime**" for conventional energy sources, and the "**Special Regime**" for renewable energy sources that the Government wished to promote.[19] The 1994 Electricity Law enshrined into law the distinction between these two regimes.[20] RD 2366/1994 had also created a general registry for production facilities participating in the Special Regime "[f]or the adequate monitoring of energy planning" ("*Registro General de Instalaciones de Producción de Régimen Especial*").[21]

95. The 1997 Electricity Law maintained these essential principles. The Preamble of the Law stated that its "basic purpose" was to regulate the electricity sector with "the traditional, three-fold goal of guaranteeing the supply of electric power, its quality and the provision of such supply at the lowest possible cost."[22] Article 1 emphasized that the Law was intended to ensure that the supply of electric power was "rationalised, made more efficient and optimised, while heeding the

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[15] R-18, Law 40/1994 of 30 December 1994, on planning of the National Electricity System (published on 31 December 1994).

[16] R-18, 1994 Electricity Law, Article 15(1), (2); *see also*, Article 16(7) (providing that the "remuneration of those who engage in each type of activity … shall be charged to income from collection of tariffs").

[17] R-18, 1994 Electricity Law, Article 16(1)(a).

[18] R-35, Royal Decree 2366/1994 of 9 December 1994, on the production of electrical energy by hydraulic and cogeneration facilities, and other facilities supplied by resources or sources of renewable energy (published on 31 December 1994).

[19] Article 2 of RD 2366/1994 defined the facilities qualified to join the Special Regime, and Article 4 required owners of such facilities to register their facilities in advance. R-35, RD 2366/1994, Articles 2 and 4.

[20] *See, e.g.,* R-18, 1994 Electricity Law, Articles 16(3) and 16(7) (referring to "special regime producers").

[21] R-35, RD 2366/1994, Article 6(1).

[22] C-10/R-27, 1997 Electricity Law, Preamble.

principles of … implementation at the lowest possible cost."[23] The emphasis on improving efficiency of supply and minimizing the costs of remuneration was again premised on the principle of self-sufficiency, namely that the remuneration of supply activities would "determine the rates and prices that consumers must pay."[24] Specifically, Article 15 of the 1997 Electricity Law provides as follows:

> Article 15. Remuneration of activities.
>
> 1. The activities involved in the supply of electric power shall be remunerated economically in the manner provided by this Act, as charged to the rates and prices paid.
>
> 2. To determine the rates and prices that consumers must pay, the remuneration of activities shall be stipulated in regulations with objective, transparent and non-discriminatory criteria that act as an incentive to improve the effectiveness of management, the economic and technical efficiency of said activities and the quality of the electricity supply.[25]

96. The 1997 Electricity Law continued to recognize two different categories of energy generation: an Ordinary Regime for conventional energy sources and the Special Regime for renewable energy sources. Generators under the Special Regime were entitled to "priority access" to the transmission and distribution networks for the electricity they generated.[26] Another key distinction was the method of remuneration for generators. Ordinary Regime generators received the market price for generated electricity, whereas Special Regime generators received a tariff that was supplemented by a "premium that will be determined by the Government."[27] Essentially, this premium operated as a State subsidy for renewable energy, on the basis that renewable energy was not yet economically competitive (at market rates) with non-renewable energy sources.

97. The specific terms of the premium for Special Regime generators were not provided by the 1997 Electricity Law, but rather were to be provided "under statutory terms set out in regulations" that

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[23] C-10/R-27, 1997 Electricity Law, Article 1.

[24] C-10/R-27, 1997 Electricity Law, Article 15. The economic self-sufficiency of the Spanish electricity system was also expressly confirmed in a provision of the 1997 Electricity Law which addressed the calculation of "last resort tariffs," stating that these would be "calculated in such a way that they respect the sufficiency of income principle." C-10/R-27, 1997 Electricity Law, Article 18.

[25] C-10/R-27, 1997 Electricity Law, Article 15.

[26] C-10/R-27, 1997 Electricity Law, Article 30.2(b).

[27] C-10/R-27, 1997 Electricity Law, Article 16.7.

would follow.[28] Consistent with the structure of the Spanish legislative framework, such subsequent regulations would be subordinate to the terms of the 1997 Electricity Law, which was the reference norm under which they were issued. Nonetheless, Article 30.4 of the 1997 Electricity Law provided this overarching guidance:

> To work out the premiums, the voltage level on delivery of the power to the network, the effective contribution to environmental improvement, to primary energy saving and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred shall all be taken into account so as to achieve reasonable profitability rates with reference to the cost of money on capital markets.[29]

98. The 1997 Electricity Law provided that the "remunerative arrangements that apply" to each Special Regime generator would be specified in a new registry,[30] the Administrative Register of Electricity Generation Installations ("*Registro Administrativo de Instalaciones de Producción de Energía Eléctrica*") ("**RAIPEE**"), that was created in the Ministry of Industry and Energy (the "**Ministry**")[31] to list *all* authorized electricity generation installations – including those subject to the Ordinary Regime – together with their conditions and capacity.[32]

99. In 1998, the Spanish National Energy Commission (the "**CNE**") was established as the regulatory agency in charge of energy policy, a competence which in 2013 was transferred to the Spanish National Commission on Markets and Competition (the "**CNMC**"). The CNE did not, however, have the authority to set tariff levels; that authority continued to repose in the Government.

100. Royal Decree 2818/1998 ("**RD 2818/1998**")[33] was the first regulatory development of the Special Regime framework established by the 1997 Electricity Law. Its stated objective was "[t]o develop regulatory measures related to the special regime," including registration procedures related to the register created by the 1997 Electricity Law and "the applicable economic scheme" for installations participating in the regime.[34] For this purpose, RD 2818/1998 created the Administrative Register of Generation Installations under the Special Regime ("*Registro Administrativo de Instalaciones*

[28] C-10/R-27, 1997 Electricity Law, Article 30.4.

[29] C-10/R-27, 1997 Electricity Law, Article 30.4.

[30] C-10/R-27, 1997 Electricity Law, Article 31.

[31] The name of this Ministry has changed several times between the 1997 Electricity Law and the time of this Award, but regardless of the name at the relevant time, it is referred to herein as the "**Ministry**."

[32] C-10/R-27, 1997 Electricity Law, Article 21.4.

[33] C-1/R-46, Royal Decree 2818/1998 of 23 December 1998, on electricity production installations supplied by renewable energy, waste or cogeneration (published on 30 December 1998).

[34] C-1/R-46, RD 2818/1998, Article 1(a) (quoting from the English translation of C-1, p. 1).

de Producción en Régimen Especial") ("**RAIPRE**") as a sub-section of the registry referred to in the 1997 Electricity Law, RAIPEE, for production facilities participating in the Special Regime.[35] The Decree referred to a 2010 target, established pursuant to the 1997 Electricity Law, of achieving at least 12% of the nation's total energy needs through renewable energy by 2010, and explained that to meet this goal, "a temporary incentive system shall be implemented for installations where such is necessary in order to assume a competitive position in a free market context." For plants based on renewable energy, however, "the established incentive shall not be time-limited due to the need to internalise their environmental benefits, and the fact that elevated running costs derived from such plants' characteristics and level of technology do not allow for competition in a free market."[36]

101. RD 2818/1998 categorized renewable energy plants by their relevant technology (solar, wind, geothermal, hydroelectric, biomass, etc.), and provided that qualifying installations could choose between receiving a specified premium on top of the market price or a fixed regulated tariff for each kWh of electricity sold. The premiums for certain industries (hydroelectric and wind) were to be updated annually according to the variation of the average price of electricity; otherwise, future reviews of premiums were forecasted to take place every four years, taking into account the evolution of electricity prices in the market and the participation of renewal installations in meeting demand. For solar energy, the premium was higher than for other technologies, but no distinction was made among solar facilities based on their individual characteristics; all would receive the same tariff per kWh of electricity produced.[37]

102. On 19 December 1999, the Government adopted the 2000-2010 Plan for the Promotion of Renewable Energies in Spain ("**PFER 2000-2010**"),[38] as part of the further execution of the 1997 Electricity Law. This was the first of several successive "Renewable Energy Plans" which sought to forecast the revenues and accommodate the costs of the SES, taking into account certain proposed targets for the percentage of the nation's total energy needs that would be met by renewable energy sources. The PFER 2000-2010 noted that the remuneration to be offered to generators was developed "[t]aking as a baseline the proposed energy targets" (*i.e.*, the achievement of 12% renewable sources by 2010). It also noted that "the financing requirements have been determined for each technology according to its profitability, defining a range of standard projects

[35] C-1/R-46, RD 2818/1998, Article 9(1).

[36] C-1/R-46, RD 2818/1998, Preamble (quoting from the English translation of C-1, p. 1).

[37] C-1/R-46, RD 2818/1998, Articles 2, 28, 32.

[38] C-46/R-62, 2000-2010 Plan for the Promotion of Renewable Energies in Spain, 19 December 1999.

for the calculation model."[39] The reference to "standard projects" confirmed that the plan was not based on an assessment of the actual capital and operating expenses of each electricity plant in the country, but rather on certain assumptions about the reasonable costs of different *types* of facilities, operating on the assumption of reasonable efficiency:

> These standard projects have been characterised by technical parameters relating to their size, equivalent operating hours, unit costs, periods of implementation, lifespan, operating and maintenance costs and sale prices per final unit of energy.[40]

103. The PFER 2000-2010 also articulated more detail about the objective established in the 1997 Electricity Law of assuring a "reasonable return" for efficiently operated renewable installations, taking into account the available revenues within the SES:

> The analysis conducted aims to balance the application of all available resources, obtaining a level of profitability for investments that would make it an attractive option compared to investing in a sector with similar profitability, risk and liquidity.[41]

In particular, the calculations of profitability for each standard project were "calculated on the basis of maintaining an Internal Rate of Return (IRR), measured in current pesetas and for each standard project, at a minimum of 7%, with own capital, before financing and after tax."[42]

104. The Spanish subsidy regime for renewable energy may be seen against the backdrop of the EU's own policy of establishing targets for increases in renewable energy, consistent with the targets agreed in the Kyoto Protocol. In 2001, the EU Directive 2001/77/EC (the "**2001 Renewables Directive**")[43] recognized the need for EU Member States to grant public aid in favor of renewable energy sources in order to promote their development. At the same time, the 2001 Renewables Directive established that public subsidies for renewable energy sources would be set by Member

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[39] C-46/R-62, PFER 2000-2010, p. 180 (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84).

[40] C-46/R-62, PFER 2000-2010, pp. 180-181 (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84).

[41] C-46/R-62, PFER 2000-2010, p. 181 (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84).

[42] C-46/R-62, PFER 2000-2010, pp. 181-182 (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84).

[43] C-11/RL-25, Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001, on the promotion of electricity produced from renewable energy sources in the internal electricity market, Official Journal of the European Communities Series L 283 (entered into force on 27 October 2001).

States within the framework of EU State aid policy.[44] The relevance of State aid issues to this dispute is explored later in this Award.

105. On 27 December 2002, the Government issued Royal Decree 1432/2002 ("**RD 1432/2002**"), to set out the methodology for the approval or modification of the annual "average benchmark or reference tariff" (the "**TMR**") as had been provided for in Article 17 of the 1997 Electricity Law.[45] The TMR, which determined the sale price of electricity to consumers, would be based on "a relation between the costs forecast as necessary to remunerate" supply activities and the "forecast … of demand from final consumers" for the same period.[46] The forecast of costs was to take into account, *inter alia*, the costs of subsidizing production in the Special Regime.[47]

106. On 12 March 2004, the Government issued Royal Decree 436/2004 ("**RD 436/2004**"),[48] which repealed RD 2818/1998. RD 436/2004 was introduced "to unify the legislation developing and implementing the 1997 Electricity [Law] with respect to electricity production under the special regime," with the understanding that this would "continue down the path first taken by Royal Decree 2818/1998," but also "take advantage of the stability bestowed on the whole system at large by Royal Decree 1432/2002," to provide those opting for the Special Regime "with a durable, objective and transparent framework."[49]

107. RD 436/2004 established a so-called feed-in tariff ("**FIT**") for renewable energy investors. There were two types of FITs, corresponding to the two basic options that RD 2818/1998 had first introduced: (i) selling electricity directly on the daily market, in exchange for the market price plus a premium (the "**Premium**"), or (ii) selling electricity to the distribution system, in exchange for a fixed regulated tariff set above market levels ("**Regulated Tariff**"). In the words of the RD 436/2004 Preamble:

> One option is to sell his [the plant operator's] electricity output or surplus energy to the distributor in return for remuneration in the form of a regulated tariff which is a single, flat rate for all the scheduling periods.

[44] C-11/RL-25, 2001 Renewables Directive, Recital 12.

[45] R-47, Royal Decree 1432/2002 of 27 December 2002, establishing the methodology for approval or modification of the average or reference electricity tariff (published on 31 December 2002), Preamble.

[46] R-47, RD 1432/2002, Article 2.

[47] R-47, RD 1432/2002, Article 4(2)(b).

[48] C-2/R-48, Royal Decree 436/2004 of 12 March 2004, establishing the methodology for the updating and systematization of the legal and economic regime for electric power production in the special regime (published on 27 March 2004).

[49] C-2/R-48, RD 436/2004, Preamble.

> That amount is defined as a percentage of the average or reference electricity tariff regulated in Royal Decree 1432/2002, dated December 27th, and that, therefore, is based indirectly on the price in the production market. The alternative option for the operator is to sell that output or surplus power directly in the day-ahead market, in the forward market or through a bilateral contract. In this case, however, the operator would receive the market trading price plus an incentive to participate in it and a premium if the specific plant is entitled to receive one.
>
> This incentive and this supplementary premium are also defined generically as a percentage of the average or reference electricity tariff although subsequently they are specified on a case-by-case basis taking into account the criteria mentioned in article 30.4 of the 1997 Electricity Act.
>
> Whichever remuneration mechanism is chosen, the Royal Decree guarantees operators of special regime installations fair remuneration for their investments and an equally fair allocation to electricity consumers of the costs that can be attributed to the electricity system....[50]

108. In order to implement the tariff regime, Article 40.4 of RD 436/2004 empowered the CNE to establish "the definition of standard or typical technologies and installations or plants," and to "compile information on investments, costs, income and other parameters of the different actual plants making up standard or typical technologies."[51] The definition of standard technologies and installations was critical to the setting of tariffs, but it was understood that the performance of any actual installation might fare worse or better than the standard, based on its own particularities, including efficiencies or inefficiencies. As the Government explained in its *Memoria Económica* for RD 436/2004 (an official but internal document assessing the economic rationale for a decree), "any plant in Spain in the special regime, provided it is equal to or better than the standard (the standardised plant) for its group, will obtain reasonable return."[52]

109. At the same time, the information the CNE would compile about the performance of actual plants would help inform regular "[r]evision[s] of tariffs, premiums, incentives and supplements for new plants." In particular, a revision was scheduled to be made during 2006 and every four years thereafter.[53] However, Article 40.3 provided that the "tariffs, premiums, incentives and supplements resulting from any of the revisions provided for in this section" – *i.e.*, the regularly

[50] C-2/R-48, RD 436/2004, Preamble.

[51] C-2/R-48, RD 436/2004, Article 40.4.

[52] R-32, *Memoria Económica* for RD 436/2004, p. 4.

[53] C-2/R-48, RD 436/2004, Article 40 (title) and Article 40.1.

scheduled revisions foreseen by RD 436/2004 – "shall apply solely to the plants that commence operating subsequent to the date of the entry into force" of such revisions, namely, "January 1st of the second year subsequent to the year that the revision has been carried out," and not to existing installations. Moreover, the scheduled revisions "shall not have a backdated effect on any previous tariffs and premiums."[54]

110. As discussed in Section III.B below, certain renewable energy producers challenged RD 436/2004 on the basis that it allegedly had improperly modified the remuneration scheme previously set out in RD 2818/98. There was also debate about the effectiveness of RD 426/2004 in achieving its stated goals. The Claimants say that it "was … not as successful in attracting [renewable energy] investment as Spain had hoped."[55] The Respondent, by contrast, emphasizes other problems, including that RD 436/2004 generated "windfall profits" for certain investors in a way that was not sustainable.[56] The Respondent explains that a sustainability risk was created by RD 436/2004's link between the TMR (used to calculate consumer prices) and the subsidies for renewable energy: the "TMR [was] calculated based on the costs of the SES, including subsidies to the Renewables," so a "[l]oop arose in the mechanism for setting premiums: premium was a percentage of the TMR which, in turn, was calculated taking into account the increase in the amount of the premiums."[57]

111. In 2005, Spain approved its Renewable Energy Plan 2005-2010 ("**PER 2005-2010**"),[58] revising the PFER 2000-2010 in light of recent experience and updated indicative targets. The publicly issued summary of the PER 2005-2010 noted that while the existing system of premiums and investment subsidies had effectively promoted the growth of certain technologies (such as wind power), other areas had not grown at anticipated rates, and "it is necessary to provide further incentives if possible in particular technology areas in order to make them more attractive to future investors."[59] The

[54] C-2/R-48, RD 436/2004, Article 40.3 and Article 40.2. The English translations submitted in these proceedings for both C-2 and R-48 are identical and use the phrase "backdated effect" in Article 40.3, although certain of the Parties' submissions use the phrase "retroactivity" (*see, e.g.*, RD-1, Resp. Op. Statement, Slides 108-109).

[55] Cl. Mem., ¶ 12.

[56] RD-1, Resp. Op. Statement, Slide 93.

[57] RD-1, Resp. Op. Statement, Slide 95.

[58] C-48/R-63, Ministry of Industry, Tourism and Commerce & IDAE, Renewable Energy Plan in Spain for Term 2005-2010.

[59] C-3/BRR-69, Government of Spain, Ministry of Industry, Tourism and Commerce and IDAE, "Summary of the Spanish Renewable Energy Plan 2005-2010," August 2005, pp. 47-48 ("**Summary PER 2005-2010**").

summary then set out current and proposed premiums to be implemented through an anticipated further revision of RD 436/2004.[60]

112. In terms of methodology, the plan emphasized that in order "[t]o establish the funding needs of each technology" that formed part of the renewable energy plan, "the technical and economic parameters of each have been determined, leading to the formulation of the corresponding typical projects for each technology."[61] Proposed remuneration in turn would be based on these "typical projects," with an objective of allowing investors in each "to maintain an adequate return on investment" that would be "attractive compared to alternatives in an equivalent sector," while still aiming "to optimise the public resources available."[62] In particular, the PER 2005-2010 summary explained that in determining the profitability of typical projects, "[r]eturns were calculated based on an Internal Rate of Return (IRR) measured in current euros for each project type of close to 7%, financed with equity (before external finance) and after tax."[63] The summary also emphasized that although the premiums paid to renewable energy generators to help them achieve these levels of return were "obviously the outcome of a public decision within the competencies of national government, the cost of this measure falls on electricity consumers through the electricity tariff."[64]

113. On 23 June 2006, the Government approved Royal Decree Law 7/2006 ("**RDL 7/2006**"), described as "establishing urgent measures in the energy sector."[65] Among other things, RDL 7/2006 froze the consumer tariff for the purposes of determining the FIT for renewable energy installations, by providing that future variations of the TMR would not apply to the RD 436/2004 FIT. The reforms, which applied to existing facilities, were said to be urgently needed in view of the inefficiency of RD 436/2004 and the impending 2006 tariff review that otherwise was scheduled to occur under its terms.[66] At the same time, it was understood that a new remuneration regime was under development.

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[60] C-3/BRR-69, Summary PER 2005-2010, pp. 48-49.

[61] C-3/BRR-69, Summary PER 2005-2010, p. 55; *see also* C-48/R-63, PER 2005-2010, p. 273 (referring to the English translation of R-63).

[62] C-3/BRR-69, Summary PER 2005-2010, pp. 55-56; *see also* C-48/R-63, PER 2005-2010, p. 273 (referring to the English translation of R-63).

[63] C-3/BRR-69, Summary PER 2005-2010, p. 56 (emphasis omitted); *see also* C-48/R-63, PER 2005-2010, p. 274 (referring to the English translation of R-63).

[64] C-3/BRR-69, Summary PER 2005-2010, p. 58; *see also* C-48/R-63, PER 2005-2010, p. 276 (referring to the English translation of R-63).

[65] C-50/R-36, Royal Decree Law 7/2006 of 23 June 2006, establishing urgent measures in the energy sector (published on 24 June 2006).

[66] C-50/R-36, RDL 7/2006, p. 2 (referring to the English translation of C-50).

114. In December 2006, the *Asociación de Productores de Energías Renovables* (the Association of Renewable Energy Producers, or "**APPA**") expressed concerns about RDL 7/2006, and in particular with what APPA perceived to be "the elements of retroactivity and legal uncertainty." APPA protested that RDL 7/2006 "eliminates … the remuneration stability mechanisms" that RD 436/2004 was said to have provided, "without considering the guarantees or timeframes established." According to APPA, RDL 7/2006 "tears up the rules half way through play, introduces retroactivity and seriously destroys legitimate investor confidence" which had been based on the regime established by RD 436/2004.[67]

(3) RD 661/2007

115. The regime envisioned by RDL 7/2006 came with Royal Decree 661/2007 regulating the activity of electricity production under the Special Regime ("**RD 661/2007**"), which replaced RD 436/2004 on 25 May 2007.[68] Because RD 661/2007 lies at the center of the present dispute – invoked by the Claimants as the basis for the expectations on which they decided to invest – the Tribunal summarizes it here in some detail.

116. The Preamble to RD 661/2007 explains its basic objectives. These began with the recognition that the PER 2005-2010 had provided targets for the promotion of renewable energy in Spain, and the observation that although there had been noteworthy growth in the Special Regime as a whole, "the targets set for certain technologies are still far from being achieved."[69] Meanwhile, it had "become necessary" for several reasons to modify the economic and legal framework regulating the Special Regime. These included not only a need to incentivize further growth in certain technologies, but also "to modify the compensation system" that was previously established, delinking it from the TMR which had been used to date. It was also necessary to include changes in legislation derived from RDL 7/2006.[70] In consequence, RD 661/2007 "replaces and repeals" RD 436/2004 *in toto*, "while maintaining the basic structure of the regulations therein"; it further "develops the principles set forth" in the 1997 Electricity Law; and "guarantees the owners of special regime installations a

[67] R-161, Info APPA Journal No. 23, "RD-L 7/06 and review of RD 436/04. Storm in the renewables sector," August-December 2006.

[68] C-4/R-49, Royal Decree 661/2007 of 25 May 2007, regulating the activity of electricity production under the special regime (published on 26 May 2007).

[69] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 73).

[70] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 74).

reasonable return for their investments, and the consumers of electricity an assignment of the costs attributable to the electricity system which is also reasonable ...."[71]

117. To this effect, the Preamble explained, the new Decree maintained "a system which is analogous" to that provided in RD 436/2004, through which facility owners might opt to sell energy to the distributor at a Regulated Tariff, or alternatively (with an exception for photovoltaic facilities)[72] could opt to sell to the market for market prices plus a regulated Premium.[73] However, unlike in RD 436/2004, both options would now be subject to "upper and lower limits," with the stated goal of protecting generators when market prices were low but eliminating the premium when market prices were "sufficiently high to ensure that their costs [were] covered, eliminating irrationalities in the remuneration of technologies."[74] Like the prior regime, the RD 661/2007 regime again calculated tariffs on the basis of standard facilities, "classif[ied] ... into categories, groups and sub-groups,"[75] and it again envisioned a scheduled review of the compensation system, to be provided at the end of 2010.[76] The hope was that by 2010, at least 29.4% of the gross consumption of electricity should be derived from renewable energy sources.[77]

118. As with prior iterations of the Special Regime, facilities wishing to qualify for its benefits would need to be registered with the RAIPRE registry.[78] Under Article 17 of RD 661/2007, registered facilities "shall enjoy" certain specified "rights," including that they would have the right to transfer their net production to the distribution grid; to enjoy priority grid access; and to receive "the compensation provided in the economic regime set out by this Royal Decree," namely "the

[71] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 74).

[72] As the Respondent notes, the market plus premium option was eliminated for photovoltaic facilities, without any transition period. RD-1, Resp. Op. Statement, Slides 105, 136 (quoting R-29, Ministry "Report on Draft Royal Decree Regulating the Activity of Electricity Production under the Special Regime and Certain Installations using Similar Technologies under the Ordinary Regime," 21 March 2007 ("***Memoria Económica* for RD 661/2007**")); RD-6, Resp. Closing Statement, Slide 65. As discussed in Section III.B below, the elimination of this option for photovoltaic facilities became the grounds of a challenge to RD 661/2007 that was resolved by the Spanish Supreme Court in December of 2009.

[73] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 74).

[74] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 75). The Government's internal *Memoria Económica* for RD 661/2007 of 21 March 2007, prepared two months before the final Decree was issued, explained the purpose of these limits similarly: "a lower limit has been introduced that limits market risk and an upper limit that guarantees that the returns obtained in any case would be reasonable." C-155/R-29, *Memoria Económica* for RD 661/2007, Section 3 (quoting from the English translation of C-155, PDF p. 12).

[75] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 77).

[76] C-4/R-49, RD 661/2007, Preamble (referring to the English translation of C-4, p. 75).

[77] C-4/R-49, RD 661/2007, Preamble (referring to the English translation of C-4, p. 77).

[78] C-4/R-49, RD 661/2007, Article 9(1) (referring to the English translation of C-4, p. 88).

regulated Tariff, or if appropriate the premium," provided however that their final RAIPRE registration predated certain deadlines set out in Article 22.[79] Specifically, Article 22 provided that, as soon as "85% of the power target for any Group or Sub-Group" of facilities had been reached, Spain would set a window of at least 12 months (the "**Tariff Window**") during which new installations were required to register with the RAIPRE in order to lock in the right to enjoy the economic regime established by RD 661/2007. Investors that registered *after* the Tariff Window expired would be subject to less beneficial regime.[80] For the particular technology at issue in this case, known as "concentrated solar power" ("**CSP**"), the regulatory target was set at 500 megawatts,[81] meaning the Tariff Window would begin to close when 85% of that target was reached.

119. Article 24 of RD 661/2007 confirmed that producers could elect to choose each year between the Regulated Tariff and Premium options for compensation, with the price under both options specified in kilowatt/hours.[82] According to Article 25, the Regulated Tariff "shall be determined as a function of the Category, Group, or Sub-Group to which the facility belongs," and as well as the installed power.[83] The CNE again was authorized to define the relevant "technologies and standard facilities" to be used in setting tariff levels.[84] Article 36, which applied to various types of facilities, specified the applicable Regulated Tariff and Premium for each Sub-Group, along with an "upper limit" and a "lower limit" for the market-based Premium. The same tariff was provided for all CSP plants.[85] Article 36 did, however, distinguish between the tariff levels applicable for the "first 25 years" of operation, and the lower levels applicable "thereafter," but with no specified end date to

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[79] C-4/R-49, RD 661/2007, Article 17 (quoting from the English translation of C-4, p. 95).

[80] C-4/R-49, RD 661/2007, Article 22 (quoting from the English translation of C-4, p. 99). Article 22(2) states that "[s]uch facilities as have been given final registration ... subsequent to the deadline for that technology shall if they have elected option a) under Article 24.1, receive compensation for the energy sold equivalent to the final hourly price on the production market, and if they have elected option b), the price for the sale of the electricity shall be the price arising in the organised market or the price freely negotiated by the proprietor or the representative of the facility supplemented by the applicable market supplements if any." *Id.*, Article 22(2) (quoting from the English translation of C-4, p. 99).

[81] C-4/R-49, RD 661/2007, Article 37 (referring to the English translation of C-4, pp. 114-115).

[82] C-4/R-49, RD 661/2007, Article 24 (referring to the English translation of C-4, pp. 101-102).

[83] C-4/R-49, RD 661/2007, Article 25 (quoting from the English translation of C-4, p. 102).

[84] C-4/R-49, RD 661/2007, Article 44.4 (quoting from the English translation of C-4, p. 118).

[85] C-4/R-49, RD 661/2007, Article 36 (quoting from the English translation of C-4, pp. 113-114). CSP plants were considered to be part of Group b.1, and classified as Subgroup b.1.2 for purposes of the listed tariffs and premiums. *See also* Tr. Day 6, 47:8-11 (the Claimants "accept[ing] ... that there was, under RD 661, only one tariff for all CSP. So it was for investors to decide in which specific technology to invest" in return for the specified FIT for CSP facilities).

a plant's entitlement to the FITs.[86]

120. Finally, Article 44 of RD 661/2007 addressed the procedure for "Updating and review of tariffs, premiums, and supplements."[87] Article 44.1 provided for quarterly updates for inflation. Of more relevance to the present dispute is Article 44.3, which provided that in 2010 – when reports were available on the extent to which the PER 2005-2010 goals had been achieved, and new goals were established in the next Renewable Energy Plan for 2011-2020 – all of the tariffs, premiums and upper and lower thresholds set out in RD 661/2007 "will be reviewed." This scheduled review would take into account, *inter alia*, "the costs associated with each of these technologies, the degree of participation of the special regime in meeting demand and its impact on the technical and economic management of the system, guaranteeing reasonable returns with reference to the cost of money on capital markets." After 2010, a "new adjustment" would be carried out every four years.[88]

121. Article 44.3 provided, however, the following with respect to existing installations (in the translation provided by the Claimants):

> The adjustment to the regulated tariff and the lower and upper threshold referred to in this section will not affect the facilities for which the start-up document was issued before January 1 of the second year in which the adjustment was implemented.[89]

In the Respondent's alternative translation, the same sentence states as follows:

> The revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed.[90]

In either translation, the sentence has clear echoes of Article 40.3 of the prior RD 436/2004, which (as noted above) had provided that the scheduled "revisions provided for in this section" would "apply solely" to new plants and not to existing installations.[91] In RD 661/2007, as reflected above,

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[86] C-4/R-49, RD 661/2007, Article 36 (quoting from the English translation of C-4, pp. 113-114).

[87] C-4/R-49, RD 661/2007, Article 44 (title) (quoting from the English translation of C-4, p. 116).

[88] C-4/R-49, RD 661/2007, Article 44.3 (quoting from the English translation of C-4, pp. 117-118).

[89] C-4, RD 661/2007, Article 44.3, p. 118.

[90] R-49, RD 661/2007, Article 44.3, p. 118.

[91] C-2/R-48, RD 436/2004, Article 40.3 (providing that "[t]he tariffs, premiums, incentives and supplements resulting from any of the revisions provided for in this section shall apply solely to the plants that commence operating subsequent to the date of the entry into force referred to in the paragraph above [*i.e.*, "January 1st of the second year

the reference is to the adjustments or revisions that were "referred to in this section" or, alternatively translated, "indicated in this paragraph."

122. The Parties have debated why this last sentence was added to Article 44.3 of RD 661/2007; it does not appear in the first draft,[92] but was added in the second draft[93] and thereafter was retained in the final Decree. The Claimants contend that the sentence was added following the CNE's recommendation,[94] while the Respondent contends that the CNE's request was that RD 661/2007 not be applied at all to existing facilities.[95] The Respondent notes that despite this request, the final Decree *did* impact existing facilities, just as prior Royal Decrees (RD 2818/1998 and RD 436/2004) had done.[96] The Tribunal returns to this issue further below.

123. The Parties have also noted certain statements by the CNE and the Government during the drafting period for RD 661/2007, which addressed either the level of returns considered "reasonable" in the regulated electricity market, and/or the levels projected to result for "typical" plants under the new RD 661/2007 regime. The Respondent: (i) recalls that both the PFER 2000-2010 and the PER 2005-2010 had alluded to a targeted return for standard projects in the range of 7%, before financing and after tax;[97] (ii) cites CNE Report 3/2007, which was issued on 14 February 2007 to comment on the first draft of RD 661/2007 ("**CNE Report 3/2007**"),[98] and which noted that *actual* returns from 2004 through mid-2006, under the prior RD 436/2004 regime, were "generally higher than those proposed by the Ministry for the regulated tariffs (namely 7%)";[99] and (iii) cites the Ministry's internal *Memoria Económica* for RD 661/2007, dated 21 March 2007 (shortly after the second draft

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subsequent to the year that the revision has been carried out"] and shall not have a backdated effect on any previous tariffs and premiums.")

[92] C-158, First Draft of RD 661/2007 of the Ministry, 29 November 2006, Article 40.3.

[93] C-159, Second Draft of RD 661/2007 of the Ministry, 19 March 2007, Article 44.3 (provision translated in this exhibit as "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") (quoting from the English translation of C-159 submitted with the Cl. PHB on 3 November 2021).

[94] Cl. PHB, ¶ 29.

[95] Resp. PHB, ¶ 92; *see also* RD-6, Resp. Closing Statement, Slide 72.

[96] RD-1, Resp. Op. Statement, Slide 173; Resp. PHB, ¶¶ 91-92.

[97] RD-1, Resp. Op. Statement, Slide 104.

[98] C-53/R-235, CNE Report 3/2007 on the Proposed Royal Decree Regulating Electricity Generation in the Special Regime and Specific Technological Facilities Equivalent to the Ordinary Regime, 14 February 2007.

[99] RD-1, Resp. Op. Statement, Slide 105 (citing C-53, CNE Report 3/2007, p. 21).

of RD 661/2007), stating that the Regulated Tariff under its terms "has been calculated in order to ensure a return of between 7% and 8% depending on the technology."[100]

124. The Claimants in turn cite a different passage from the same Ministry's internal *Memoria Económica* for RD 661/2007,[101] which projected that for the solar thermoelectric sector in particular, "[t]he proposed value of the regulated tariff provides a rate of return (IRR in current Euros, with equity after taxes and at 25 years) of 8%."[102] The Claimants note that the same document referred to the alternative market Premium option as "proposed [to] ensure[] a project IRR of 9.5% for the typical 25-year case, with a minimum of 7.6% and a maximum of 11% in the band limits."[103]

125. In any event, the Government issued the final version of RD 661/2007 on 25 May 2007. On the same day, the Government issued an announcement, under the headline "[t]he Government prioritises profitability and stability in new Royal Decree on renewables and combined heat and power." The announcement stated, among other things, that "[t]he aim of this Royal Decree is to increase remuneration for facilities using newer technologies," with different profitability targets depending on technology; for the solar-thermoelectric sector, "profitability shall rise to 8% for facilities that choose to supply distributors and between 7% and 11% return for those participating in the wholesale market."[104] The announcement also stated as follows:

> Tariffs shall be reviewed every 4 years, taking into account compliance with the established targets. Such a revision shall allow for adjustments to be made to the tariff in virtue of new costs and the level of compliance with the targets. Future tariff revisions shall not be applied to existing

[100] RD-1, Resp. Op. Statement, Slide 105 (citing R-29, *Memoria Económica* for RD 661/2007, p. 13). The same statement appears in the Claimants' translation of this same document with slight modifications. *See* C-155, *Memoria Económica* for RD 661/2007, PDF p. 12 (stating that "[t]he regulated tariff has been calculated in order to guarantee a return of 7-8% depending on the technology").

[101] C-155/R-29, *Memoria Económica* for RD 661/2007. It appears undisputed that the Claimants did not see the *Memoria Económica* for RD 661/2007 prior to their investment. *See* Tr. Day 2, T. Andrist, 46:8-10; Tr. Day 6, 146:3-12; Tr. Day 6, 157:12-19.

[102] Cl. PHB, ¶ 205 (citing C-155, *Memoria Económica* for RD 661/2007, PDF p. 16).

[103] CD-1.1, Cl. Op. Statement, Part 3, Slide 65 (citing C-155, *Memoria Económica* for RD 661/2007, PDF p. 16). During Hearing Day 1, Cl. Op. Statement presentation was provided in four separate PDF files (parts), with independent page numberings. On the last day of the Hearing, the Claimants merged them in a single PDF file designated as CD-1.1, which does not have consecutive page numbering, and instead preserves the independent page numberings of the four original files. Thus, the references to "Part" and "Slide" numbers in the citations in this Award correspond to those of the four PDF files presented on Day 1.

[104] C-54, Ministry of Industry, Tourism and Commerce's announcement of Royal Decree 661/2007, 25 May 2007 ("**RD 661/2007 Ministry Announcement**"), p. 1.

> facilities. This guarantees legal certainty for the electricity producer and stability for the sector, thereby favouring development.[105]

(4) Further Developments Prior to EBL's Investment

126. The Claimants emphasize that following RD 661/2007, various presentations were made by organizations or individuals said to be affiliated with the Government, touting the expected benefits and stability of its regulatory regime. The Claimants concede that they did not see such presentations at the time, but say that the presentations nonetheless are relevant to the Government's contemporaneous intentions and understandings.[106] The Respondent disclaims the relevance of these presentations even in that respect, noting that the authors either were not speaking officially for the Government, or were not speaking to a foreign investor audience.[107] Given this debate, the Tribunal provides a brief overview of the presentations at issue, along with other developments in the Spanish regulatory regime between the issuance of RD 661/2007 and the specific measures that are challenged in this proceeding.

127. First, on 16 November 2007 a group called InvestInSpain, which the Claimants describe as a State-owned entity whose objective is to attract investment to Spain,[108] gave a presentation in Vienna entitled "Opportunities in Renewable Energy in Spain." This described Spain as "the most attractive country in the world for investment projects in renewable energies."[109] The presentation included references to the FIT levels offered by RD 661/2007, including for solar thermoelectric energy, and stated that over 60 solar thermoelectric projects already were being developed.[110] It identified the relevant legal framework as including the 1997 Electricity Law, the PER 2005-2010

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[105] C-54, RD 661/2007 Ministry Announcement, p. 1.

[106] *See, e.g.,* Cl. Reply, ¶ 212; Tr. Day 6, 36:19-37:4; Cl. PHB, ¶¶ 23(g), 41.

[107] *See, e.g.,* Resp. C-Mem., ¶ 729 (stating that presentations by InvestInSpain and the Institute for the Diversification and Saving of Energy ("**IDAE**") were not acts that bind the Kingdom of Spain); Resp. Rej., ¶¶ 825-826 (stating that the CNE "does not have among its functions and competences … promoting the Spanish regulatory framework" to potential investors or making presentations "to promote or explain the investment regime" to investors, and presentations attributed by the Claimants to the CNE in fact "belong to courses given by the CNE staff … in the university context or in actions with other international *regulatory authorities*") (emphasis in original); *see also* Tr. Day 6, 160:16-18, 161:15-18.

[108] Cl. Reply, ¶ 209.

[109] C-58, INTERES InvestInSpain, PowerPoint Presentation, "Opportunities in Renewable Energy in Spain," Vienna, Republic of Austria, 16 November 2007 ("**InvestInSpain Presentation, 16 November 2007**"), PDF p. 4.

[110] C-58, InvestInSpain Presentation, 16 November 2007, PDF pp. 16-17.

and RD 661/2007, and described RD 661/2007 as having a "[p]remium system guaranteed" but "[n]o retro-active benefits for past investments."[111]

128. On 29 July 2008, the CNE published CNE Report number 30/2008 ("**CNE Report 30/2008**"), to address a proposed new decree that would regulate tariffs for photovoltaic plants registered *after* the Tariff Window under RD 661/2007 already had closed.[112] Although this arbitration does not involve any photovoltaic plants, the Claimants contend that CNE Report 30/2008 outlined "Spain's contemporaneous understanding of RD 661/2007."[113] The Claimants draw attention in particular to the following passage of the Report:

> 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.[114]

129. The Respondent draws attention to a different passage of CNE Report 30/2008,[115] stating as follows:

> Certainly, the principles of legal certainty and the protection of legitimate expectations (Article 9.3 EC) do not constitute insurmountable obstacles to the innovation of the legal system and cannot therefore be used as instruments to petrify the legal framework in force at any given time. In this sense, these principles do not prevent the dynamic innovation of the

[111] C-58, InvestInSpain Presentation, 16 November 2007, PDF pp. 30, 32.

[112] C-59/R-246, CNE Report 30/2008 on the Royal Decree Proposal Regulating the Economic Incentives for PV Installations Not Subject to the Economic Regime Defined by Royal Decree 661/2007, 29 July 2008.

[113] CD-1.1, Cl. Op. Statement, Part 2, Slide 17.

[114] C-59/R-246, CNE Report 30/2008 (quoting from the English translation of C-59, p. 21).

[115] RD-1, Resp. Op. Statement, Slide 113; RD-6, Resp. Closing Statement, Slide 72.

> regulatory frameworks, nor of new normative provisions which can be applied pro-future to situations initiated before it comes into force.[116]

130. On 26 September 2008, Spain issued Royal Decree 1578/2008 ("**RD 1578/2008**"),[117] the final version of the decree regarding solar photovoltaic plants that had been the subject of the CNE's earlier comments in CNE Report 30/2008. The Preamble to RD 1578/2008 observed that "[t]he growth of installed capacity experienced by photovoltaic solar technology has been much greater than expected," which justified not only revising the relevant annual capacity goals but also adapting "the support framework for this technology." RD 1578/2008 explained as follows:

> Just as insufficient compensation would make the investments nonviable, excessive compensation could have significant repercussions on the costs of the electric power system and create disincentives for investing in research and development, thereby reducing the excellent medium-term and long-term perspectives for this technology. Therefore, it is felt that it is necessary to rationalize compensation and, therefore, the royal decree that is approved should modify the economic regime downward, following the expected evolution of the technology, with a long-term perspective.[118]

131. On 29 October 2008, Mr. Fernando Marti Scharfhausen, the Vice President of the CNE, gave a presentation about the framework for the renewable energy sector in Spain (the "**First CNE Presentation**").[119] The Claimants note, *inter alia*, that this presentation: (i) distinguished FITs in Spain from those in France and Germany on the basis that they applied for the life span of a facility, rather than a set period of time;[120] (ii) stated that while RD 661/2007 incentives were a "policy tool (sufficient to guarantee reasonable return, … incentives that provide greater returns are justified)," and the regime promised "[r]egulatory stability: [p]redictability and certainty of economic

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[116] C-59/R-246, CNE Report 30/2008 (quoting from the English translation of R-246, p. 9). The Claimants point out that the same passage continues as follows: "But these principles do require that regulatory innovation – especially if it is abrupt, unforeseeable or unexpected – is carried out with certain guarantees and cautions (transitional periods to adapt to the new regimes, where appropriate compensatory measures, etc.) that dampen, moderate and minimize, as far as possible, the disappointing of any expectations generated by the previous regulations." Cl. PHB, ¶¶ 30-31, citing R-246, CNE Report 30/2008, p. 9.

[117] R-50, Royal Decree 1578/2008 of 26 September 2008, on remuneration for the production of electric energy using solar photovoltaic technology for facilities after the deadline for maintaining the remuneration of Royal Decree 661/2007 of 25 May 2007, for such technology (published on 27 September 2008).

[118] R-50, RD 1578/2008, PDF p. 1.

[119] C-62, CNE Presentation on the Legal and Regulatory Framework for the Renewable Energy Sector, 29 October 2008.

[120] CD-1.1, Cl. Op. Statement, Part 2, Slide 22 (reproducing C-62, First CNE Presentation, p. 11 (PDF p. 5 of the English translation)).

incentives for the duration of the facility's life span";[121] and (iii) provided that revisions to take place every four years would have "[n]o retroactivity in respect of existing facilities."[122] As noted above, the Claimants do not contend they saw this or subsequent CNE presentations at the time of their investment.[123] The Respondent emphasizes this point, and notes more generally that the CNE is a consultative body rather than a regulatory authority, and the CNE's presentations were not prepared for a foreign investor audience but rather were provided for academic purposes or interactions with other regulatory authorities.[124]

132. On 23 April 2009, Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (the "**2009 Renewables Directive**") replaced the 2001 Renewables Directive.[125] Among other things, the 2009 Renewables Directive established a requirement that each EU Member State compile a National Renewable Energy Action Plan.[126]

133. Although the precise timing and causes are disputed, the Parties agree that by 2008-2009, the Spanish renewable energy regime was experiencing a significant tariff deficit (the "**Tariff Deficit**"), the effects of which were exacerbated by the pressures being placed on consumers from the international financial crisis.[127] The challenges created by this Tariff Deficit ultimately led to a series of new regulatory measures, some of which are challenged in this arbitration.

134. One of Spain's early responses to the Tariff Deficit was the urgent adoption of a new Royal Decree Law on 30 April 2009 ("**RDL 6/2009**").[128] The Preamble to RDL 6/2009 recalled the original market liberalization objectives of the 1997 Electricity Law, but stated that "the commercial

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[121] CD-1.1, Cl. Op. Statement, Part 2, Slide 23 (reproducing C-62, First CNE Presentation, p. 25 (PDF p. 6 of the English translation)) (emphasis in original). This statement was echoed in a second CNE presentation, given in Barcelona on 1 February 2009, which stated that RD 661/2007 provided "[p]redictability and security in economic incentives throughout the lifetime of the installation." C-73, CNE Presentation on Renewable Energy Regulation, 1 February 2009 (the "**Second CNE Presentation**"), Slide 21.

[122] CD-1.1, Cl. Op. Statement, Part 2, Slide 24 (reproducing C-62, First CNE Presentation, p. 27 (PDF p. 7 of the English translation)) (emphasis in original).

[123] Cl. PHB, ¶ 23(g).

[124] *See* Resp. C-Mem., ¶ 734; Resp. Rej., ¶¶ 825-826.

[125] C-12/RL-26, Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009, on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (entered into force on 25 June 2009).

[126] C-12/RL-26, 2009 Renewables Directive, Article 4(1).

[127] *See* Cl. Mem., ¶ 102; Resp. C-Mem., ¶ 381.

[128] C-13/R-37, Royal Decree Law 6/2009 of 30 April 2009, which adopted certain measures within the energy industry and approved the special rate (published on 7 May 2009).

activity has in fact been greatly conditioned by the tariff system," resulting in a "difference between the regulated tariffs and the energy prices" which now "threatened the primary objective that was sought in using market prices to achieve greater efficiency."[129] Specifically, RDL 6/2009 stated that:

> The growing tariff deficit, [*i.e.*,] the difference between revenue from the regulated tariffs … that consumers pay for their regulated supply … and the real costs associated with these tariffs, is causing serious problems which, in the current context of international financial crisis, is having a profound effect on the system and placing at risk not only financial situation of the companies that make up the Electricity Industry, but also the very sustainability of the system. This imbalance is unsustainable …[130]

135. In consequence, the Preamble explained, it had become necessary to adopt "various urgent measures … with a view to protecting the consumer and to guaranteeing the economic sustainability of the electricity system."[131] This included, among various other measures, the establishment of "mechanisms … with respect to the remunerative system of special regime facilities," due to the "growing impact" of such remuneration on the tariff deficit.[132] The objective of these new mechanisms was not only "to guarantee the necessary legal security of those who have made investments," but also to "lay[] down the bases for establishing new economic regimes that encourage compliance with the intended objectives: the achievement of certain power objectives from technology at a reasonable cost for the consumer and the technological evolution thereof, which makes possible a gradual reduction in their cost and consequently their concurrence with conventional technologies."[133]

136. In response to these concerns, RDL 6/2009 introduced a number of changes to control new capacity within the SES. One of these was to create a new "Remuneration Pre-assignment Registry" (the "**Pre-Assignment Registry**"), which allowed greater planning for the Special Regime by requiring that any new projects under development register in advance and then be "definitively registered" in the RAIPRE and enter into production within three years, in order to qualify for the RD 661/2007 economic scheme.[134] This mechanism was expected to enable "the rights and expectations of the

[129] C-13/R-37, RDL 6/2009, Preamble (quoting from the English translation of C-13, p. 1).
[130] C-13/R-37, RDL 6/2009, Preamble (quoting from the English translation of C-13, p. 1).
[131] C-13/R-37, RDL 6/2009, Preamble (quoting from the English translation of C-13, p. 2).
[132] C-13/R-37, RDL 6/2009, Preamble (quoting from the English translation of C-13, p. 3).
[133] C-13/R-37, RDL 6/2009, Preamble (quoting from the English translation of C-13, pp. 3-4).
[134] C-13/R-37, RDL 6/2009, Preamble and Article 4 (quoting from the English translation of C-13, pp. 4, 10, 12).

owners of the facilities [to be] respected, with the necessary caution being exercised and the necessary transitional regime for adaptation being envisaged."[135]

137. More drastically, RDL 6/2009 authorized the Government, as part of a "transitional" mechanism, to suspend the commissioning of plants already registered to come online if and when the power associated with those projects exceeded the established power targets for their "group and sub-group" as classified in RD 661/2007. If such suspensions were to prove necessary, then the Government was empowered to establish "annual restrictions" for the "entry-into-service of the registered facilities and the prioritisation thereof so as not to compromise the technical and economic sustainability of the system."[136] A new economic regime would be developed "once the remunerative regime currently in force is exhausted," in order to "encourage the entry-into-service" of such suspended facilities.[137]

138. At some point following the issuance of both RD 1578/2008 and RDL 6/2009, InvestInSpain and someone from the Ministry collaborated to produce another presentation, entitled "Legal Framework for Renewable Energies in Spain."[138] This presentation described RD 661/2007 as an "attempt[] to attain stability over time allowing the business community to set mid and long-term milestones and also achieve a sufficient and reasonable return," while also "seek[ing] to contribute in the achievement of the objectives" established in the PER 2005-2010.[139] The presentation also noted that under RD 661/2007's terms, installations which start operating before 1 January 2008 "may remain subject to the fixed tariff system throughout their useful life"; that tariff levels were scheduled for revision in 2010, "subject to the accomplishment of the objectives foreseen" in the PER 2005-2010 and "pursuant to the new objectives" to be included in the next PER 2011-2020; but that such tariff revisions "will not affect the installations which have already been commissioned," a "guaranty [which] provides legal certainty to the producer, ensuring the stability and development of the sector."[140] It described the anticipated returns for standard installations of each technology (wind, hydraulic, biomass and thermoelectric), stating with respect to

[135] C-13/R-37, RDL 6/2009, Preamble (quoting from the English translation of C-13, p. 4).

[136] C-13/R-37, RDL 6/2009, Fifth transitional provision, ¶ 1 (quoting from the English translation of C-13, p. 14).

[137] C-13/R-37, RDL 6/2009, Fifth transitional provision, ¶ 2 (quoting from the English translation of C-13, p. 14).

[138] C-64, Ministry and InvestInSpain, PowerPoint Presentation "Legal Framework for Renewable Energies in Spain," undated ("**Ministry and InvestInSpain Presentation**").

[139] C-64, Ministry and InvestInSpain Presentation, p. 3.

[140] C-64, Ministry and InvestInSpain Presentation, p. 4.

thermoelectric that "[t]heir return is increased to 8 per cent if the production is assigned to the distributors and between 7 and 11 per cent if they take part in the market."[141]

139. While the presentation described above did not address the possibility of future changes to the RD 661/2007 regime, it did allude more generally to the notion of successive Royal Decrees being used to adapt to changing circumstances. It explained that one of the reasons for RD 1578/2008 was that "[t]he growth of photovoltaic technology has been far greater than expected and adjustments are required."[142]

140. Around the same time, on 21 May 2009, APPA and Greenpeace published a "Draft Bill for the Promotion of Renewable Energies" (the "**APPA Draft Bill**").[143] In the APPA Draft Bill, the organizations criticized the existing remuneration scheme for renewable energy, and proposed instead that remuneration be calculated as a reasonable return tied to the return on 10-year Spanish Treasury bonds plus 300 basis points.[144] According to the Respondent, subsequent changes to the regime – the same changes of which the Claimants complain in this arbitration – are "equivalent" to what the APPA Draft Bill proposed in 2009,[145] prior to the Claimants' investment in Spain.

141. As discussed further below, it was at this stage of events – on 12 June 2009 – that EBL committed contractually to invest in the shares of Tubo Sol, including in the costs of Tubo Sol's developing the new concentrated solar power plant at issue in this case.[146] The actual share purchase agreement was dated 29 December 2009.[147] Before turning to the facts relevant to the Claimants' investment, the Tribunal summarizes below certain decisions of the Spanish Supreme Court, rendered before or around the time of the Claimants' investment, which assessed the legality of prior changes to the regulatory regime for electricity.

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[141] C-64, Ministry and InvestInSpain Presentation, p. 5.

[142] C-64, Ministry and InvestInSpain Presentation, p. 12.

[143] R-143, Press Release APPA-Greenpeace, on the Draft Bill of the Renewable Energy Development Act, 20 May 2009 ("**APPA-Greenpeace Press Release**"); R-158, 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 ("**APPA Draft Bill**").

[144] R-158, APPA Draft Bill, Article 23.4.

[145] Resp. C-Mem., ¶¶ 625, 1154.

[146] C-16, Investment Agreement between Tubo Sol Murcia, S.A., EBL, Tubo Sol, Novatec Solar España, S.A. and Novatec Biosol AG, 12 June 2009 ("**Investment Agreement**").

[147] C-18, Public Deed Notarizing the Share Purchase Agreement between Tubo Sol Murcia, S.A., EBL and Novatec Biosol AG, 29 December 2009 ("**SPA**").

B. SPANISH SUPREME COURT DECISIONS (2005-2009)

142. The Spanish regulatory framework for electricity, based primarily on the 1997 Electricity Law and the various subordinate instruments implementing it, has been the subject of extensive litigation in Spanish courts. The Tribunal here summarizes certain decisions of the Spanish Supreme Court, which pre-date the Claimants' investment, and which the Parties have argued are relevant to understanding the Spanish regulatory framework.

143. The first such decision was a judgment of 15 December 2005, concerning a challenge against RD 436/2004, which was brought by an association of small renewable energy producers ("**Judgment App. 73/2004**").[148] Among other things, the appellant maintained that the Government should have continued to update premiums and prices for Special Regime producers in accordance with the prior RD 2818/1998. The Supreme Court dismissed the appeal. It began by referring to a prior judgment of 5 July 2005, in which it had explained as follows, applying the hierarchy of norms under Spanish law:

> [T]he right to the annual updating of the premium for special regime facilities does not arise directly from the [1997 Electricity Law], as article 30 thereof, in leaving the determination thereof in the hands of the Government, attributes it a margin of freedom within the parameters established in this provision, in terms of the time of application thereof and even the subsequent modification thereof. There is therefore no imperative mandate of the legislator in terms of the frequency of updating, but rather simply an authorisation for the holder of the Executive Power to determine the right to the premium, an authorisation that is positively expressed through Royal Decree 2818/98. Given the regulatory range of this Royal Decree, *there is nothing to prevent another regulation of the same hierarchical level from modifying such.* … [RD 2818/1998 is] not … immune to subsequent alteration ….[149]

144. The Supreme Court found that the same reasons were "fully applicable" to the introduction of RD 436/2004 since, with respect to the updating of premiums from RD 2818/1998, there was not "the slightest impediment to prevent said obligation from being modified – or eliminated – by the challenged Royal Decree, a regulation of equal ranking."[150] More generally, it stated the following:

> There is no legal obstacle to the Government, in the exercise of its regulatory powers and the broad authority it has in such a heavily regulated field as that of electricity, modifying a specific remuneration system

[148] R-80, Judgment, Third Chamber of the Supreme Court, 15 December 2005 (App. 73/2004).

[149] R-80, Judgment App. 73/2004, pp. 9-10 (emphasis added).

[150] R-80, Judgment App. 73/2004, p. 10.

> providing it remains within the framework laid down by the [1997 Electricity Law]. And although it may be necessary to establish transitory measures for adaptation to the new system for already existing companies in virtue of the principle of legitimate expectation, in no way does said requirement go to the extreme of respecting the previous regime without the slightest change over a fairly prolonged period of time.
>
> On the contrary, the transitory systems tend to be characterised precisely by progressive adaptation to the new system, without it being possible, therefore, to automatically consider that the imposition of requirements belonging to the new regime violates the principle of legitimate expectation [under EU law].[151]

145. In the same decision, the Supreme Court also held that the regime did not violate the principle of non-retroactivity "as this is a requirement of the new system that is imposed for the future (not retroactively) as part of the transitory regime" and, "apart from the moderation imposed by the principle of legitimate expectation, no legal reason prevents the modification of a system in force and, in this case, it is simply the imposition of a means of approximation to the new regime with which all the facilities will eventually have to comply in full."[152]

146. Following Judgment App. 73/2004 (which as noted concerned a challenge against RD 436/2004), the Supreme Court dismissed a number of challenges against subsequent Royal Decrees that amended RD 436/2004. The first of these was a judgment of 25 October 2006, which concerned a challenge against Royal Decree 2351 of 23 December 2004 ("**RD 2351/2004**"), which the appellants argued had modified the system for calculating Special Regime premiums in a way that reduced the premiums below what they would have received under the original (unamended) RD 436/2004 ("**Judgment App. 12/2005**").[153] The Supreme Court rejected the challenge, finding that:

> [T]he owners of electric power production facilities under the special regime have no 'unmodifiable right' to the fact that the financial scheme that regulates the receipt of premiums will remain unaltered. Indeed, said scheme attempts to promote the use of renewable energies through an incentivising mechanism that, like all mechanisms of this kind, has no assurance that it will remain without being modified in the future.
>
> It is true that … the setting of the premiums is subject to certain regulatory guidelines, … but it is also true that the Council of Ministers can … introduce quantitative variations in the formulas … [for] the calculation of these premiums. If the modification has not deviated from the[] legal

[151] R-80, Judgment App. 73/2004, p. 11.

[152] R-80, Judgment App. 73/2004, p. 11.

[153] R-81, Judgment, Third Chamber of the Supreme Court, 25 October 2006 (App. 12/2005).

> guidelines … of article 30 of the [1997 Electricity Law], it would be difficult to consider this as contrary to law.[154]

147. The Supreme Court expressly rejected arguments framed under principles of "legal certainty" and "legitimate expectations" (the latter understood from an EU law perspective, not from the standpoint of international investment treaty jurisprudence). As to legal certainty, it stated that this "is not incompatible with regulatory changes from the perspective of the validity of these changes, the sole factor on which we must decide on in law." As to legitimate expectations, the Supreme Court stated that this was "increasingly and unduly given as an argument [against] regulatory changes that some economic agents claim are … detrimental to their interests," on the basis that they invested "trusting that the Administration would not change the legal conditions." It rejected this notion, stating that "[s]uch reasoning … cannot be shared" with respect to an "incentivising mechanism such as that of the premiums in question." The Court noted that Article 30 of the 1997 Electricity Law permits companies "to aspire to a relevant factor of the premiums being that of the incorporation of 'reasonable rates of return with regard to the cost of money in capital markets'," but stated that "[t]he remuneration scheme [of RD 436/2004] does not guarantee the intangibility of a particular level of profit or income … in relation to that which was obtained in previous years, or the indefinite permanence of the formulas used to set the premiums." Rather, "depending on very varied factors of economic policy," the Government could increase or decrease premiums and incentives when considered advisable, and "provided the variations are kept within the legal limits" of the 1997 Electricity Law, such changes neither "constitute grounds for invalidity nor … affect the legitimate confidence of the addressees."[155]

148. In closing, the Supreme Court summed up its ruling as follows:

> Companies that freely decide to set up in a market such as electricity generation under that special scheme, knowing beforehand that it largely depends on the establishment of financial incentives by the public administration, are or should be aware that such incentives can be modified by said authorities within legal guidelines. One of the 'regulatory risks' to which they are subject, which they will have to count on, is precisely that of the variation of the parameters of the premiums or incentives, which the [1997 Electricity Law] tempers (in the aforementioned sense) but does not exclude.[156]

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[154] R-81, Judgment App. 12/2005, p. 3.

[155] R-81, Judgment App. 12/2005, p. 3.

[156] R-81, Judgment App. 12/2005, p. 3.

149. On 20 March 2007, the Supreme Court rendered another judgment, this time in an appeal against Royal Decree 2392 of 30 December 2004 ("**RD 2392/2004**"), which similarly had amended RD 436/2004 ("**Judgment App. 11/2005**").[157] The appellants complained that the challenged Decree reduced their 2005 premium by 22.6% over the 2004 level, whereas had RD 436/2004 not been amended, the decrease would have been less than 1%.[158] The Court quoted its prior ruling in Judgment App. 12/2005 at length in dismissing the appeal.[159]

150. On 9 October 2007, the Supreme Court rendered yet another judgment concerning the electricity sector, this time dismissing an appeal against Royal Decree 1454 of 2 December 2005 ("**RD 1454/2005**"), another Decree amending RD 436/2004 ("**Judgment App. 13/2006**").[160] In it, the Court noted that it "has maintained, effectively, the same jurisprudence … that we now reiterate, that the subsidy, and in general all promotion activities, are recorded under discretionary powers of Public Administration," and that "[i]n effect, the rules leave discretionary powers to the Government for the termination of the right to the receipt of a premium. The circumstances that lead to the government's decision shall be those of an economic or environmental character and in appreciation of these circumstances the government shall act with full discretionary power."[161] The Supreme Court again quoted its ruling in Judgment App. 12/2005, and stated that "the principle of regulatory hierarchy does not make impossible that a rule of the same rank be modified or quashed by another, … and moreover nothing impedes the … regulatory authority to change previous dispositions of equal hierarchical levels to adapt these to the circumstances that political or economic circumstances demand at different times."[162]

151. These Supreme Court judgments were each rendered prior to EBL's June 2009 contractual agreement to invest in the shares of Tubo Sol. The Supreme Court issued two further judgments, with similar reasoning, between then and late December 2009, when EBL purchased the Tubo Sol shares. These judgments – "**Judgment App. 151/2007**" of 3 December 2009[163] and "**Judgment**

[157] R-82, Judgment, Third Chamber of the Supreme Court, 20 March 2007 (App. 11/2005).

[158] R-82, Judgment App. 11/2005, p. 2.

[159] R-82, Judgment App. 11/2005, pp. 2-3.

[160] R-83, Judgment, Third Chamber of the Supreme Court, 9 October 2007 (App. 13/2006).

[161] R-83, Judgment App. 13/2006, p. 4.

[162] R-83, Judgment App. 13/2006, p. 4.

[163] R-84, Judgment, Third Chamber of the Supreme Court, 3 December 2009 (App. 151/2007).

App. 152/2007" of 9 December 2009[164] – both dismissed appeals against RD 661/2007, which, to recall, had repealed and replaced RD 436/2004 *in toto*.

152. The applicants in Judgment App. 151/2007, the owners of a small photovoltaic facility, argued that RD 661/2007 had improperly removed the ability for such facilities to choose between regulated tariffs and a market plus premium option, a choice that RD 436/2004 had previously granted it, ostensibly for the remaining life of the installation. The applicant argued *inter alia* that by contravening an alleged "guarantee of non-retroactivity" in Article 40.3 of RD 436/2004, the Government had infringed principles of legal certainty and legitimate expectations under the Spanish Constitution. The Supreme Court rejected this argument, noting first that the 1997 Electricity Law did not prescribe the "setting-in-stone or freezing of the remuneration system" under the Special Regime, but rather granted the Government "a margin of assessment" to update the remuneration methodology, consistent with the "objective of guaranteeing a fair return throughout the service life of these facilities."[165] The Court also examined the text of Article 40.3 of RD 436/2004, which (as explained in Section III.A(2) above) provided that "tariffs, premiums, incentives and supplements resulting from" the regularly scheduled revisions foreseen by RD 436/2004 "shall apply solely" to new plants and not to existing installations.[166] It rejected the notion that this "include[d] any right to the freezing of the existing legal system." The Supreme Court concluded that photovoltaic facilities "do not have a right for the remuneration regime of the electricity sector to remain unaltered,"[167] and the EU law "principle of legitimate expectation does not guarantee the perpetuation of the existing situation, which can be modified within the framework of the discretionary power of public institutions and capacities to impose new regulations in appreciation of needs of general interest."[168] In reaching this conclusion, the Supreme Court relied *inter alia* on its prior Judgment App. 73/2004 of 15 December 2005.

153. Less than a week later, the Supreme Court issued Judgment App. 152/2007, rejecting another appeal against RD 661/2007. This appeal was by the owner of a high-efficiency cogeneration facility, who complained that RD 661/2007 had excluded from subsidies cogeneration facilities with an installed capacity of more than 100 MW, allegedly in frustration of expectations based on RD 436/2004's creation of a "stable legal framework" entitling such facilities to receive

[164] R-85, Judgment, Third Chamber of the Supreme Court, 9 December 2009 (App. 152/2007).

[165] R-84, Judgment App. 151/2007, p. 6.

[166] C-2/R-48, RD 436/2004, Article 40.3. *See*, ¶ 109 and n. 91 above.

[167] R-84, Judgment App. 151/2007, p. 6.

[168] R-84, Judgment App. 151/2007, p. 7.

subsidies.[169] The appellant also argued that removing premiums for these facilities was a "retroactive expropriation" of the rights recognized by RD 436/2004.[170] In response, the State Attorney noted certain facts specific to this facility, including that the investment had predated RD 436/2004 and that the plant was still projected to earn a 25-year return in excess of the 7% profitability target for cogeneration facilities.[171] The Supreme Court acknowledged these case-specific facts, but also referred to the broader principles recited in its prior jurisprudence:

> [The appellant] does not pay sufficient attention to the case law of this Chamber that has been specifically handed down regarding the principles of legitimate expectation and non-retroactivity applied to the successive systems of incentives for the generation of electricity. They refer to the considerations included in our judgement of 25 October 2006 and reiterated in the judgment of 20 March 2007, among others, regarding the legal situation of the owners of electrical energy production facilities under the special regime, for whom it is not possible to recognise a 'non-modifiable right' to keep the remuneration framework approved by the holder of the regulatory authority unaltered in the future, as long as the prescriptions of the [1997 Electricity Law] regarding the reasonable returns on the investments are respected.[172]

154. The Supreme Court took the occasion to expressly "repeat that the legal obligation, susceptible to various regulatory developments, is merely to maintain 'adequate remuneration', which in this case is not in any doubt."[173] It also quoted at length its Judgment App. 13/2006 of 9 October 2007, in response to the appellant's arguments about retroactivity, concluding as follows in that regard:

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

[169] R-85, Judgment App. 152/2007, p. 2.

[170] R-85, Judgment App. 152/2007, p. 3.

[171] R-85, Judgment App. 152/2007, p. 3.

[172] R-85, Judgment App. 152/2007, p. 5.

[173] R-85, Judgment App. 152/2007, p. 6.

> entitled to receive benefits to which they are entitled whilst the benefit remains applicable: there is no right for this to be maintained over time.[174]

C. EBL'S INITIAL INVESTMENT IN TUBO SOL

155. With this backdrop of events in Spain that preceded the investment at issue in this case, the Tribunal now turns to that investment itself, including the circumstances relevant to EBL's decision to invest in the shares of Tubo Sol.

(1) EBL's Purchase of 85% of Tubo Sol Shares

156. Tubo Sol owns and operates the PE2 CSP plant located in Calasparra, in the Spanish region of Murcia. The Plant uses so-called "linear Fresnel" technology, and consists of two separate turbine generator units of 15 MW each. According to the Claimants, the Plant is "one of the world's largest operational CSP linear fresnel installations."[175] The Plant is the only linear Fresnel plant in Spain, however – a novelty which features significantly in this dispute.[176] Other CSP plants in Spain employ more traditional parabolic trough technology.[177]

157. The development of the Plant began before EBL's investment in Tubo Sol's shares, by the German company Novatec Solar GmbH ("**Novatec**"). Novatec first began construction of a 20m^2 prototype plant, Puerto Errado 1 ("**PE1**"), in 2006. PE1 was intended to "trial the design and construction methodologies that would be used for" the planned PE2.[178] On 30 June 2006, Novatec's subsidiary Tubo Sol Murcia S.A. ("**TBSM**") registered PE2 as a plant to be developed as a Special Regime installation in Spain, under the procedures established pursuant to the then-applicable RD 436/2004.[179]

158. Meanwhile, in 2007, in Switzerland, EBL began looking for investment options to secure a long-term supply of electricity for its business, looking overseas in light of limits to growth from its current long-term suppliers in Switzerland.[180] While an experienced energy investor in Switzerland,

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[174] R-85, Judgment App. 152/2007, p. 7.

[175] Request for Arbitration, ¶ 51; Cl. Mem., ¶ 87.

[176] *See, e.g.,* Cl. Mem., ¶ 136(a).

[177] *See, e.g.,* First Brattle Regulatory Report, p. 15, n. 24.

[178] C-72, Fichtner Technical Due Diligence Report for Solar Thermal Power Plant Puerto Errado II, 19 January 2009, Section 3.4, PDF p. 38; B. Andrist Statement, ¶¶ 29-30.

[179] C-15, Resolution by the General Directorate of Industry, Energy and Mines, 30 June 2006.

[180] B. Andrist Statement, ¶¶ 18-20; C-67, EBL Circular VR 08/38, 26 November 2008, pp. 1-3.

this would be EBL's first investment abroad.[181] EBL was pursuing investment opportunities in collaboration with the separate Swiss company Industrielle Werke Basel ("**IWB**"), which supplies electricity, water, telecommunications services and natural gas to the Swiss city of Basel.[182]

159. On 16 May 2008, Novatec's subsidiary TBSM signed a 30-year land lease on property to house the planned PE2 facility. The lease permitted TBSM to terminate the lease before the expiration of its term, "if the legal conditions governing the electrical energy production facilities covered by the special regime, the operation, subsidy, premiums, rates, incentives and, in general, any other regulated aspect, are modified to decrease the profitability of the exploitation of the solar plant in relation to the parameters currently in force."[183] In 2008, TBSM incorporated Tubo Sol as a special purpose vehicle to further develop the Plant.[184]

160. In June 2008, the Spanish law firm Cuatrecasas prepared a report for Novatec entitled "Memorandum on the regulatory structure for the 'Special Regime' applicable to solar thermal energy facilities" (the "**Cuatrecasas Report**").[185] The Cuatrecasas Report analyzed the regulatory structure of the Special Regime, noting that this regime was first created by RD 2366/1994, and "[a]fterwards, three subsequent regulations have covered the Special Regime (abrogating, respectively, previous dispositions, although maintaining their validity for transitory period of time for those installations approved under such previous regulations)": RD 2818/1998, RD 436/2004, and RD 661/2007.[186] The Cuatrecasas Report described the Special Regime as it was "currently developed" in RD 661/2007, noting that this regulation had "superseded the previous special regime" regulated by the 1994 and 1998 provisions.[187] After describing the main provisions of RD 661/2007 – including the choice between a regulated tariff and a market premium tariff subject to a "cap & floor," the stated levels of these tariffs, and the plan for these tariffs to be "periodically reviewed" according to a specified timetable[188] – the Cuatrecasas Report concluded with a section

[181] B. Andrist Statement, ¶ 23; Tr. Day 2, B. Andrist, 57:6-8.

[182] B. Andrist Statement, ¶ 22.

[183] C-214, Puerto Errado 2's Land Lease Agreement in Favour of Tubo Sol, Murcia, S.A., 1 May 2008 ("**2008 Land Lease Agreement**"), Article 6 (quoting from the English translation in RD-1, Resp. Op. Statement, Slide 191).

[184] C-6, Extract from the Commercial Registry in respect of Tubo Sol PE2 S.L., 7 September 2018.

[185] C-168, Memorandum on the Regulatory Structure for the "Special Regime" Applicable to Solar Thermal Energy Facilities prepared by Cuatrecasas, June 2008.

[186] C-168, Cuatrecasas Report, p. 1.

[187] C-168, Cuatrecasas Report, pp. 1-2, 4.

[188] C-168, Cuatrecasas Report, pp. 3-11.

entitled "Other considerations regarding the future of the Special Regime." The section cautioned as follows:

> RD 661/07 abrogated previous legal framework for renewable energy that was approved by RD 436/2004. RD 436/2004 also substituted RD 2818/1998 and the latter, abrogated the regulation that created for the first time the Special Regime, the RD 2366/1994. There have been up to today's date four different legal frameworks governing the Special Regime of electricity production in Spain and *this past experience demonstrates that further changes of the current legal framework could occur in the future.*[189]

161. While Cuatrecasas was so advising Novatec, EBL and IWB continued their search for an appropriate overseas investment, supported by the investigations of the engineering consultancy Fichtner, which they retained to identify and evaluate options. On 11 August 2008, Fichtner submitted a preliminary report to EBL and IWB (the "**Fichtner Analysis**"), which suggested that they focus on "project options in the field of solar thermal energy in Spain and onshore wind in Italy."[190] Fichtner proposed a further scope of work to include "[p]roject assessments (due diligence)" centered on technical and economic issues, noting at the same time that its assessment would "not include any legal or tax-related advice."[191] One week later, Mr. Beat Andrist ("**Mr. B. Andrist**"), then-head of EBL's Power Business Unit,[192] recommended that EBL's Management Board approve further study of the "[t]wo focal project areas" that had emerged thus far.[193]

162. On 25 November 2008, Fichtner held a workshop with EBL and IWB, discussing "Phase II" of the investment project, which had concluded that the Novatec solar project in Spain was further along in "progress status" than the wind project in Italy that also had been investigated.[194] The report contained the "interim results" of the "Novatec Due Diligence," which was said to be "based on an extensive data room" in which "[c]omprehensive documents on technology and profitability [were]

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[189] C-168, Cuatrecasas Report, p. 14 (emphasis added).

[190] C-60, Report by Fichtner on Renewable Energy Investment Alternatives, 11 August 2008, pp. 2, 3.

[191] C-60, Fichtner Analysis, pp. 6-7.

[192] Mr. B. Andrist is the father of Mr. Tobias Andrist ("**Mr. T. Andrist**"), who was an IWB employee between 2006 and 2009, working among other things on IWB's renewable energy strategy. T. Andrist Statement, ¶ 9. Both Messrs. Andrist are witnesses in this Arbitration.

[193] C-61, Presentation by Beat Andrist and Denis Spät to EBL's Management Board on Renewable Energy Investment Alternatives, 18 August 2008.

[194] C-66, Fichtner Presentation on Possible Renewable Energy Projects, 25 November 2008 ("**Fichtner Presentation**"), p. 5.

available," but since certain "contractual and business-related information" was still pending and an on-site inspection had been postponed, an offer to Novatec should "be tabled only in January."[195] The presentation listed certain "contract risks and individual technology risks" associated with an investment, including that the Fresnel technology had "no operating experience as yet" and that Novatec lacked experience in project management.[196]

163. It appears undisputed that as part of the due diligence exercise referenced in this presentation, Novatec made various documents available to EBL's advisers, Fichtner and the Spanish law firm Bartolome & Briones ("**B&B**"). Among other documents provided for review was the Cuatrecasas Report, which the Claimants admit "was shared by Novatec with EBL in November 2008," and which EBL in turn "shared … with its external advisors, Fichtner and B&B …."[197] The Claimants emphasize, however, that Cuatrecasas was not their legal advisor; that they did not rely on the Cuatrecasas Report when deciding to invest in the Plant; and that their Spanish legal advisors, B&B, "raise[d] no such red flags."[198] However, as discussed below, it appears that B&B had been requested to advise its clients on only certain questions. The Claimants' witness, Mr. T. Andrist, confirmed that these did not include any request for a legal assessment about the possibility of further changes to the Spanish regulatory regime.[199]

164. In any event, the day after the Fichtner workshop in November 2008, EBL's management sent a written report to the EBL Supervisory Board, noting the possibility of purchasing shares in Novatec's PE2 project by the end of January 2009. The PE2 project was described as based on the "pioneering Fresnel" technology, which "requires 71% less material per thermal MWh and simpler construction compared to the parabolic trough solar fields operated since 1982."[200] The PE2 project was described as involving (according to its developers) a €155 million investment that was projected to have a Project IRR of roughly 9%.[201] In general, the project was described as a "splendid opportunity with market potential," if EBL wished to enter the thermosolar generation

[195] C-66, Fichtner Presentation, pp. 8, 14.

[196] C-66, Fichtner Presentation, pp. 35-36.

[197] Cl. Reply, ¶ 248; *see also* CD-6, Cl. Closing Statement, Part 2, Slide 59 ("the Claimants' experts reviewed the Cuatrecasas report").

[198] Cl. Reply, ¶¶ 243, 249.

[199] Tr. Day 2, T. Andrist, 27:2-14.

[200] C-67, EBL Circular VR 08/38, 26 November 2008, pp. 11-14.

[201] C-67, EBL Circular VR 08/38, 26 November 2008, p. 12.

market, but the report noted that "[t]he timeframe for involvement in PE II is very tight, requiring flexibility and speed of action on the part of IWB and EBL."[202]

165. The same day, the Supervisory Board met to discuss the proposed investment. Mr. B. Andrist described the PE2 project as "economically very viable, thanks to the Spanish power remuneration for solar energy," and suggested that "[i]f the Supervisory Board agrees to an investment by EBL in principle, the necessary enquiries on technical, legal and financial aspects will be made in the next few weeks." The discussion that followed touched on a number of issues, one of which is listed as the "[p]roblem of the location in Spain regarding legal certainty."[203] The Supervisory Board noted "the performance of due diligence for the Nova Tec [*sic*] project" and indicated that it was expecting "the decision criteria at the meeting on 14 January 2009 (technical enquiries, economic efficiency, legal) for the final decision."[204]

166. On 7 January 2009, B&B submitted to EBL and IWB a "Preliminary Legal Report" about certain issues of Spanish law (the "**First B&B Report**").[205] The First B&B Report was limited to answering specific questions that EBL and IWB had posed,[206] about three topics: (i) obligations and liabilities of shareholders in the event of Tubo Sol's insolvency;[207] (ii) the legal framework for transferring TBSM's permits and authorizations to Tubo Sol and for EBL to acquire 80% of Tubo Sol's shares;[208] and (iii) comments on a draft Share Purchase Agreement for the acquisition of Tubo Sol shares.[209]

167. Also in January 2009, Fichtner submitted a "Technical Due Diligence Report" for the Plant (the "**Fichtner Due Diligence Report**").[210] The Report reflected Novatec's "latest information" about "total project costs" of approximately €154.5 million. Fichtner advised that on a "per installed capacity" basis the projected PE2 CAPEX costs would be "about 12% to 20% lower than the corresponding investment of a parabolic trough power plant," but if it was compared on a "per

[202] C-67, EBL Circular VR 08/38, 26 November 2008, p. 14.
[203] C-68, Minutes of Meeting of EBL's Supervisory Board, 26 November 2008, p. 2.
[204] C-68, Minutes of Meeting of EBL's Supervisory Board, 26 November 2008, pp. 2-3.
[205] C-69, Preliminary Legal Report by Bartolome & Briones Abogados, 7 January 2009.
[206] C-69, First B&B Report, p. 3.
[207] C-69, First B&B Report, p. 4.
[208] C-69, First B&B Report, p. 22.
[209] C-69, First B&B Report, p. 28.
[210] C-72, Fichtner Technical Due Diligence Report for Solar Thermal Power Plant Puerto Errado II, 19 January 2009.

generated electricity" basis,[211] the value for the PE2 Plant "could be about 50 - 90% above" that for a parabolic trough plant.[212] Ultimately, Fichtner stated that "[e]ven if there are no other solar thermal power plants on the basis of the Fresnel technology to compare the investment with, the consultant presumes that there should be some cost reduction potential for the solar field."[213]

168. The Fichtner Due Diligence Report described the current FIT regime in Spain under RD 661/2007, and considered potential returns based on projections of the "fixed tariff" and "floating tariff" options.[214] Fichtner advised, however, that the Plant "has to be put into operation at the latest" in the 2nd quarter of 2011 to ensure remuneration according to this system.[215] The report prepared calculations on the assumption of a capital expenditure of either €125 or 130 million.[216] Ultimately, Fichtner recommended that EBL insist, in its draft purchase agreement with Novatec, on a "right to refuse acceptance" if, *inter alia*, the total project budget exceeded €135 million, and a "right[] for diminution of value" should the project budget exceed €125 million.[217]

169. On 14 January 2009, the day of the next EBL Supervisory Board meeting, EBL's management distributed a circular describing the results of additional due diligence, and requesting the Board's approval to submit a bid to Novatec for the Tubo Sol shares. With respect to technical due diligence, the circular described the PE2 Plant as based on a "power station concept" that was "future oriented," with Fresnel having the "major advantages" (compared to a parabolic trough plant) of "substantial reductions" in construction material and a "massive reduction in water use" for cleaning the solar field.[218] Novatec had built a smaller "pilot plant" to demonstrate to potential investors the "functional reliability" of the Fresnel technology, but the PE1 plant still was not in operation. Given this problem, and that "the proof obligation for the proper functioning of the complete plant … is a fundamental requirement for us as investors," the circular advised that the

[211] C-72, Fichtner Due Diligence Report, p. 9.1. Fichtner's analysis assumed annual generation of 50 GW. C-72, Fichtner Due Diligence Report, p. 5.1. As discussed further herein, the Plant "never actually reached these levels" of production, in the words of Mr. T. Andrist. Tr. Day 2, T. Andrist, 10:1-19.

[212] C-72, Fichtner Due Diligence Report, p. 9.1.

[213] C-72, Fichtner Due Diligence Report, p. 9.1.

[214] C-72, Fichtner Due Diligence Report, pp. 9.3-9.8.

[215] C-72, Fichtner Due Diligence Report, p. 9.8.

[216] C-72, Fichtner Due Diligence Report, pp. 10.1, 10.2.

[217] C-72, Fichtner Due Diligence Report, p. 8.4.

[218] C-71, EBL Circular VR 09/02, 14 January 2009, p. 4.

bid it was prepared to issue on 19 January 2009 included a right of rejection if the PE1 plant still was not in operation by 31 January 2009.[219]

170. Regarding legal issues, the 14 January 2009 circular described the investigations by Swiss outside counsel and by B&B in Spain as being focused on the contractual documents and on securing the transfer of all necessary rights from Novatec to Tubo Sol.[220]

171. Finally, regarding financial analysis, the report communicated Novatec's assumption that the PE2 Plant would require a €154 million investment and would promise a Project IRR of roughly 9%.[221] The IWB-EBL-Fichtner working group had carried out its own assessment based on an assumed total €135 million investment, assumed energy production from the Plant of 49.12 GWh, and assumed future cash flows over a 25-year term. On this basis, the group calculated an IRR of 9.1%, which it compared to "the applicable WACC of 9.26%." The circular concluded that "[b]ased on this calculation, in the case of a shareholder ROE requirement of 15 % p.a. and a WACC of 9.26 % based on the calculated cash flows, a total project investment of 128 million to 135 million EUR can be financed depending on the specific feed-in tariff scenario, as well as the financing structure negotiated with the providers of external capital."[222]

172. In summary, the circular stated that the working group "considers the plant concept to be technically feasible and workable," subject to the operating experience that PE1 was expected to gather by the end of January 2009.[223] The "opportunities" posed by the investment included a "[h]igh return on equity" and putting EBL "at the forefront of a new, pioneering technology"; the "risks" included increasing financing costs due to the latest financial market developments, a potential "lower return on equity" if production were lower than assumed, and the fact that "[t]he plant must be in operation by the middle of 2011, otherwise tariff is not yet clarified."[224] On this basis, EBL's management requested authorization to submit a bid for the Tubo Sol shares, on the understanding that "a maximum total project investment of 135 million EUR can be financed."[225]

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[219] C-71, EBL Circular VR 09/02, 14 January 2009, pp. 5-6.

[220] C-71, EBL Circular VR 09/02, 14 January 2009, p. 7.

[221] C-71, EBL Circular VR 09/02, 14 January 2009, p. 2 ("Investment according to developer").

[222] C-71, EBL Circular VR 09/02, 14 January 2009, pp. 4, 8.

[223] C-71, EBL Circular VR 09/02, 14 January 2009, p. 8.

[224] C-71, EBL Circular VR 09/02, 14 January 2009, p. 9.

[225] C-71, EBL Circular VR 09/02, 14 January 2009, p. 10.

173. At the Supervisory Board meeting the same day, Mr. B. Andrist advised the Board that the project was "ready for a decision to be made."[226] The minutes reflect that the Board discussed, *inter alia*, the issue of "[l]egal certainty in relation to feed-in tariff," and noted in this respect that "Spain has set the current feed-in tariff for solar energy systems up to a volume of 500 MW. The timely completion of the project is crucial."[227] The EBL Board authorized an offer to Novatec to acquire 85% of the Plant, 34% to be owned by IWB (on whose behalf the EBL board also agreed to advance the funding) and 51% to be owned by EBL. This authorization was conditioned on obtaining a contractual "right of rejection" if "the sum of the total investments" exceeded €135 million (and with a "right of reduction" if the total investments exceeded €125 million.[228]

174. Three months later, in advance of a 15 April 2009 Supervisory Board meeting, EBL's management provided an update regarding the proposed purchase of a stake in the Plant. Among other things, the circular noted that agreement with Novatec had now been reached on certain "[i]nvestment parameters" for Tubo Sol, including that EBL and IWB together would acquire 85% of the project company for €4.5 million, and that the three shareholders together would make a total investment of €142 million in developing the new Plant.[229] The circular analyzed the risks of the proposed investment, which included technical risks (to be mitigated by further testing of the PE1 prototype plant) and a variety of economic risks. As to the latter, EBL's management considered that the risk of investment (cost) overruns was mitigated by the existence of a "clearly specified EPC contract" with Novatec, and that "external financing is not yet fully certain" but "should be possible" with additional time, "in view of the reduced willingness of the financial sector to accept risks."[230] With respect to the Plant's projected yield from electricity generation, this would depend on plant availability, production levels and the FIT, which was regulated by RD 661/2007. As to the FIT, the circular advised as follows:

> The prerequisite for remuneration is that the plant is available by a specific point in time and can feed electricity into the grid. As the Spanish government only wants to make this remuneration available to a limited number of projects, PE II is in a race against time. This risk component for PE II was investigated repeatedly by various organisations. Our latest analysis shows that there is very little risk if project work starts from May 2009 (Early Works Program). With a project duration of around 21 months

[226] C-70, Minutes of Meeting of EBL's Supervisory Board, 14 January 2009, PDF p. 2.

[227] C-70, Minutes of Meeting of EBL's Supervisory Board, 14 January 2009, PDF p. 2.

[228] C-70, Minutes of Meeting of EBL's Supervisory Board, 14 January 2009, PDF pp. 2-3.

[229] C-75, EBL Circular VR 09/15, 15 April 2009, pp. 1-2.

[230] C-75, EBL Circular VR 09/15, 15 April 2009, pp. 3-4.

> until commissioning, actual grid integration would take place at the end of January 2011.[231]

175. The circular noted the legal questions that had been put to its Swiss and Spanish outside counsel, which focused on the assessment of transaction documents; "the current rights and permits" of PE2 and their transferability; and the proposed EPC contract with Novatec.[232]

176. Finally, the circular requested the Supervisory Board to approve a purchase of at least 51% of the Tubo Sol shares, and possibly up to 85% of those shares if IWB was unable to obtain financing by the time of closing.[233]

177. The Supervisory Board met the same day, but decided to temporarily suspend the transaction rather than approve it at this point, while noting that the board was "prepared to deal with this matter further at short notice." The suspension was not based on any concerns about the Spanish regulatory situation, but rather on "major uncertainties" related to external funding in the wake of the financial crisis.[234]

178. A week later, on 22 April 2009, the Spanish law firm B&B submitted a second legal report to EBL (the "**Second B&B Report**"), focusing on the subjects of B&B's due diligence, namely the relevant authorizations and permits for Plant construction and their transferability to Tubo Sol.[235] B&B also provided an analysis of RD 436/2004 (under which the PE2 permitting process had commenced) and of the current RD 661/2007, which had replaced RD 436/2004.[236] B&B noted that it had held a conference call with Novatec's outside counsel, Cuatrecasas,[237] but there is no indication that the two firms discussed Cuatrecasas' caution that, having amended the regulatory regime several times in the past, Spain could do so again in future.[238]

179. Shortly thereafter, on 30 April 2009, Spain enacted RDL 6/2009, which (as discussed in Section III.A(4) above) created a new Pre-Assignment Registry, imposed deadlines for registered companies to come online, and authorized the Government to suspend the commissioning of plants

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[231] C-75, EBL Circular VR 09/15, 15 April 2009, p. 5.

[232] C-75, EBL Circular VR 09/15, 15 April 2009, p. 6.

[233] C-75, EBL Circular VR 09/15, 15 April 2009, p. 7.

[234] C-76, Minutes of Meeting of EBL's Supervisory Board, 15 April 2009, pp. 2-3.

[235] C-77, Legal Report on Puerto Errado 2 by Bartolome & Briones Abogados, 22 April 2009, p. 6.

[236] C-77, Second B&B Report, pp. 7-10.

[237] C-77, Second B&B Report, p. 6.

[238] C-168, Cuatrecasas Report, p. 14.

already registered if the power associated with those projects exceeded the established power targets for their "group and sub-group" as classified in RD 661/2007.[239] Mr. B. Andrist has testified that the enactment of RDL 6/2009 led the Claimants to "stop[] everything and focus[] on the paperwork required to achieve the pre-registration" in the Pre-Assignment Registry in order to secure the remuneration offered by RD 661/2007.[240]

180. On 14 May 2009, Mr. B. Andrist made another presentation to the Supervisory Board regarding the "Opportunities/Risks" of the PE2 investment option.[241] Among the listed "[s]uccess factors" was a "[s]ecured feed-in tariff … [s]ecured by the State."[242] RDL 6/2009 was presented as a regulatory amendment "in favour of the project developers (more securities for investors)," with the FIT now "secured" provided that certain deadlines were met, namely, that: (i) an application to register the project was made within 30 days from 4 May 2009; (ii) a bid bond was deposited within 60 days (leading to a July 2009 notice of registration); and (iii) the project was implemented within three years.[243] Mr. B. Andrist presented the "pros of the new regulation in principle" as including the chance to obtain certainty on the FIT by mid-July 2009, before actual project start, but the "[d]isadvantages for EBL" including that Novatec's "position [is] strengthened if registration is successful," because it then "has time for negotiations also with new partners."[244] Mr. B. Andrist therefore asked the Supervisory Board to agree to the purchase of up to 85% of Tubo Sol shares (with at least 30% to be sold off then to IWB or other partners), and to authorize management to conclude the necessary contracts now, "provided that PE II obtains authorisation to [the] feed-in tariff."[245]

181. The EBL Supervisory Board approved the acquisition later that day.[246] The discussion at the meeting reiterated that "Spain has changed the regulation on feed-in tariff at short notice," and that the new regulation had "strengthen[ed] the position of Novatec" by removing the need to actually start the project to qualify for a given FIT level and therefore giving it "time for negotiations with

[239] C-13/R-37, RDL 6/2009, Preamble, Article 4, and Fifth transitional provision (referring to the English translation of C-13).

[240] B. Andrist Statement, ¶¶ 45-46.

[241] C-78, Presentation to Supervisory Board on the Status and Assessment Opportunities/Risks on the Investment Option PE II Novatec (Spain), 14 May 2009 ("**Presentation to Supervisory Board, 14 May 2009**").

[242] C-78, Presentation to Supervisory Board, 14 May 2009, Slide 2.

[243] C-78, Presentation to Supervisory Board, 14 May 2009, Slide 3.

[244] C-78, Presentation to Supervisory Board, 14 May 2009, Slide 5.

[245] C-78, Presentation to Supervisory Board, 14 May 2009, Slide 18.

[246] C-79, Minutes of Meeting of EBL's Supervisory Board, 14 May 2009, p. 3.

new partners." Now, the "new decision on the feed-in tariff will be made in July," and "the project does not need to be started" until the new FIT was confirmed. As a result, "intensive negotiations had to be held with Novatec during the previous few days, to take into account the new situation."[247] In light of these developments, the Board determined to go ahead, while noting that "[i]t is never possible to have absolute certainty at a business project of the present magnitude and complexity."[248]

182. On 12 June 2009 EBL, TBSM, Tubo Sol, Novatec Solar España, S.A. and Novatec Biosol AG entered into an investment agreement (the "**Investment Agreement**").[249] Pursuant to the Investment Agreement, EBL was to acquire 85% of the share capital of Tubo Sol for a purchase price of €4.5 million, and to assume 85% of the costs associated with developing the Plant.[250] The Investment Agreement also contained a number of conditions precedent. Most relevant for present purposes was that the transaction was subject to obtaining preliminary registration in the Pre-Assignment Registry established by RDL 6/2009.[251] TBSM and Tubo Sol were required to take "all reasonable steps" to attain such registration, although their obligation "to take such steps" was itself subject to the condition of "no variation being made to the terms of Royal Decree 661/2007 or Royal Decree [Law] 6/2009 or any other variations being made to the regime provided by either of those decrees."[252]

183. On the same date (12 June 2009), Tubo Sol and Novatec GmbH Co KG also entered into a contract, under which Novatec GmbH Co KG agreed to "[e]ngineer, [p]rocure, [i]nstall and [c]ommission" the Plant (the "**EPC Contract**").[253]

184. On 11 December 2009, the Ministry registered the Plant with the Pre-Assignment Registry,[254] thereby fulfilling the Investment Agreement's condition precedent that the Plant be registered for the FIT regime established by RD 661/2007.

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[247] C-79, Minutes of Meeting of EBL's Supervisory Board, 14 May 2009, p. 1.

[248] C-79, Minutes of Meeting of EBL's Supervisory Board, 14 May 2009, p. 2.

[249] C-16, Investment Agreement.

[250] C-16, Investment Agreement, Recital XII.

[251] C-16, Investment Agreement, Clause 3.2.

[252] C-16, Investment Agreement, Clause 3.1.

[253] C-80, Engineering, Procurement and Construction Contract for Puerto Errado 2 between TBS PE2 and Novatec GmbH Co KG, 12 June 2009.

[254] C-17, Resolution of Pre-Assignment Issued by the Ministry of Industry, Tourism and Commerce, 11 December 2009.

185. As envisioned by the Investment Agreement, EBL acquired 85% of the share capital in Tubo Sol through a share purchase agreement (the "**SPA**") with Novatec Biosol AG and TBSM, dated 29 December 2009.[255]

(2) EBL's Sale of 34% of Tubo Sol Shares

186. In the following years, EBL sold smaller stakes in Tubo Sol to other investors, in several separate steps. The first of these sales were two sales to IWB, in March and September 2010, for a total of 12% of the Tubo Sol shares.[256]

187. On 3 December 2010, the EBL Supervisory Board met to discuss the "[s]tatus report and resolution on financing" for Tubo Sol. The minutes reflect unexpected difficulty in obtaining project financing for the project, and concern that this would leave the shareholders having to fund development with their own resources, an outcome with which the Board was "uncomfortable": "[t]he previous resolutions were always taken based on the expectation that project financing could be obtained. The complexity and repeated delays were misjudged."[257] After an overview by B. Andrist of "the following risk categories: Delay, completion, performance/quality, feed-in-tariff," the Board considered the option of terminating the EPC Contract or suspending works, which was permissible under its terms but would incur substantial costs, and "the impact on the registration or feed-in remuneration cannot be estimated" if and when the Project were resumed.[258]

188. In addition to these delay risks, the Board also considered the broader "country risk" associated with the project:

> The most significant, uncontrollable risk is deemed to be the solvency of Spain and thus the risk that the feed-in remuneration guaranteed by the Spanish Government will not be paid in a worst-case scenario.[259]

This country risk could be hedged with by obtaining a guarantee, at the additional cost of €6 million.[260]

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[255] C-18, SPA.

[256] C-82, Public Deed Notarizing Share Purchase Agreement between EBL and IWB, 22 March 2010; C-87, Public Deed Notarizing Share Purchase Agreement between EBL and IWB, 7 September 2010.

[257] C-118, Minutes of Meeting of EBL's Supervisory Board, 3 December 2010, p. 1.

[258] C-118, Minutes of Meeting of EBL's Supervisory Board, 3 December 2010, pp. 2-3.

[259] C-118, Minutes of Meeting of EBL's Supervisory Board, 3 December 2010, p. 3.

[260] C-118, Minutes of Meeting of EBL's Supervisory Board, 3 December 2010, p. 3.

189. On balance, the Board concluded that "[t]he high cost of an exit from the project make it currently de facto impossible to abandon the project." It blamed "[t]his unsatisfactory situation" on having taken the decision to approve the project "under pressure to act": "[t]he decision was taken without secured project financing under the time constraint of having to complete the project before the end of 2012 due to the conditions for the feed-in remuneration."[261] The Board therefore approved an additional €4.52 million financing cost (not the originally discussed €6 million) to hedge the country risk in the form of a premium paid to Euler Hermes, one of the banks providing debt financing for the project.[262] At the same meeting, the Board authorized the reduction of EBL's shareholding in Tubo Sol to 51%, by selling a further 22% of shares to "Swiss investors."[263]

190. On 10 February 2011, Tubo Sol entered into a financing agreement with two banks, Bayerische Landesbank and Commerzbank.[264]

191. In July 2011, EBL sold a total of 22% of Tubo Sol shares to three different entities: 10% to EWZ (Deutschland) GmbH ("**EWZ (Deutschland)**"), 6% to EKZ Renewables S.A, and 6% to Berna Energía Natural España, S.L.U.[265]

192. Following these transactions, and the earlier sale to IWB of 12% in 2010, EBL's stake in Tubo Sol, and thereby in the Plant, went from 85% to 51%. EBL's stake remained at that level through the time the Plant entered into operation in June 2012, and indeed for several years after the 2012-2014 measures that the Claimants challenge in this case (the "**Initial Disputed Measures**"). As discussed

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[261] C-118, Minutes of Meeting of EBL's Supervisory Board, 3 December 2010, p. 3.

[262] C-118, Minutes of Meeting of EBL's Supervisory Board, 3 December 2010, p. 4. The Claimants' witness Mr. T. Andrist testified that EBL did in fact obtain such coverage, which he characterizes as "export credit insurance" rather than as a payment to hedge country risk, at an extra cost of roughly €4.5 million. This extra cost was included in the Claimants' calculation of overall CAPEX (at €166 million) for purposes of calculating their return on investment as part of their liability and quantum case. Tr. Day 2, T. Andrist, 44:6-45:25.

[263] C-118, Minutes of Meeting of EBL's Supervisory Board, 3 December 2010, p. 4.

[264] C-90, Common Terms Agreement entered into between TBS PE2 as the Project Company and Commerzbank Aktiengesellschaft, Filiale Luxemburg as VAT Facility Agent and Security Agent, 10 February 2011. The Respondent points out that this financing agreement required Tubo Sol, "[f]ollowing a Change in Law that results in a modification of the structure of, or remuneration payable under any Tariff Scheme," to obtain prior consent of the lenders before it made any change in election regarding its remuneration "under any Tariff Scheme." *Id.*, Article 21.25; Resp. C-Mem., ¶¶ 766-767.

[265] C-91, Public Deed Notarizing Share Purchase Agreement between EBL and EWZ (Deutschland) GmbH, 29 July 2011; C-92, Public Deed Notarizing Share Purchase Agreement between EBL and EKZ Renewables S.A., 29 July 2011; C-93, Public Deed Notarizing Share Purchase Agreement between EBL and Berna Energía Natural España, S.L.U., 29 July 2011.

further at Section III.I below, in December 2018, two months after the Claimants filed their Request for Arbitration, EBL made a further investment in Tubo Sol's shares, increasing its stake by 12%.[266]

D. REGULATORY DEVELOPMENTS AFTER EBL'S INITIAL INVESTMENT (2009-2012)

193. Between the time when EBL first decided to invest in Tubo Sol in 2009, and the issuance of the various 2012-2014 measures that prompted the Claimants' decision to initiate this arbitration, there were various further regulatory developments in Spain. These are not challenged measures in the arbitration, but they provide relevant context to the country situation, and are therefore summarized briefly below.

194. First, after the entry into force of RDL 6/2009 in April 2009, it soon became clear that the combined capacity of the facilities pre-registered in the Pre-Assignment Registry exceeded the installed capacity envisioned by the PER 2005-2010 and allowed under RD 661/2007 and RDL 6/2009. The Claimants note that the Government was authorized in these circumstances to reject all coverage of the pre-registered facilities that exceeded the target capacity.[267] Instead, through a ministerial decision on 19 November 2009 (the "**Council of Ministers' Agreement**"),[268] the Government adopted a more measured approach, premised on a belief that it could allow 3,100 MW of additional renewable energy capacity per year until 2014 without compromising the sustainability of the SES.[269] This was less than the capacity that had been requested, but more than had been foreseen in RD 661/2007.[270] At the same time, the Council of Ministers' Agreement staged the entry into operation of the facilities that were pre-registered under RDL 6/2009. The PE2 Plant was included in Phase 1 of the staged plan.[271]

195. In February 2010, Mr. Scharfhausen of CNE gave another English-language presentation (again to an audience that did not include the Claimants), about renewable energy regulation in Spain (the "**Third CNE Presentation**").[272] This presentation rooted the regime in the 1997 Electricity Law,

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[266] C-113, Share and Loan Purchase Agreement entered into between IWB Renewable Power, A.G. and EBL, 24 May 2018 ("**2018 Share and Loan Purchase Agreement**").

[267] *See* Cl. PHB, ¶ 14.

[268] C-220/R-61/R-305/BRR-116, Resolution of 19 November 2009, from the State Energy Secretariat, publishing the Agreement of the Council of Ministers of 13 November 2009 (published on 24 November 2009).

[269] *See* Cl. PHB, ¶ 14 (citing BRR-116, Council of Ministers' Agreement).

[270] *See* Cl. PHB, ¶ 14 (citing Tr. Day 4, Saura, 140:21-23).

[271] C-17, Resolution of Pre-Assignment Issued by the Ministry of Industry, Tourism and Commerce, 11 December 2009.

[272] C-81, CNE Presentation, "Renewable Energy Regulation in Spain," 1 February 2010.

which was described as establishing "three goals" for Spanish electricity regulation: guaranteed supply of power, guaranteed quality, and "the lowest possible cost."[273] The renewable energy regime was described as offering "[e]conomic incentives" as a "[p]olicy tool" to reach the "targets set in the indicative planning," with incentives set at levels "enough to obtain a reasonable profitability."[274] The presentation noted that the system presumed certain levels of "construction costs, operating costs and efficiencies" for different types of installations.[275] It described the regime as aiming to provide "[s]ecurity and predictability of the economic supports," to "eliminate the regulatory risk (warranty by law)"; "[e]conomic incentives are assured during the life of the installation" and "[e]very 4 years or when planning is fulfilled, economic incentives are updated (only for new capacity)."[276] At the same time, the presentation noted that the "[t]otal yearly amount of regulated tariffs and premiums are included in the access tariffs paid for by consumers,"[277] and described as one of the disadvantages of the regulatory regime that there were "[s]ome windfall profits in the market in a transitional period (from RD 43[6]/2004 to RD 661/2007" and that "[f]ollow-up of real costs are necessary."[278]

196. In May and June 2010, the Government informed renewable energy producers that it intended to promulgate new regulation, which would apply to all plants, including those already in operation, and would link tariffs to the returns on Spanish 10-year bonds plus a differential. The Government explained this plan as tying returns more closely to a "reasonable" rate of return, in a context where higher subsidy levels were jeopardizing the goal of reducing the Tariff Deficit, and noted that the new mechanism would be similar (although somewhat more favorable) to that already used for the operators of large electricity networks. The Ministry of Industry focused on the fact that this would cut existing premium levels.[279]

197. In June of that year, the National Renewable Energy Action Plan for 2011-2020 (the "**PANER**") was enacted,[280] in response to the 2009 Renewables Directive, and following a consultation period

[273] C-81, Third CNE Presentation, Slide 15.

[274] C-81, Third CNE Presentation, Slide 21.

[275] C-81, Third CNE Presentation, Slide 25.

[276] C-81, Third CNE Presentation, Slide 29.

[277] C-81, Third CNE Presentation, Slide 37.

[278] C-81, Third CNE Presentation, Slide 42.

[279] R-270, Cinco Días Journal, "Industry proposes to cut premiums for renewables by 2.5 billion," 8 May 2010; R-277, Cinco Días Journal, "Industry will lower premiums to all renewables in operation," 14 June 2010.

[280] R-64, Spain's National Renewable Energy Action Plan 2011–2020, 30 June 2010 (PANER according to its Spanish acronym) (also referred to as "**NREAP**" at times in the Parties' submissions).

in which various stakeholders were consulted. The PANER described Spain as having successfully "completed [the] initial launching stage" of a model to promote renewable energy, and therefore now ready to "embark upon stage two," which required adapting support policies to the reality that renewable energy was "no longer a minority element in the system but rather one of its basic components."[281] The PANER described the basic tenets of the Special Regime as follows:

> The support mechanism takes account of the evolution of electricity market prices so as to strike a balance between the need to guarantee minimum remuneration levels and the desirability that electricity generation from renewable sources be able to compete on an equal footing with conventional generation, … while at the same time contributing as far as possible to lower system costs. …
>
> … With a view to ensuring the sustainability and efficiency of the support framework, the remuneration paid for each technology will tend to converge over time with that paid under the Ordinary Regime ….[282]

198. The PANER described "[t]he economic framework, currently implemented by" RD 661/2007, as providing for "a reasonable return on investment" based on "the specific technical and economic aspects of each technology … using criteria of system economic sustainability and efficiency."[283] It then stated that "[f]uture developments in support schemes" should "assure that gains from the development of these technologies in terms of relative cost competitiveness are passed on to society, thus minimising the speculative risks posed in the past by excessive rates of return, which not only hurts consumers but is also damaging to the industry in general …."[284]

199. Following discussions during the spring of 2010, the Government reached an agreement in July 2010 with certain trade associations representing wind and solar power (the "**July 2010 Agreement**"). According to a press release from the Ministry, the participants had agreed to a revision in remuneration frameworks that was said to take into account "the different technologies and the provisions of the Renewable Energies Plan [PER] 2005-2010 for the calculation of the profitability of the facilities."[285] The July 2010 Agreement envisioned a 35% reduction in the premium for wind plants, and for solar thermal plants a limit on production hours for CSP plants,

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[281] R-64, PANER, p. 9.

[282] R-64, PANER, p. 112.

[283] R-64, PANER, p. 112.

[284] R-64, PANER, p. 118.

[285] C-86, Ministry of Industry, Tourism and Commerce, Press Release, "The Ministry of Industry, Tourism and Commerce Reaches an Agreement with the Solar Thermal and Wind Power Sectors to Revise their Remuneration Frameworks," 2 July 2010 ("**2010 Ministry Press Release**").

as well an understanding that new CSP installations would be limited to the Regulated Tariff option during their first twelve months of operation, after which the operators could choose between the Regulated Tariff and the Premium.[286]

200. The Claimants suggest that the July 2010 Agreement was later implemented into law through Royal Decree 1614/2010 ("**RD 1614/2010**") on 7 December 2010.[287] The Respondent disagrees with this contention, saying instead that RD 1614/2010 was a governmental regulatory initiative separate from the July 2010 Agreement.[288]

201. Be that as it may, in the time between the July 2010 Agreement and the enactment of RD 1614/2010, the Government enacted Royal Decree 1565/2010 of 19 November 2010, which "regulates and modifies certain aspects related to the activity of electricity production" under the Special Regime ("**RD 1565/2010**").[289] While not subject to any significant attention by the Parties in their pleadings, RD 1565/2010 described renewable energy as "a very dynamic sector and with a very fast rate of technological evolution," and introduced limited "additional technical requirements to guarantee the functioning of the [renewable energy] system…."[290]

202. RD 1614/2010 itself was preceded by a governmental regulatory impact report on 4 November 2010 (the "**Regulatory Impact Analysis Report**"), which stated that:

> This Royal Decree provides a series of austerity measures to contribute to transferring to society the gain from the proper evolution of these technologies in terms of competitiveness in relative costs, reducing the deficit of the power system, while safeguarding the legal security of investments and the principle of reasonable profitability.[291]

203. The Regulatory Impact Analysis Report explained that "[t]he installed power objectives set out under the Renewable Energy Plan [PER] 2005-2010 have been reached or exceeded for solar thermal and wind power technologies," and that "[w]hile this development can be considered a major achievement for all actors involved … it has also caused problems that need to be addressed

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[286] C-86, 2010 Ministry Press Release.

[287] C-14/R-53, Royal Decree 1614/2010 of 7 December 2010, regulating and modifying certain aspects relating to the production of electricity based on thermoelectric and wind technologies (published on 8 December 2010).

[288] Cl. Mem., ¶ 118; Resp. C-Mem., ¶ 646.

[289] C-121/R-52, Royal Decree 1565/2010 of 19 November 2010, which regulates and modifies certain aspects related to the activity of electricity production under the special regime (published on 23 November 2010).

[290] C-121/R-52, RD 1565/2010, Preamble (quoting from the English translation of R-52, p. 1).

[291] R-30, Regulatory Impact Analysis Report of Draft Royal Decree 1614/2010 which regulates and amends certain aspects concerning electricity production using solar energy and wind technologies, 4 November 2010, p. 4.

before they pose an irreversible threat to the economic and technical sustainability of the system."[292] For solar thermal, for example, the Report explained that the PER 2005-2010 had set a 500 MW power objective, but in fact 4,399 MW of solar thermal technology had been recorded in the Pre-Assignment Registry established by RDL 6/2009, all of it scheduled to become operational in the next few years; the first 930 MW (almost double the 500 MW objective) would be reached in 2010, with roughly 500 MW/year installed each of the next three years. The avalanche of extra capacity from wind and solar thermal plants in turn imposed significant "extra cost" on the SES, with Special Regime subsidies projected to rise to €5.888 billion from a 2007 level of €2.2 billion.[293] Various different measures had been adopted "in order to finance this deficit which was being transferred to future generations by means of the recognition of long-term payment rights," but these had proven insufficient. At the same time, the Report recounted, Spain's broader economic situation was forcing the national, regional and municipal governments to cut public spending in other areas to reduce State deficits, and "[a]nother necessary measure also appears to involve the electricity production sector using renewable technologies, financed by all consumers, undertaking part of the effort to reduce the tariff deficit and safeguard the economic sustainability of the power system."[294] The Report added that the "alternative … of inaction … would mean … that some technologies would obtain remuneration above what is reasonable, and the tariff deficit would continue to grow … unless there was an unbearable rise in access fees for consumers."[295]

204. For the solar thermal sector, the Report noted several measures that were now contemplated, including caps on the operating hours that would be entitled to subsidies (without which, "the remuneration obtained exceeds that which is considered reasonable"), and requiring new installations to operate for their first year under the Regulated Tariff option rather than the market Premium option.[296] As "compensation" for these measures, the Report indicated that the tariffs for existing installations would not be revised during the scheduled periodic "revisions" anticipated under Article 44 of RD 661/2007.[297] The Report concluded that the proposed amendments would not infringe the principle established in the 1997 Electricity Law of "maintaining reasonable profitability regarding the cost of money in the capital market," and in fact were being carried out pursuant to the Government's regulatory powers to implement the "reasonable profitability"

[292] R-30, Regulatory Impact Analysis Report, p. 3.
[293] R-30, Regulatory Impact Analysis Report, p. 3.
[294] R-30, Regulatory Impact Analysis Report, p. 4.
[295] R-30, Regulatory Impact Analysis Report, p. 4.
[296] R-30, Regulatory Impact Analysis Report, p. 5.
[297] R-30, Regulatory Impact Analysis Report, p. 6.

principle, powers which "cannot be relinquished."[298] At the same time, the Report acknowledged that the CNE "regards the measures … to be insufficient,"[299] leaving open the possibility that further measures might have to be considered in the future.

205. RD 1614/2010 was enacted on 8 December 2010,[300] implementing the measures described in the preceding Regulatory Impact Analysis Report – including eliminating the market Premium tariff option for certain facilities during their first year of operation. The Claimants do not challenge this measure, which their experts describe as having only a temporary and insignificant effect on the PE2 Plant.[301] Nonetheless, RD 1614/2010 was the source of complaints by other investors in Spain.

206. On 16 December 2010, the CNE warned that current measures would not be sufficient to prevent further growth of the Tariff Deficit, because the access tariffs that consumers were proposed to pay for 2011 were "clearly insufficient" to cover the projected costs of the Spanish electrical system, including the costs of the Special Regime.[302]

207. On 23 December 2010, Royal Decree Law 14/2010 "on the establishment of urgent measures for the correction of the tariff deficit in the electricity sector" ("**RDL 14/2010**") was enacted.[303] RDL 14/2010 raised the maximum limits of the Tariff Deficit that had been established by RDL 6/2009, which its Preamble explained was necessary given that RDL 6/2009 had established "as of 2013, the principle of sufficiency of the access fees to cover the total costs of regulated activities," which clearly would not be possible to achieve. RDL 14/2010 attributed the Tariff Deficit to several factors, including that (i) the global financial crisis had significantly reduced the demand for energy, while (ii) supply had grown because of the evolution of market prices and the increased production from renewable sources. Traditional Ordinary Regime power plants had reduced their operating hours and income due to the decline in wholesale market prices, but Special Regime producers were expanding production under a regime that continued to ensure the sale of all their generated electricity "at preferential rates." RDL 14/2010 noted that the problem of the Tariff Deficit could not be "borne exclusively by consumers" through increased access fees, which

[298] R-30, Regulatory Impact Analysis Report, p. 8.

[299] R-30, Regulatory Impact Analysis Report, p. 8.

[300] C-14/R-53, RD 1614/2010.

[301] Tr. Day 3, Lapuerta, 45:14-22; Tr. Day 3, Lapuerta/García, 57:24-58:21.

[302] C-203, CNE Report 39/2010 Based on the Draft Ministerial Mandate Approving Access Tariff Reform in the Electrical Energy Sector as of 1 January 2011 ("**CNE Report 39/2010**"), 16 December 2010, PDF p. 2.

[303] R-38, Royal Decree Law 14/2010 of 23 December 2010, establishing urgent measures for the correction of the tariff deficit in the electricity sector (published on 24 December 2010).

"would [a]ffect, in the short term and during the current financial crisis, household finances and the competitiveness of businesses."[304] Rather, measures were being implemented "so that all industry agents contribute, in a further and combined effort, to the reduction of the deficit of the electricity system." This included Special Regime producers, whom "it is deemed reasonable … also make a contribution to mitigate the additional costs on the system, … proportionate to the characteristics of each technology," but "whose reasonable return, nonetheless, is guaranteed."[305] Among other things, RDL 14/2010 imposed a toll with respect to wind energy, bringing it in line with other Special Regime technologies.[306]

208. On 4 March 2011, Spain's legislature enacted Law 2/2011 on Sustainable Economy ("**Law 2/2011**"), which underlined the need to undertake further reform in energy regulation in general and in the incentive system for the Special Regime in particular.[307] Article 79 of Law 2/2011 provided that after a public consultation process, the Government should establish a plan to achieve certain specified goals by 2020, consistent with a variety of principles which included, *inter alia*, "the guarantee of a suitable return on investment in technologies under the special regime"; "[c]onsideration of the learning curves in the different technologies until a point of competitiveness is reached with the cost of energy consumption"; "[t]he progressive internalization of costs assumed by the energy system to guarantee the sufficiency and stability of supply"; and "[t]he prioritization of facilities that incorporate technological … innovations [and] which optimize efficiency in production …."[308]

209. Royal Decree Law 1/2012, "implementing the suspension of the remuneration pre-assignment procedures and the elimination of economic incentives for new electrical energy production installations based on cogeneration, renewable energy sources and waste" ("**RDL 1/2012**"),[309] was enacted on 27 January 2012. RDL 1/2012 represented a first step in the overhaul of the SES. The broader rationale for the overhaul was explained in the Preamble, which began as follows:

> In recent years, the growth achieved thanks to the technologies included in the special regime has allowed in 2010 the outperformance of the

[304] R-38, RDL 14/2010, Preamble, p. 1.

[305] R-38, RDL 14/2010, Preamble, p. 2.

[306] R-38, RDL 14/2010, Article 1.2; RD-1, Resp. Op. Statement, Slide 127.

[307] R-24, Law 2/2011 of 4 March 2011, on Sustainable Economy (published on 5 March 2011) (consolidated version).

[308] R-24, Law 2/2011, Article 79.

[309] R-39, Royal Decree Law 1/2012 of 27 January 2012, implementing the suspension of the remuneration pre-assignment procedures and the elimination of economic incentives for new electrical energy production installations based on cogeneration, renewable energy sources and waste (published on 28 January 2012).

> installed power targets foreseen in the [PER 2005-2010] for wind technology and in particular for solar thermoelectric and solar photovoltaic technologies.
>
> However, this high level of development has not been without its critics. Outperforming the targets has made it clear that there is an imbalance between the production costs and the value of the premiums, entailing an increase in the additional cost for the system in terms of premiums for solar technologies of more than 2000 million in 2010, a figure that will increase by 2000 million Euros per year as from 2014.[310]

210. The Preamble of RDL 1/2012 explained that RDL 6/2009 had set limits to restrict increases in the Tariff Deficit, including establishing a principle of self-sufficiency as from 2013, and new measures were later "urgently adopted" in RDL 14/2010 to try to "correct" the Tariff Deficit. However, "the measures adopted to date have not proven sufficient," and "[t]he tariff deficit constitutes, *per se*, a barrier to the proper development of the sector as a whole." Moreover, the presently installed generation capacity "is enough to cover the demand expected for the coming years," so "at this time it is not vital to continue" adding capacity at these rates to achieve the power targets set for 2020. This situation would call for "the temporary elimination of the incentives to build" further installations until the "main problem" of the Tariff Deficit could be resolved.[311]

211. More broadly, RDL 1/2012 stated, "[i]t has become necessary to design a new remuneration model for this type of technologies that … promotes market competitiveness" and "incentivise[s] a reduction in costs, taking advantage of the slope of the learning curve and affording the capture of the maturing of technology in such a way that the costs revert to consumers."[312] At the same time, the Government considered the most urgent step to be halting the pipeline by which new installations could qualify for Special Regime subsidies. It explained as follows:

> In view of the above, it has been deemed opportune to eliminate the incentivising economic regimes for certain installations under a special regime … as well as the suspension of the remuneration pre-assignment procedure for them in such a way that the problem of the high tariff deficit in the electrical system could be tackled in a more favourable environment. Adopting said measure, the Government opted to limit its remit to installations under a special regime that have not yet been entered on the Remuneration pre-assignment Register ….

[310] R-39, RDL 1/2012, Preamble, p. 1.

[311] R-39, RDL 1/2012, Preamble, p. 1.

[312] R-39, RDL 1/2012, Preamble, p. 2.

> This Royal Decree maintains the remuneration regime set out in the legislation for installations which are up and running and for those that have been entered on the Remuneration pre-assignment Register.[313]

212. Accordingly, RDL 1/2012 declared the "elimination of the economic incentives … under a special regime" and the "suspension of the remuneration pre-assignment procedure for granting the premium economic regime," both steps applicable only to facilities that had "not been entered on the Remuneration pre-assignment Register…."[314]

213. On the same day as RDL 1/2012 was enacted, the Secretary of State for Energy asked the CNE to propose certain other regulatory measures to address the growing Tariff Deficit. The CNE responded on 7 March 2012 with a Report identifying certain short-term and medium-term measures which might be considered ("**CNE Report/2012**").[315] The Report also noted the persistence and magnitude of the Tariff Deficit:

> The Spanish electrical system has recorded a structural deficit in the revenues from regulated activities (tariff deficit) for a decade, due to the fact that the costs that have been recognised for the various regulated activities and costs have been (and continue to be) higher than the revenues obtained from the regulated prices paid by consumers.[316]

> Since 2006 (the last year in which access tariffs were sufficient), average revenues from access tariffs have risen by 70% in cumulative terms up to 2010, whereas the increase in access costs was of 140%. The … most significant access cost item[] [was] the special regime premiums (which accounted for 40.3% of total costs in 2010)….[317]

214. The CNE emphasized that "the financial path of the system is unsustainable, in the hypothetical event that no measures are introduced, either regarding revenue (tariff increases) or on the costs of regulated activities."[318] At the same time, the CNE noted, Spanish electricity consumers were already paying higher prices for electricity than the EU average, "particularly in the case of the household consumer and the low consumption industrial consumer,"[319] who were paying "among

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[313] R-39, RDL 1/2012, Preamble, p. 2.

[314] R-39, RDL 1/2012, Articles 1, 2 and 3.

[315] C-97/R-72, CNE Report on the Spanish Electricity System, 7 March 2012 (referring to the English translation of R-72, Part I, PDF p. 5); *see also* RD-1, Resp. Op. Statement, Slide 133.

[316] C-97/R-72, CNE Report/2012 (quoting from the English translation of R-72, Part I, PDF p. 6).

[317] C-97/R-72, CNE Report/2012 (quoting from the English translation of R-72, Part I, PDF p. 7).

[318] C-97/R-72, CNE Report/2012 (quoting from the English translation of R-72, Part I, PDF p. 13).

[319] C-97/R-72, CNE Report/2012 (quoting from the English translation of R-72, Part I, PDF p. 17).

the highest prices … in Europe."[320] The CNE further explained that the end prices paid by Spanish consumers were "mainly explained … by the addition to system costs of a growing volume of costs recognised for regulated activities, initially planned amid a context which expected greater growth in demand and, particularly … by the surcharges [for remuneration of] special regime facilities."[321] These realities necessarily constrained the range of measures the Government could consider to ameliorate the growing Tariff Deficit crisis: the CNE concluded that the Tariff Deficit could not be addressed simply by raising the rates paid by consumers.[322]

E. THE PLANT'S 2012 COMMISSIONING, REGISTRATION AND ENTRY INTO OPERATION

215. It was against this backdrop that the PE2 Plant was finally commissioned on 15 February 2012,[323] and was definitively registered in the RAIPRE on 28 March 2012.[324] According to Mr. T. Andrist, the Plant began operating commercially on 14 August 2012.[325]

216. Shortly before the Plant became operational, on 28 June 2012, an EBL representative, together with a representative from the law firm B&B, met with two officials from the Spanish Directorate of Energy Policy and Mines. EBL's representative reported to the company's management that during the meeting, the Government representatives "confirmed that Spain have [*sic*] big problems," but stated that "the aim is to find ways to not take retroactive measures, that is to keep legal security/stability," with initial measures to be adopted by August 2012, "basically affect[ing] general taxes."[326]

F. THE INITIAL DISPUTED MEASURES (2012-2014)

217. Shortly after the Plant became operational in August 2012, Spain enacted the first of several measures that the Claimants contend violated its obligations under the ECT. In the Claimants' eventual letter of 20 February 2018 invoking the ECT and requesting negotiations (the "**Trigger**

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[320] C-97/R-72, CNE Report/2012 (quoting from the English translation of R-72, Part I, PDF p. 19).

[321] C-97/R-72, CNE Report/2012 (quoting from the English translation of R-72, Part I, PDF p. 19).

[322] C-97/R-72, CNE Report/2012 (quoting from the English translation of R-72, Part I, PDF, p. 76) (noting that in the absence of other regulatory measures, consumer tariffs would have to increase more than 35% in 2012, and again thereafter, "which would be unsustainable for consumers").

[323] C-24, Act of Commissioning of the Plant Issued by the Government of Murcia, 15 February 2012.

[324] C-25, RAIPRE Certificate Issued by the Ministry of Industry, Energy and Tourism (definitive registration), 8 February 2013.

[325] T. Andrist Statement, ¶ 31.

[326] C-126, Email from Juan Ricardo Rothe to Urs Steiner, Tobias Andrist, Beat Andrist and Isaac Hernandez Valles concerning a meeting with the Ministry, 28 June 2012, p. 1.

Letter"),[327] they identified five measures between 2012 and 2014 which they argue violated the Treaty. These measures, collectively referred to as "the **Initial Disputed Measures**," are described below. As further developed below in Sections III.J and V.E below, the Claimants subsequently invoked one further measure from 2019, which the Respondent contests may be properly considered in these proceedings.

(1) Law 15/2012

218. Spain enacted Law 15/2012 on tax measures for energy sustainability on 27 December 2012 ("**Law 15/2012**").[328] Title I of Law 15/2012 included a 7% environmental tax on the value of production of electrical energy (the "**TVPEE**"), including but not limited to renewable energy production. Title II of Law 15/2012 also imposed taxes on the production and storage of spent nuclear fuel and radioactive waste resulting from nuclear energy generation. The Preamble of Law 15/2012 explained that the Law's goal was "the internalization of environmental costs generated by the production of electric power and storage of spent nuclear fuel or radioactive waste."[329]

219. With respect to the electricity sector, the TVPEE was levied on the "economic gains of the producers … whose installations require significant investments in electric power transport and distribution grids in order to evacuate the power they contribute to those grids, … as well as the generation of substantial costs necessary to maintain a guaranteed supply."[330] Specifically, Article 1 of Law 15/2012 provided for a "direct and real tax on activities that involve production and incorporation into the electric power system, measured at the power station busbars," from all installations covered by the 1997 Electricity Law.[331] Effectively, this was a tax on the funds received by electricity installations, whether from the market (for conventional energy producers in the Ordinary Regime) or from regulated tariffs (for renewable energy producers in the Special Regime).[332] The sums raised by the TVPEE were payable to the Treasury and went into the State General Budget, but then were passed in an equal amount back into the SES as an added source of

[327] C-40, Letter from Allen & Overy on behalf of the Claimants to President Mariano Rajoy, 19 February 2018.

[328] C-26/C-99/R-6, Law 15/2012 of 27 December 2012, on tax measures for energy sustainability (published on 28 December 2012).

[329] C-26/C-99/R-6, Law 15/2012, Preamble, Part I (quoting from the English translation of R-6, PDF p. 1).

[330] C-26/C-99/R-6, Law 15/2012, Preamble, Part II (quoting from the English translation of R-6, PDF p. 2).

[331] C-26/C-99/R-6, Law 15/2012, Article 1 (quoting from the English translation of R-6, PDF p. 4); *see also* Article 6.1 ("The taxable basis is the total amount that the taxpayer receives …. For these purposes, calculation of the total amount will include income from all economic regimes derived from [the 1997 Electricity Law] …") (quoting from the English translation of R-6, PDF p. 5).

[332] C-26/C-99/R-6, Law 15/2012, Article 6.

revenue to help cover its costs. In recognition of this change, Law 15/2012 amended Article 15 of the 1997 Electricity Law to provide that the cost of regulated activities would now be financed not only by the revenue collected from users, but also "by items from the State General Budget," to which the TVPEE tax would contribute.[333]

220. As discussed further in Section V.D below, the Parties disagree as to the character of the TVPEE, in particular whether (as applied to Special Regime producers) it was a "thinly-disguised tariff cut" or a *bona fide tax* measure.[334] The resolution of this issue is directly relevant to one of the Respondent's jurisdictional objections, which invokes the ECT's express exclusion of "Taxation Measures" from any rights or obligations under the Treaty.[335]

(2) RDL 2/2013

221. Enacted on 1 February 2013, Royal Decree Law 2/2013 concerning urgent measures within the electricity system and the financial sector ("**RDL 2/2013**"),[336] provided for inflation adjustments, as well as a modified inflation index, compared to that provided by RD 661/2007, with respect to future adjustments of the FIT.[337] It also provided that henceforth, Special Regime producers would only have access to Regulated Tariffs or to selling their electricity on the market without a premium, eliminating the prior option for CSP plants of a tariff based on a Premium over market prices.[338]

222. The Preamble to RDL 2/2013 alluded to the growing Tariff Deficit which "[t]o a great extent … [is] due to a greater increase in the cost of the special regime … and to a decrease in revenue from fees due to a very marked fall in demand" by users. It also noted that a "new increase in the access fees paid by consumers … would directly affect household economies and company competitiveness, both in a delicate situation given the current economic situation." The Preamble recalled that accordingly, "in order to palliate this problem, the Government has considered adopting certain urgent cost-reduction measures which avoid consumers having to bear a new burden."[339] In that context, the rationale for adjusting inflation indexes was explained as follows,

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[333] C-26/C-99/R-6, Law 15/2012, First Final Provision (quoting from the English translation of R-6, PDF p. 15).

[334] Cl. Mem., ¶¶ 126-127; Resp. C-Mem., ¶¶ 803-811.

[335] CL-1/RL-20, ECT, Article 21.

[336] C-28/R-42, Royal Decree Law 2/2013 of 1 February 2013, concerning urgent measures within the electricity system and the financial sector (published on 2 February 2013).

[337] C-28/R-42, RDL 2/2013, Article 1.

[338] C-28/R-42, RDL 2/2013, Article 2.

[339] C-28/R-42, RDL 2/2013, Preamble (quoting from the English translation of C-28, pp. 1-2).

with a specific reference to the impact of the recent TVPEE:

> In the regulations of this industry, certain methodologies used to update the remuneration from the different activities of the Electricity Industry are linked to the performance of the Consumer Price Index (CPI), which may be influenced by tax variations, particularly relevant during the course of last year. It is not right that increasing a tax should also give rise to increases in the regulated remuneration of the Electricity Industry, whose costs are not directly related to the direct tax on consumption.
>
> Consequently, in order to use a more stable index … it is established that all those methodologies used to update remuneration which are linked to the CPI, should be replaced by the Consumer Price Index at constant taxes ….[340]

223. RDL 2/2013's elimination of the Premium tariff option for Special Regime producers was explained as follows:

> At the same time, taking into account the volatility of the production market price, the option of remuneration for the energy generated in special premium regime to complement this price makes it difficult to comply with the double objective of guaranteeing a reasonable return for such facilities, and avoiding at the same time an over-remuneration thereof, which would fall on the other agents of the electricity system. Therefore the premium economic regime has to be supported exclusively by the regulated tariff option, without prejudice to facility owners being able to freely sell their energy in the production market without receiving a premium.[341]

224. The Claimants describe RDL 2/2013's inflation adjustments as having "a limited effect in practice," but nonetheless making clear the broader intention "to cut the FIT."[342] The Claimants also complain that the existence of the Premium option had been "a key part" of their decision to invest in CSP technology.[343] The Respondent points out the "[p]recedents" for removing the Premium option, including that this option was abolished for photovoltaic plants by RD 661/2007 itself.[344] The Respondent also observes, among others, that Spain's Constitutional Court subsequently declared

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[340] C-28/R-42, RDL 2/2013, Preamble (quoting from the English translation of C-28, p. 2).

[341] C-28/R-42, RDL 2/2013, Preamble (quoting from the English translation of C-28, p. 2).

[342] Cl. Mem., ¶¶ 128, 232; Cl. Reply, ¶¶ 494-495.

[343] Cl. Mem., ¶ 233.

[344] RD-1, Resp. Op. Statement, Slide 136. As discussed above, RD 661/2007 had previously abolished the Premium option for photovoltaic producers that was first offered in RD 436/2004, and RD 1614/2010 had suspended the Premium option for the first 12 months for new CSP plants.

RDL 2/2013 constitutional, and that the measures were limited in scope and time,[345] as RDL 2/2013 was soon to be replaced by what the Claimants characterize as the "**New Regime**," established by Royal Decree Law 9/2013 ("**RDL 9/2013**") and several measures that followed.[346]

(3) RDL 9/2013

225. RDL 9/2013,[347] enacted on 12 July 2013, was aimed at addressing the Tariff Deficit and established the core aspects of the New Regime. Its Preamble first explained the background of the many regulatory initiatives that had predated RDL 9/2013:

> Ever since [the 1997 Electricity Law], the electricity sector model in Spain has been based on the sufficient-income principle and on the different players therein receiving adequate reimbursement. ….
>
> … [F]or the past decade, the Spanish electricity system has generated a tariff deficit which, over time, has become structural due to the fact that the real costs associated with regulated activities and with the operation of the electricity sector are higher than the revenues collected from the fees set by the government and paid by consumers.
>
> Between 2004 and 2012, the electricity system's income from consumer fees has increased by 122%, while the increase in the system's regulated costs in the same period has been 197 percent. Prominent among the cost items that have most contributed to such an increase are the special scheme premiums and the accumulated deficit annual payments, items that have multiplied by six and nine respectively during the said period.
>
> According to the latest data … as of 10 May 2013 there is an accumulated debt of [more than €26 billion].
>
> These figures testify to the unsustainable nature of the electricity sector debt and to the need to adopt urgent and immediately-applicable measures that make it possible to bring such a situation to an end.
>
> … [I]n recent years a series of urgent measures have been adopted which have affected both costs and revenues.

[345] Resp. C-Mem., ¶¶ 812-823.

[346] Cl. Mem., ¶ 129 (introducing the notion of the "New Regime").

[347] C-32/R-43, Royal Decree Law 9/2013 of 12 July 2013, by which urgent measures are adopted to guarantee the financial stability of the electricity system (published on 13 July 2013).

> We should mention among other measures, first of all, [RDL 6/2009], which … set up a series of decreasing annual limits to the electricity tariff deficit with a view to abolishing it in 2013….
>
> However, following [RDL 6/2009], a series of circumstances occurred which meant that the annual maximum deficit limits established ex ante, proved insufficient. For example, factors such as a significant drop in demand, the increase in the production of electricity from premium renewable sources and the drop in market prices … gave rise to increases in the temporary imbalances which were hard to absorb. These imbalances could not have been covered by increasing the access fees without worsening and compromising the already complex economic situation of families and companies and without thereby significantly affecting economic activity as a whole.
>
> For this reason, [*discussion follows of various measures, including RDL 6/2010, RDL 14/2010, RDL 1/2012, RDL 13/2012, RDL 20/2012, Law 15/2012, Law 17/2012, RDL 29/2012, and RDL 2/2013*]….
>
> In addition to this cost adjustment other measures have been adopted which have meant an increase in consumer access fees and consequently of revenue for the electricity system.
>
> As can be seen, the measures adopted over these last months have been applied in a proportional and balanced way to the different industry players, in terms that … seemed to make it possible to achieve the objective of tariff sufficiency at the beginning of 2013….[348]

226. The Preamble then set out the rationale for further action, as follows:

> However, during the first half of 2013, a series of events have arisen which have altered the hypotheses on which the estimates were made at the beginning of the year, which consequently will mean that new imbalances will arise at the end of the year if urgent steps are not taken to correct the situation.
>
> These imbalances arise from the fact that the first months of 2013 have brought unusual meteorological conditions and the volume of rainfall and wind conditions have been much greater than historical averages.
>
> These conditions have had a two-fold effect. On the one hand they have caused the daily market price to fall …. On the other hand, there has been an increase in the number of operating hours of certain technologies and particularly of wind technology installations entitled to the premium regime. This has all created a notable upward deviation in the extra costs

[348] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, pp. 1-7).

> of the special regime, as a consequence of the lower market prices that have been recorded.
>
> Furthermore, due to the effect of the reduction in economic activity and the impact of the economic crisis on household economies, demand has contracted more than was expected. ….
>
> These circumstances make patently obvious the pressing need to immediately adopt a series of urgent measures to guarantee the financial stability of the electricity system and at the same time, the necessity of undertaking a review of the regulatory framework which will allow it to adapt to events that define the reality of the industry in each given period in the interest of maintaining the sustainability of the electricity system.[349]

227. RDL 9/2013 introduced a number of reforms. First, as the Preamble explained, it modified Article 30.4 of the 1997 Electricity Law to "introduce the concrete principles" on which "a new legal and economic regime" for existing renewable energy facilities "will be based." These principles were that installations would "receiv[e] the revenue deriving from market participation, with an additional remuneration which, were it to prove necessary, covers those investment costs that an efficient and well-run company cannot recover from the market." Correspondingly, "[t]he objective is to guarantee that the high costs of an inefficient company are not used as a benchmark."[350]

228. At the same time, RDL 9/2013 reiterated that the new framework should make it possible for efficiently run renewable energy installations "to compete in the market on an equal level with the other technologies and to obtain a reasonable return." Remuneration would be calculated on the basis of the costs of a "standard installation," presumed to be "efficient and well-run," with the regime set up "based on standardised parameters depending on the different standard installations that are established."[351]

229. The Preamble of RDL 9/2013 emphasized continuity with the 1997 Electricity Law's concept of "reasonable return," while stating that "in line with jurisprudence and doctrine that has been laid down in recent years," project profitability "will depend, before tax, on the average yield from ten-year Government Bonds, on the secondary market, by applying the appropriate differential." The

[349] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, pp. 7-8).

[350] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 9).

[351] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 9).

remuneration parameters would be reviewed every six years in order to "maintain the legally recognised principle of reasonable return."[352]

230. Implementing these objectives, RDL 9/2013 removed the FIT regime that was previously in place. In its place, Article 1(2) of RDL 9/2013 introduced a remuneration regime, which would "not go beyond the minimum level necessary to cover the costs that are necessary for installations to compete on an equal footing with the rest of the technologies in the market in order to allow those installations to obtain a reasonable return, by reference to the standard installation, as the case may be." It also established that "[s]uch reasonable return will be based on, before taxes, the average returns in the secondary market of the State's ten-year bonds plus the adequate differential," while providing that "[t]he parameters of the remuneration regime can be revised every six years."[353]

231. As discussed above, RDL 9/2013 also amended Article 30.4 of the 1997 Electricity Law, and introduced in its place a special payment (the "**Special Payment**") as follows:

> Additionally, subject to the terms that the Council of Ministers might adopt pursuant to Royal Decrees, in relation to the remuneration for the generation of electricity calculated according to market price, installations may receive a specific remuneration composed of an amount per unit of installed capacity. Such amount shall cover, as appropriate, the investment costs of a standard installation that cannot be recovered through the sale of energy, as well as an amount for the operation of the installation to cover, as the case may be, the difference between exploitation costs and the revenues obtained from the participation of such a standard installation in the market.
>
> For the calculation of that specific remuneration, the following elements shall be considered, based on the installation's regulatory useful life and by reference to the activities carried out by an efficient and well administered business:
>
> a) The standard revenues for the sale of generated energy valued at market price of production;
>
> b) The standard exploitation costs;
>
> c) The standard value of the initial investment.

[352] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, pp. 9-10).

[353] C-32/R-43, RDL 9/2013, Article 1 (Two) (quoting from the English translation of C-32).

...

> This remuneration regime will not go beyond the minimum level necessary to cover the costs that are necessary for installations to compete on an equal footing with the rest of the technologies in the market in order to allow those installations to obtain a reasonable return, by reference to the standard installation, as the case may be. ...
>
> Such reasonable return will be based on, before taxes, the average returns in the secondary market of the State's ten-year bonds plus the adequate differential.
>
> The parameters of the remuneration regime can be revised every six years.[354]

232. The "[f]irst additional provision" to RDL 9/2013 fixed the "differential" over the bond return at 300 basis points, with the result that "the reasonable return" for the first six-year period for installations in the prior Special Regime "shall be referenced, before tax, to the average yield during the ten years prior ... from ten-year Government Bonds ... increased by 300 base points."[355] As discussed further herein, the Respondent's position is that this was consistent with the principle of "reasonable return" that already existed in Article 30.4 of the 1997 Electricity Law, and already was the "cornerstone" of the renewable energy system in Spain.[356] The Claimants' view is that it was "only in the New Regime that Spain for the first time defined reasonable return as a percentage based on bond yields."[357]

233. RDL 9/2013 provided the principles which the Government was then to enact into law. While the new draft law was pending, Spain's Permanent Commission of the Council of State took up a challenge to its constitutionality, and on 12 September 2013, issued its opinion concluding that the draft law was constitutional ("**Opinion 937/2013**").[358] In that Opinion, the Council of State acknowledged that "the ongoing reform," whose guidelines were already in force pursuant to RDL 9/2013, had a "far greater scope than previous amendments to the compensation system under special provisions, given that the draft bill is bringing about the abolition of that system, with the exceptional possibility of substituting it for a specific compensation system based on different

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[354] C-32/R-43, RDL 9/2013, Article 1 (Two) (quoting from the English translation of C-32).

[355] C-32/R-43, RDL 9/2013, First Additional Provision (quoting from the English translation of C-32).

[356] *See, e.g.,* Resp. C-Mem., ¶¶ 428-431, 489, 556, 723(e).

[357] Cl. Reply, ¶ 292.

[358] R-65, Opinion 937/2013 of the Permanent Commission of the Council of State on the Electricity Sector Bill, 12 September 2013.

parameters."[359] Nonetheless, based on existing jurisprudence in Spain, the Council of State concluded that "the approval of a particular remuneration scheme, like the one arising from [RD 661/2007], does not generate a right of the beneficiary to the same facilities without admitting the petrification of legislation." It also emphasized that RDL 9/2013's First Additional Provision provided for a reasonable return, which was "aimed at mitigating the effects of the transition from a scheme with a premium to the new model, such that, without perpetuating the recognition of a premium or the reception of a regulated tariff, it favours a remuneration based on criteria of economic reasonableness."[360] The Council of State also stated its view that "even though the specific scope and the terms of the reform have not been known" until RDL 9/2013 was issued, "any diligent operator" could have anticipated the need of the State "to undertake major changes," given the "notoriety of the situation of tariff deficit" and "the progressive deterioration of the sustainability of the electricity system"; operators therefore "could not rely legitimately in the conservation of the parameters that had degenerated into the situation described." The Council also stated its view that RDL 9/2013 was not retroactive, because it applied only on a going forward basis, although to all facilities, "existing or new."[361]

(4) Law 24/2013

234. A new Electricity Sector Law, Law 24/2013 ("**Law 24/2013**" or the "**2013 Electricity Law**"),[362] which implemented the principles established by RDL 9/2013, was enacted on 26 December 2013. It explicitly repealed the 1997 Electricity Law, and reiterated and developed the main principles for remuneration which were introduced by RDL 9/2013.

235. The Preamble to the 2013 Electricity Law further explained why it was necessary to change the regulatory framework for remuneration. As explained in the Preamble:

> Sixteen years on from the coming into force of [the 1997 Electricity Law], a large part of its aims can essentially be said to have been fulfilled. …
>
> Notwithstanding, during this period there have been fundamental changes in the Electrical Sector which have brought about continuous action by the legislator and have led to the need to endow the electrical system with a new normative framework. In this regard, it is worth highlighting the high

[359] R-65, Opinion 937/2013, p. 16 (quoting from Claimants' translation in CD-1.1, Cl. Op. Statement, Part 1, Slide 86).

[360] R-65, Opinion 937/2013, General Observation VI.

[361] R-65, Opinion 937/2013, General Observation VI.

[362] C-29/R-26, Law 24/2013 of 26 December 2013, on the electricity sector (published on 27 December 2013).

> level of investment in transmission and distribution networks, the high penetration of renewable electrical generation technologies, the evolution of the wholesale electricity market [and other factors]. A decisive element for undertaking this reform was also the accumulation during the last decade of annual imbalances between the income and costs of the electrical system which has brought about the appearance of a structural deficit.
>
> The causes of this imbalance lie in the excessive growth of certain costs' items owing to energy policy decisions without ensuring their correlative income from the system. This has all been exacerbated by the lack of growth in electrical demand, essentially the consequence of the economic crisis.
>
> Despite the fact that tolling increased by twenty two percent between 2004 and 2012, positioning the electricity price in Spain well above the European Union average, this was not enough to cover the system's costs. This imbalance has reached the point where … the failure to correct the imbalance has introduced the risk of the bankruptcy of the electrical system.
>
> [The 1997 Electricity Law] has proven insufficient to ensure the financial balance of the system, amongst other reasons because the remuneration system for regulated activities has lacked the flexibility required for its adaptation to major changes in the electrical system or in the evolution of the economy.
>
> Hence, the experience of the last decade has made it clear that the economic and financial instability of the electrical system, brought about by the tariff deficit, has prevented the assurance of a stable regulatory framework which is necessary for the smooth carrying out of an activity like the electrical business which is very capital intensive.[363]

236. The Preamble of the 2013 Electricity Law noted that "the economic unsustainability" of the system, along with "the continuous evolution in the sector" over the past 16 years, "has required the legislator to adapt" the 1997 Electricity Law on numerous occasions, often through the approval of urgent measures by Royal Decree. After listing these measures in turn, the Preamble stated that "[e]ssentially, the continuous normative changes have entailed an important distortion to the normal operation of the electrical system and which needs to be corrected through action by the legislator which lends the regulatory stability that electrical activity require[d]." This justified approval of an "overall reform of the sector, based on a new income and expenses regime … which tries to return

[363] C-29/R-26, 2013 Electricity Law, Preamble (quoting from the English translation of R-26, PDF pp. 1-2).

to the system the financial sustainability it lost a long time ago ...."[364] Henceforth, sustainability "will be the guiding principle," and therefore "any normative measure ... that entails a cost increase for the electrical system or a reduction in income must incorporate an equivalent reduction in other cost items or an equivalent increase in income," so as to rule out the possibility of accumulating a new tariff deficit.[365]

237. The 2013 Electricity Law also explained that given "[t]he high penetration of production technologies deriving from renewable energy sources," there no longer was a reason for "its unique regulation" through a Special Regime, which distinguished those installations from others. Going forward, renewable facilities would be considered "in a similar way to those of other technologies," namely with integration into the market – however, with their market income "complemented ... with specific[ally] regulated remuneration which enables these technologies to compete on an equal footing with the other technologies on the market," enabling them "to attain the minimum level required to cover any costs ... and ... to obtain a suitable return with reference to the installation type applicable in each case." To calculate the "specific remuneration for an installation type," income would be assumed valued at the market price, and the "mean operating costs ... and the value of the initial investment of the installation type" would be based on "an efficient, well-managed company."[366]

238. Importantly, the 2013 Electricity Law also provided that the "reasonable return" introduced by RDL 9/2013 would be calculated "throughout the regulatory life" of plants.[367] As will be developed further below, in the Claimants' view, this new calculation method amounted to applying the New Regime "as if it had been in place over an installation's entire lifetime,"[368] which the Claimants categorize as a "clawback," because "whatever payments an installation received in the past in excess of what the Government considers to be reasonable under the New Regime will have to be discounted from future payments."[369] The Respondent disputes the "clawback" characterization, emphasizing that the Spanish regulatory regime has always been based on principles of reasonable return, noting that producers "of course will not be required to pay-back any subsidies already

[364] C-29/R-26, 2013 Electricity Law, Preamble (quoting from the English translation of R-26, PDF pp. 2-4).

[365] C-29/R-26, 2013 Electricity Law, Preamble (quoting from the English translation of R-26, PDF p. 5).

[366] C-29/R-26, 2013 Electricity Law, Preamble (quoting from the English translation of R-26, PDF pp. 6-7).

[367] C-29/R-26, 2013 Electricity Law, Preamble (quoting from the English translation of R-26), and Third Final Provision (3) (quoting from the English translation of R-26).

[368] Cl. Mem., ¶ 132(d).

[369] Cl. PHB, ¶ 49.

received," and contending that taking into account past performance "may be retrospective, but it is certainly not retroactive."[370] In any event, the Parties agree that the impact of this particular provision on the PE2 Plant was minimal, because it entered into operation only in the summer of 2012 and with relatively low production.[371]

(5) RD 413/2014 and Order IET/1045/2014

239. On 10 June 2014 – eleven months after RDL 9/2013 and five months after the 2013 Electricity Law – Spain issued Royal Decree 413/2014 regulating the production of electricity from renewable energy sources, cogeneration and wastes ("**RD 413/2014**"),[372] with certain details then confirmed and further developed on 20 June 2014 by Order IET/1045/2014 (the "**June 2014 Order**").[373] Based on the new legislative framework introduced by the 2013 Electricity Law, which in turn was based on the principles suggested in RDL 9/2013, these two instruments further defined the payment scheme for renewable energy producers. The Claimants state that it was only with these instruments that they were fully able to apprehend the impact on them of the New Regime.[374]

240. The Preamble to RD 413/2014 provided a thumbnail history of regulatory developments to date, while noting that the "regulatory evolution" in Spain had always been "oriented toward promoting the appropriate and strict observance of the principle of reasonable return," while "guaranteeing the financial sustainability of the system at the same time."[375] It observed that the "very favourable support scheme" reflected in RD 661/2007 regime had "promoted the quick achievement of the forecasts that had preceded its approval," but it also was accompanied by a "gradual reduction of technological costs," which two factors "made necessary successive corrections to the regulatory framework" between 2009 and 2011, in order to "guarantee the principle of reasonable return as well as the financial sustainability of the system itself."[376] Yet, the 2009-2011 measures "had proved insufficient for achieving the established objectives," and left in place a regulatory framework that still "suffered from inefficiencies which, not having been corrected in spite of the

[370] Resp. PHB, ¶ 114.

[371] *See, e.g.,* Cl. PHB, ¶ 50; Resp. PHB, ¶ 113.

[372] C-30/R-56, Royal Decree 413/2014 of 6 June 2014, regulating the activity of electric power production from renewable energy sources, cogeneration and waste (published on 10 June 2014).

[373] C-31/R-60, Order IET/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 (published on 20 June 2014).

[374] Cl. Mem., ¶ 238.

[375] C-30/R-56, RD 413/2014, Preamble, Part I (quoting from the English translation of C-30, PDF p. 1).

[376] C-30/R-56, RD 413/2014, Preamble, Part I (quoting from the English translation of C-30, PDF p. 2).

intense effort at regulatory adaptation, seriously jeopardized the financial sustainability of the system." This in turn led to RDL 1/2012, which eliminated "economic incentives for new installations," and RDL 2/2013, which eliminated the market price plus premium option for the technologies to which it applied.[377] Finally, RDL 9/2013 was enacted "to consolidate the continuous adaptation that the regulation had experienced," in order to promote "strict and correct application of the principle of reasonable return" and to "carry out a review of the regulatory framework that would allow for its ideal adaptation to the events that define the reality of the sector." RDL 9/2013 "incorporate[d] a mandate to the Government" to approve a new regime for existing installations, explicitly stating the concrete principles upon which that regime would be defined, and those principles were "further integrated" in the 2013 Electricity Law and "are developed in the present Royal Decree."[378] The Preamble stated that both RDL 9/2013 and the 2013 Electricity Law "assume continuously one of the main principles" of the 1997 Electricity Law, namely that "the defined remuneration regimes must allow [renewable energy] installations to cover the necessary costs to compete in the market equally with the other technologies and obtain a reasonable return on the whole project."[379]

241. RD 413/2014 developed the Special Payment, which replaced the FIT options available under the previous regime. The Special Payment would be activated only after a production threshold was reached, and was to be determined with reference to a series of hypothetical "standard installations," based on the return they were projected to receive over their "regulatory useful life,"[380] assuming "the standard revenues from the sale of energy valued at market price, the standard operating costs necessary to carry out the activity and the standard value of the initial investment … as if for an efficient and well-managed company."[381] The specific remuneration parameters for "each of the different standard installations … classified according to their technology, electrical system, power, age, etc." would be established by a forthcoming Ministry order,[382] and "every installation, depending on its characteristics, shall be assigned a standard installation."[383] The remuneration parameters may be reviewed and modified at the end of each "[r]egulatory period" of six years, or each "regulatory semi-period" of three years, except that "[i]n

[377] C-30/R-56, RD 413/2014, Preamble, Part I (quoting from the English translation of C-30, PDF p. 2).
[378] C-30/R-56, RD 413/2014, Preamble, Part I (quoting from the English translation of C-30, PDF p. 3).
[379] C-30/R-56, RD 413/2014, Preamble, Part I (quoting from the English translation of C-30, PDF p. 3).
[380] C-30/R-56, RD 413/2014, Preamble, Part II (quoting from the English translation of C-30, PDF p. 3).
[381] C-30/R-56, RD 413/2014, Preamble, Part II (quoting from the English translation of C-30, PDF p. 3).
[382] C-30/R-56, RD 413/2014, Preamble, Part II (quoting from the English translation of C-30, PDF p. 3).
[383] C-30/R-56, RD 413/2014, Article 11.4 (quoting from the English translation of C-30).

no case may the regulatory useful life or the standard value of the initial investment of a standard installation be reviewed after these values have been recognized." Once an installation exceeded its "regulatory useful life," it could still remain in operation and receive market prices, but would no longer be entitled to the Special Payment in addition.[384] For purposes of this methodology, the reasonable return for each standard installation would be calculated consistently with the first additional provision of RDL 9/2013, namely "before taxes … on the average yield in the secondary market … of ten-year Treasury Bonds plus 300 basis points ...."[385]

242. As noted, RD 413/2014 referred to a forthcoming Ministry Order which would establish the classification of standard installations, with each assigned its own code and a set of remuneration parameters based on the activity expected of an "efficient and well-managed company."[386] The June 2014 Order issued ten days later provided those specific parameters, and thus states that:

> This order finalizes the changes to the remuneration model for renewable energy, co-generation and wastes, granting financial stability to the system in a definitive manner, at the same time as it guarantees a reasonable return on the installations. These installations will continue to receive additional revenue over and above what they receive from the market until the end of their operational life, as long as they have not obtained this level of return. Furthermore, the importance of this order resides in the fact that it concerns the determination of useful operational life and the quantification of the initial value of the investment, insofar as it concerns parameters that may not be revised.[387]

243. For solar thermal installations, which RD 413/2014 had again classified into Group b.1, Subgroup b.1.2,[388] the June 2014 Order established a uniform "regulatory useful life" of 25 years.[389] Subgroup b.1.2 in turn was divided into seven distinct "[t]echnology sub-type[s],"[390] and for each of these sub-types, a number of different "[s]tandard [i]nstallation code[s]" was assigned, based on the "[y]ear of definitive operating authorisation." As an example, for the technology described as "CCP," there were five different codes, corresponding to installations entering into operations in

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[384] C-30/R-56, RD 413/2014, Preamble, Part II (quoting from the English translation of C-30, PDF p. 4).

[385] C-30/R-56, RD 413/2014, Preamble, Part III (quoting from the English translation of C-30, PDF p. 5).

[386] C-30/R-56, RD 413/2014, Article 13(2) (quoting from the English translation of C-30).

[387] C-31/R-60, June 2014 Order, Preamble, Part I (quoting from the English translation of C-31, PDF p. 2).

[388] C-30/R-56, RD 413/2014, Article 2 (referring to the English translation of C-30).

[389] C-31/R-60, June 2014 Order, Article 5.1 (quoting from the English translation of C-31).

[390] C-31/R-60, June 2014 Order, pp. 46475-46476 (identifying CCP, CPA>5h≤8h, CPA>8h, TOV, TOA, FRE, and HIB as the seven "[t]echnology sub-type[s]" for Subgroup b.1.2) (quoting from the English translation of C-31, PDF pp. 20-21).

2009, 2010, 2011, 2012 and 2013.[391] For the Fresnel technology, two different standard installation codes were listed, IT-00616 for installations entering into operation in 2009, and IT-00617 for installations entering into operation in 2012.[392] Effectively, the former was the category relevant to the PE1 prototype plant, and the latter was the category relevant to the PE2 Plant, which Tubo Sol was operating commercially. Given the novelty of Fresnel technology in Spain, the PE2 Plant was the only installation assigned to Code IT-00617. For each code, the June 2014 Order then established a remuneration level for the deemed standard initial investment, and a remuneration level for the deemed standard operating costs, based on a maximum number of operating hours.[393] The June 2014 Order provided further calculations of the expected payments towards the initial investment and operating costs for the initial three-year "semi-period" (2014-2016),[394] in turn based on a calculation that since the average ten-year bond return was 4.398%, the "applicable rate for reasonable return" for standard installations would be 7.398%.[395]

244. As discussed further, the Claimants disagree on several grounds with this methodology as applied to the PE2 Plant, one of which is that the deemed "standard" investment cost was far below Tubo Sol's actual capital expenses to bring the Plant to operation. The Respondent rejects this criticism, arguing that the actual capital expenditure on PE2 was excessive, based *inter alia* on the lower projections and advice the Claimants had earlier received from Fichtner.

245. The Parties also debate whether it was reasonable or unreasonable for Spain not to have adopted the higher capital expenditure figures listed for PE2 in certain reports by the outside companies Boston Consulting Group (the "**BCG Report**") and Roland Berger (the "**Roland Berger Report**"), which were retained in 2013 to advise the IDAE, the entity that had developed Spain's various renewable energy plans and was advising the Government on the implementation of the New

[391] C-31/R-60, June 2014 Order, p. 46475 (referring to the English translation of C-31, PDF p. 20). Six standard installation codes were assigned to the technology described as CPA>5h≤8h, based on entry into operation respectively in the years 2008-2013; two codes were assigned to the technology described as CPA>8h, based on entry into operation respectively in the years 2012-2013; two codes were assigned to each of the TOV and TOA technologies, based on entry into operation respectively in 2008 or 2009 and in 2011 or 2015; and one code was assigned the HIB technology, based on entry into operation in 2012. C-31/R-60, June 2014 Order, pp. 46475-46476 (referring to the English translation of C-31, PDF pp. 20-21).

[392] C-31/R-60, June 2014 Order, p. 46476 (referring to the English translation of C-31, PDF p. 21).

[393] C-31/R-60, June 2014 Order, p. 46530 (setting out these figures for Code IT-00617, applicable to the PE2 facility) (referring to the English translation of C-31, PDF p. 24). The Parties agree that for Code IT-00617, the standard value of the initial investment was calculated at €3,541,793/MW, which for a 30 MW plant like PE2 would amount to €106,253,790. Resp. Rej., ¶ 959.

[394] C-31/R-60, June 2014 Order, pp. 46581 (setting out these figures for Code IT-00617, applicable to PE2) (referring to the English translation of C-31, PDF p. 26).

[395] C-31/R-60, June 2014 Order, p. 46654 (quoting from the English translation of C-31, PDF p. 29).

Regime.[396] The BCG Report was issued on 30 July 2014,[397] roughly six weeks after the June 2014 Order, and Roland Berger Report was issued three months later on 31 October 2014.[398] The Claimants contend that it was arbitrary for Spain not to consider the figures presented in these reports, which they say reflected more accurately the capital expenditure necessary for a novel Fresnel plant than did a 2011 IDAE study which the Government used.[399] The Respondent rejects the BCG and Roland Berger figures as drawn simply from Tubo Sol's financial accounts, and therefore reflecting the actual (allegedly excessive) expenditure for PE2, rather than the "reasonable" expenditure that a well-managed project could have been expected to require.[400] The Respondent further contends that for plants actually commissioned in 2012, it was reasonable to use the data available at that time, including a technical study that had been used for the PER 2011-2020, rather than later data.[401] The Tribunal returns to these issues in its analysis below.

G. FURTHER SPANISH COURT DECISIONS (2012-2017)

246. In the meantime, between 2012 and 2017, the Spanish courts rendered several additional judgments regarding the regulatory regime for renewable energy investors.

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[396] *See* RD-1, Resp. Op. Statement, Slide 144.

[397] C-224, BCG Report on "Analysis of Standards for Special Regime Electricity Production Projects," 30 July 2014. The BCG Report listed the investment costs for a Fresnel plant at €5.2 million/MW, which the Claimants say would amount to €157 million for the PE2 Plant. Cl. PHB, n. 262 (citing C-224, BCG Report, PDF pp. 9, 18).

[398] C-196/C-223, Roland Berger Final Report on "Analysis of Standards for Electricity Production Projects in the Special Regime," 31 October 2014. The Roland Berger Report listed the investment cost of a Fresnel plant at €5.77 million/MW, which the Claimants say would amount to €173 million for the PE2 Plant. Cl. PHB, n. 262 (citing C-196, Roland Berger Report, p. 115).

[399] *See, e.g.*, CD-1.1, Cl. Op. Statement, Part 1, Slide 13 (noting that PE2 is "the only plant of its kind in Spain," and depicting the Roland Berger and BCG findings on its investment costs); Cl. PHB, ¶¶ 127-128, 136-140, 145-152 (arguing that Spain arbitrarily "set the investment costs with reference to a 2011 report," which was "outdated and inaccurate") (citing STAC-8, IDAE, "Request for Information about IT-000617 of the Ministerial Order of the European Institute of Innovation and Technology/1045/2014," 31 July 2019, pp. 3-4); *see also* Cl. PHB, n. 262 (contending that the actual costs of PE2 were €167 million, within the range of the Roland Berger and BCG Reports, whereas "the New Regime set the PE2 Plant's Investment costs at €107 million").

[400] *See, e.g.*, Resp. Rej., ¶¶ 959-964; RD-1, Resp. Op. Statement, Slides 143, 145 (noting that the BCG and Roland Berger Reports "simply refer to the Commercial Registry" rather than conducting an independent assessment, and that the law's requirement that costs be based on an "efficient and well managed company" is drawn from EU law); Resp. PHB, ¶ 122, n. 241.

[401] Resp. Rej., ¶¶ 959-960 (citing R-350, "Assessment of the Potential of Thermo-Electronic Solar Power, Technical Study PER 2011-2020," 2011) (the "**2011 Technical Assessment**"). The Respondent states that, by contrast, the BCG and Roland Berger final reports were delivered to IDAE in the second half of 2014 (after the Ministry issued the June 2014 Order), and earlier drafts delivered to IDAE were confidential and were "not taken into account by the regulator in preparing" its June 2014 Order. *See* RD-1, Resp. Op. Statement, Slide 213; Resp. Rej., ¶ 980.

247. First, between April and November 2012, the Supreme Court rendered a series of judgments in challenges by renewable energy producers against RD 1565/2010 and RD 1614/2010.[402] The Supreme Court rejected arguments that these regulatory reforms had impermissibly altered the framework established under RD 661/2007 for existing installations. Consistent with its prior rulings (discussed in Section III.B above), the Supreme Court again concluded that operators accepting Government subsidies to avoid market risks do so with the implicit trade-off that subsidy regimes may evolve based on subsequent circumstances; they have no "immutable right" to keep a particular subsidy regime unaltered, either generally or as a result of the specific terms of Article 44.3 of RD 661/2007.[403] As an example of the reasoning, the Supreme Court held in one 2012 case that concepts of "legal safety" under the Spanish Constitution were "not incompatible with … normative changes," and that "[t]he evolution of the 'learning curve' and the progressive 'maturity' of the photovoltaic sector … must have a 'parallel' answer from public powers, whose initial measures will be revised and will be modified" as well, based on learned experience and technical and economic changes.[404] In this context, it concluded as follows:

> It makes sense that … in the face of significant changes of the economic panorama with immediate consequences for the balance of the system, the initial key parameters are revised, in magnitudes or in time of enjoyment, of the calculation of the regulated tariff, and the value of the 'legal safety' cannot be merely opposed to that. The Government that initially sets the stimuli or incentives with charge to all the society (for consumers are who satisfy them) can later, in the face of the new circumstances, … establish adjustments or modifications so that the public assumption of the costs is accommodated up to levels that, respecting some minimum[] returns for already done investments, moderate the 'final' [returns].[405]

248. On 17 December 2015, the Spanish Constitutional Court rendered a judgment (the "**2015 Constitutional Court Judgment**"),[406] in response to a challenge to the constitutionality of RDL 9/2013, which the Respondent says "ratified and consolidated the line of case law set by the Supreme Court."[407] The Constitutional Court addressed the principles of legal security and

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[402] R-4, Judgments, Supreme Court, 2011-2012. A judgment on a challenge against RD 1565/2010 was rendered earlier in December 2011. *See* R-87, Judgment, Third Chamber of the Supreme Court, 20 December 2011 (App. 16/2011).

[403] *See, e.g.*, R-4, Tab 2, Judgment, Third Chamber of the Supreme Court, 12 April 2012 (App. 35/2011) ("**Judgment App. 35/2011**"), pp. 6, 9.

[404] R-4, Tab. 2, Judgment App. 35/2011, p. 7.

[405] R-4, Tab. 2, Judgment App. 35/2011, p. 7.

[406] R-95, Judgment, Constitutional Court, 17 December 2015 (Unconstitutional App. 5347/2013).

[407] Resp. C-Mem., ¶ 928.

legitimate expectations,[408] as well as the principle of non-retroactivity, in its decision upholding the constitutionality of RDL 9/2013.[409]

249. A further Supreme Court judgment, rendered on 21 January 2016, rejected the notion that RD 661/2007's Special Regime established "a tariff regime for ever," such that that the Government "may not adapt or modify this regime to new circumstances (economic, productive, technological or of any other nature) that may arise in … an extended period of time."[410]

250. On 5 September 2017, the Supreme Court ruled on an appeal against RD 413/2014 and the June 2014 Order, rejecting allegations that the Government had violated principles of legal security, transparency and non-retroactivity by applying a new method for calculating remuneration to existing facilities, in place of the regime previously established by RD 661/2007.[411]

H. THE EUROPEAN COMMISSION'S 2017 STATE AID DECISION

251. On 13 November 2017, the European Commission released a State aid decision on Spain's renewable energy support scheme (the "**2017 EC State Aid Decision**").[412] This Decision addressed the "specific remuneration scheme" established collectively by the Initial Disputed Measures described in Section III.F above, namely (i) RDL 9/2013 ("which repealed the laws applicable to the premium economic scheme and set out the principles for the new one"), (ii) Law 24/2013 ("which confirms those principles"), (iii) RD 413/2014 (which "further develops the principles" set out in Law 24/2013 and "regulates the production of electricity from renewable energy sources"),

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[408] R-95, 2015 Constitutional Court Judgment, pp. 21-22 (concluding that principles of legal certainty and legitimate expectations "do not imply the right of economic stakeholders to permanence of the regulations existing at a given time in a given sector of activity," when it was foreseeable that "the changing circumstances affecting that sector … made it necessary to make adjustments"; "changing the compensation system" would not be "unforeseeable for a 'prudent and diligent economic operator,' based on the economic circumstances and the insufficient measures taken to reduce persistent and continuously rising deficits in the electricity system not sufficiently tackled with previous provisions").

[409] R-95, 2015 Constitutional Court Judgment, pp. 24-25 (concluding that the limits on retroactivity established by the Spanish Constitution are "limited to … laws that are *ex post facto* punitive or restrictive of individual rights," and that "[o]utside these two areas, nothing prevents the legislator from endowing the law with the level of retroactivity that it sees fit," through new provisions that "display their immediate effectiveness in the future even if this involves an impact on a relationship or legal situation that is still ongoing").

[410] R-94, Judgment 63/2016, Supreme Court, 21 January 2016 (Administrative App. 627/2012), p. 20.

[411] R-160, Judgment 1369/2017, Supreme Court, 5 September 2017 (App. 699/2014) and Judgment 1370/2017, Supreme Court, 5 September 2017 (App. 740/2014).

[412] CL-137/RL-3, Decision of the European Commission, regarding the Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste (State Aid S.A. 40348 (2015/NN)), 10 November 2017 (also on the record as EC-22).

and (iv) the June 2014 Order ("which regulates the standard plant remuneration parameters applicable to certain renewable energy" facilities).[413]

252. The 2017 EC State Aid Decision began from the premise that, as Spanish authorities had implemented these various measures before notifying them to the EC for State aid review on 22 December 2014, they were considered procedurally to be "unlawful aid," pursuant to applicable EU law.[414] Nonetheless, consistent with applicable procedures, the measures were also assessed for their substantive "compatibility" with EU State aid law.[415]

253. The 2017 EC State Aid Decision did not assess the prior "premium economic scheme" (represented *inter alia* by RD 661/2007) for its compatibility with EU State aid law. However, it stated that payments already received by producers under that prior regime "are covered by the decision in order to assess proportionality, *i.e.* the absence of overcompensation," taking into account also the effects of the new regime.[416] It stated that the "actual beneficiaries" of both the prior and new support schemes were "the entities owning and operating the facilities" that received support.[417]

254. The 2017 EC State Aid Decision explained that under the new regime, "specific remuneration is paid as a premium in addition to income generated from the market," in order to help the supported technologies "to compete on an equal footing with other technologies on the market at a reasonable rate of return." The premium consists of two components, compensation for investments and compensation for operations.[418]

255. The EC described the remuneration as determined based on a combination of "standard" and "individual" characteristics:

> Facilities are classified under one of the various types of standard facilities on the basis of their individual characteristics. The compensation benchmarks applicable to each standard facility are established by ministerial order and include: type of technology, power generation capacity, start date of operation, lifetime, electricity system/location of the facility, standard revenue generated by selling the electricity in the market, standard operating costs required to carry out the activity and hours of

[413] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 6(a)-(d). The Decision also discussed a further Order, issued on 1 August 2014, which regulated the remuneration for new wind and photovoltaic facilities. *Id.*, ¶ 6(e).

[414] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 1, 89.

[415] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 90.

[416] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 4.

[417] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 12-13.

[418] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 31.

> operation (with a minimum and maximum value). The compensation to which an individual facility is entitled is calculated on the basis of the standard facility's compensation benchmarks and the features of the individual facility itself (e.g. the real number of running hours).[419]

256. In particular, "[c]ompensation for investments … applies to all facilities and offsets the investment costs which cannot be recovered by selling electricity in the market"; it is determined for any given facility by multiplying "the compensation for investment of the relevant standard facility" by the individual facility's generation capacity, subject to certain further adjustments.[420] The lifetime of the facility and the initial investment value of a standard facility are fixed for the entire lifetime of the facility.[421] Facilities whose operating costs are higher than the market price also receive a compensation for operations, which likewise is calculated for each settlement period by multiplying the compensation for the relevant standard facility by the energy sold in that period by the individual facility;[422] this compensation would be periodically revised based on economic developments.[423]

257. The EC observed that the scheme is organized into six-year regulatory periods, each with two half-periods of three years each, and that the first regulatory period would end on 31 December 2019.[424] While the scheme contained no official end date, the EC observed that "the Spanish authorities have committed not to apply the scheme beyond 10 June 2024 without any Commission decision approving the measure."[425]

258. As for the pre-tax "reasonable rate of return" used to calculate remuneration, this is to be "set by law every six years based on the average secondary market yield of the ten-year Treasury bonds, plus a spread." The EC noted that in the first regulatory period, this came to 7.398% before tax for existing facilities, and that "[t]he revenue obtained prior to the adoption of Royal Decree 413/2014 was taken into consideration to calculate the profitability over their lifetime."[426]

259. The EC first confirmed that this scheme constituted a form of State aid, defined as a subsidy which distorts competition by favoring certain beneficiaries. Specifically, "[t]he notified scheme favours

[419] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 30.
[420] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 32.
[421] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 37.
[422] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 33.
[423] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 37.
[424] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 28.
[425] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 29.
[426] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 35(g).

the generation of electricity from renewable sources … by the selected beneficiaries," who are "compensated at a rate exceeding the returns that they would normally have received from the market in the absence of aid," thereby providing "an advantage."[427] Nonetheless, the EC confirmed that the notified scheme was "aimed at an objective of common interest," namely helping Spain achieve the renewable energy and energy efficiency targets set by the EU as part of its 2020 strategy.[428] The EC also accepted that there was a need for State intervention and found the regime to be an appropriate instrument to address the stated objectives.[429]

260. The EC found that EU law requirements of "proportionality" were met, in the sense the State aid was "limited to the minimum [amount] needed to achieve the objective."[430] This assessment was based on the EC's study of cash flow calculations for 21 "standard facilities," which it considered to be "representative of the various technologies and installation types supported by the scheme." For all examples provided, the EC verified that the aid "does not exceed what is required to recover the initial investment costs and the relevant operational costs," plus the targeted margin of reasonable return (7.398% for existing facilities), which rates the EC considered "to be in line with the rates of return of renewable energy … projects recently approved by the Commission and does not lead to overcompensation."[431]

261. Finally, the EC acknowledged comments submitted by various investors, arguing that Spain's previous scheme – the one that included RD 661/2007 – did not constitute State aid or in any event would itself have been compatible with EU law.[432] It began by recalling that there is "no right to State aid," and that an EU Member State "may always decide not to grant an aid, or to put an end to an aid scheme."[433] In that context, since Spain had decided to replace the prior scheme with the new one that was notified to the EC for assessment, the EC did not consider it "relevant for the scope of this decision to assess whether the originally foreseen payments under the previous schemes would have been compatible or not."[434]

[427] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 83-88.
[428] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 96-99.
[429] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 100-104.
[430] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 113-118.
[431] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 120.
[432] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 154.
[433] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 155.
[434] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 156.

262. Nonetheless, the EC offered its views on various protests that investors had made regarding Spain's modification of its support scheme with regard to existing installations. These focused first on EU law principles of legal certainty and legitimate expectations, and concluded that "according to the case-law of the [European] Court of Justice, a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission."[435] In addition, the EC acknowledged that certain investors had presented analogous arguments to investor-State arbitration tribunals, including in claims under the ECT challenging Spain's departure from the prior "premium remuneration scheme."[436] After summarizing its view that any intra-EU ECT claims would be contrary to EU law,[437] the EC also stated its view that "on substance" there could be no fair and equitable treatment ("**FET**") violation "[i]n an intra-EU situation," because for all parties bound by EU law, "the principle of fair and equitable treatment cannot have a broader scope than the Union law notions of legal certainty and legitimate expectations in the context of a State aid scheme."[438] Even in an "extra-EU situation," the EC opined that the ECT's FET provision "is respected since no investor could have, as a matter of fact, a legitimate expectation stemming from illegal State aid."[439] Finally, the EC cautioned that any compensation that an arbitral tribunal might grant an investor "on the basis that Spain ha[d] modified the *premium* economic scheme by the notified scheme would constitute in and of itself State aid," and therefore would be subject to Spain's "standstill" obligation not to pay, unless first notified to the EC and approved by it as compatible with EU law.[440]

263. As discussed in Section VII.C below, the EC ultimately reiterated a number of these points in this case, through the EC Submission that it submitted on 1 August 2019 in accordance with the Tribunal's Procedural Order No. 2.

I. EBL'S 2018 PURCHASE OF ADDITIONAL TUBO SOL SHARES

264. Throughout this time, EBL retained the 51% stake in Tubo Sol's shares that it had held since July 2011.

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[435] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 157-158.

[436] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 157, 159.

[437] CL-137/RL-3, 2017 EC State Aid Decision, ¶¶ 160-163.

[438] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 164.

[439] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 164 (citing *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19).

[440] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 165.

265. On 24 May 2018, however, EBL signed an agreement to re-acquire 12% of Tubo Sol shares from IWB Renewable Power A.G.[441] Mr. T. Andrist explains that this was part of an exchange with IWB of their respective stakes in two different companies, done purely "for commercial reasons and to simplify our respective portfolios."[442]

266. Before the transaction above closed, however, EBL and IWB Renewable Power A.G. – along with the other Tubo Sol shareholders – signed an agreement on 30 August 2018 entitled "Arbitration Agreement," in anticipation of bringing an ECT claim against Spain (the "**Shareholders' Arbitration Agreement**").[443] The Shareholders' Arbitration Agreement provided that IWB Renewable Power A.G. would remain a party to that Agreement even after completion of its pending share sale to EBL,[444] and that each of the signatories would have the right to participate in the net proceeds of the ECT claim in proportion to their prior shareholding stake, with distribution of net proceeds to the shareholders taking place 30 days after either EBL or Tubo Sol received any payment from Spain.[445] As discussed further below, the Parties dispute the significance of the Shareholders' Arbitration Agreement, if any, for purposes of the jurisdictional, merits or quantum issues in the case.

267. On 15 October 2018, the Claimants filed their Request for Arbitration.

268. On 12 December 2018, EBL's purchase of shares from IWB Renewable Power A.G. closed,[446] increasing its shareholding in Tubo Sol to 63%.

J. THE FURTHER DISPUTED MEASURE: RDL 17/2019

269. After the Request for Arbitration and Memorial were filed, a further measure was enacted in Spain, which the Claimants contend may properly be included in these proceedings, and the Respondent disputes is admissible, as discussed further in Section V.E below. Before resolving that debate, the Tribunal describes this "**Further Disputed Measure**" as follows.

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[441] C-113, 2018 Share and Loan Purchase Agreement.

[442] T. Andrist Statement, ¶ 34.

[443] C-147, Arbitration Agreement, entered into between EBL, IWB Renewable Power, A.G., Tubo Sol Murcia, S.A., EWZ (Deutschland) GmbH, EKZ Renewables S.A., Berna Energía Natural España S.L.U. and Tubo Sol, concerning these arbitral proceedings, 30 August 2018.

[444] C-147, Shareholders' Arbitration Agreement, Recital III.

[445] C-147, Shareholders' Arbitration Agreement, ¶¶ 5.1, 5.2.

[446] T. Andrist Statement, ¶ 34 (citing C-113, 2018 Share and Loan Purchase Agreement).

270. First, in January 2019, the Government published the "Preliminary Draft Law Establishing, for the Regulatory Period 2020-2025, the Rate of Financial Remuneration for the Activities of Transport and Distribution of Electrical Energy … and Establishing the Reasonable Return for Electrical Energy Production Activities from Renewable Energy Sources …" ("**Preliminary Draft Law**").[447] This referred back to Article 14(4) of the 2013 Electricity Law and Articles 19 and 20 of RD 413/2014, both of which had provided that, at the end of the initial six-year regulatory period under those instruments, the remuneration parameters for standard installations may be reviewed, except for the regulatory useful life and the standard initial investment cost. Article 19 of RD 413/2014 had provided that the Minister would prepare a draft bill with a proposal for the next period, consisting of the "spread" over the average 10-year Government Bond yield that would be needed to achieve a reasonable return rate for standard installations.[448] Pursuant to that principle, the Preliminary Draft Law proposed a reasonable return level of 7.09% for the next six-year regulatory period (2020-2025).[449] At the same time, the Preliminary Draft Law proposed to allow plants, which already were in operation prior to RDL 9/2013, to continue to receive remuneration based on the slightly higher targeted returns in the first regulatory period (7.398%), on an exceptional basis and through the next regulatory period ending in 2031. This was in order to send "a positive message … to international investors aimed at avoiding the initiation of new arbitration proceedings or … putting an end to existing ones," in light of the large number of investment arbitration proceedings that had been triggered by prior revisions of applicable remuneration regimes.[450] This was said to be aimed at "a kind of 'partial crystallisation' of the reasonable rate of return fixed for the first regulatory period … for another 12 years …."[451]

271. It seems that the Preliminary Draft Law was never adopted, due to a general election leading to a dissolved Parliament shortly after its publication.[452] However, Royal Decree Law 17/2019 on urgent measures for the necessary adaptation of remuneration parameters affecting the electricity system and responding to the process of termination of the activity of thermal generation plants

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[447] C-116, Preliminary Draft Law Establishing, for the Regulatory Period 2020-2025, the Rate of Financial Remuneration for the Activities of Transport and Distribution of Electrical Energy and for the Production in the Electrical Systems of Non-Mainland Territories with an Additional Remuneration Regime and Establishing the Reasonable Return for Electrical Energy Production Activities from Renewable Energy Sources, High-Efficiency Cogeneration and Waste with a Specific Remuneration Regime, 9 January 2019.

[448] C-116, Preliminary Draft Law, Recital IV.

[449] C-116, Preliminary Draft Law, Recital IV.

[450] C-116, Preliminary Draft Law, Recital V.

[451] C-116, Preliminary Draft Law, Recital V.

[452] Resp. C-Mem., ¶¶ 735-736.

("**RDL 17/2019**") was adopted later the same year, on 22 November 2019 (following a second general election), reflecting some of the key aspects of the Preliminary Draft Law.[453]

272. The remuneration formula under RDL 17/2019 was somewhat different from that established by RDL 9/2013, in that, following the recommendation of the CNMC, it includes as a factor the weighted average cost of capital ("**WACC**") for the renewable energy sector, rather than solely the 10-year yield in Government bonds.[454] The result was a new, lower reasonable return rate of 7.09% for the 2020-2025 regulatory period. However, similar to the Preliminary Draft Law, this rate would apply to newer installations, whereas installations already in operation prior to RDL 9/2013 "[e]xceptionally" would not have their return rates revised from the prior 7.398% rate for either 2020-2025 or 2026-2031.[455] However, unlike the Preliminary Draft Law, this exception from the new 7.09% rate would not apply to installations over which "an arbitration or judicial procedure based on the modification of the [RD 661/2007 regime] including those arising from the entry into force of [RDL 9/2013] and its implementing regulations, is initiated or has already been initiated," unless those installations elected to terminate their legal challenges and waive any restart of them by 30 September 2020.[456]

273. Subsequently, Spain introduced certain further measures in 2020 which applied only to new investments, and are thus not directly relevant to the PE2 Plant. Nonetheless, the Claimants mention these measures – Royal Decree Law 23/2020 of 23 June 2020 ("**RDL 23/2020**")[457] and Royal

[453] C-187/R-341, Royal Decree Law 17/2019 of 22 November 2019, on urgent measures for the necessary adaptation of remuneration parameters affecting the electricity system and responding to the process of termination of the activity of thermal generation plants (published on 23 November 2019).

[454] *See* Cl. Reply, ¶¶ 509, 543; Resp. Rej., ¶¶ 1140-1142; Cl. PHB, ¶ 65; *see also* C-115/R-345, CNMC Agreement, File INF / DE / 113/18, 30 October 2018: Agreement that Approves the Proposed Methodology for Calculating the Rate of Financial Remuneration of the Activity of Production of Electrical Energy from Sources of Renewable Energy, Cogeneration and Waste for the Second Regulatory Period 2020-2025, 30 October 2018.

[455] C-187/R-341, RDL 17/2009, Final Provision Two, ¶ 1 (quoting from the English translation of C-187).

[456] C-187/R-341, RDL 17/2009, Final Provision Two, ¶ 3 (quoting from the English translation of C-187). As discussed further below, the Claimants focused heavily at the Hearing on this aspect of RDL 17/2019, presenting criticisms that had not been articulated in their prior Reply. The Respondent protested the late introduction of these arguments, and applied to submit after the Hearing a legal opinion to demonstrate that Spain's approach was consistent with general practices in Spanish administrative law. The Claimants in turn objected to the introduction of such an opinion, and the Tribunal denied the request, explaining that it "does not at this juncture accept a need for additional post-hearing evidentiary submissions," but "reserv[ed] the right to come back to the Parties in due course should it have specific questions." *See* Tribunal's Ruling of 25 October 2021. The Tribunal returns to this issue in Section V.E(2) below.

[457] C-248, Royal Decree Law 23/2020 of 23 June 2020, approving measures in the energy sector and other areas for economic reactivation (published on 24 June 2020).

Decree 960/2020 of 3 November 2020 ("**RD 960/2020**")[458] – for the proposition that their issuance was a recognition by Spain that the prior regime did not provide security and certainty. The new measures are said to revert to the principle of a long-term recognition of a fixed price for renewable energy.[459] The Respondent characterizes these 2020 measures as not a concession of anything regarding the prior regime, but rather simply a further effort to balance the same principles of reasonable return and system sustainability that had consistently prompted prior regulatory revisions.[460] The Respondent contends that under the 2020 measures, savings from lower energy production costs are transferred into the system, to be passed on to consumers, while still ensuring that investors are receiving a reasonable return on their investments.[461]

IV. THE PARTIES' REQUESTS FOR RELIEF

274. The Claimants' request for relief, as reformulated on 24 September 2021, is as follows:

> For all of the foregoing reasons, the Claimants respectfully request that the Tribunal:
>
> (a) DISMISS: (i) Spain's Public Nature Objection; (ii) Spain's Intra-EU Objection; and (iii) Spain's Tax Objection;
>
> (b) DECLARE that Spain has breached Article 10(1) of the ECT; and
>
> (c) ORDER that Spain:
>
> (i) provide full restitution to the Claimants by re-establishing the situation which existed prior to Spain's breaches of the ECT, together with compensation for all losses suffered by Tubo Sol PE2 S.L. before restitution; or
>
> (ii) in the alternative, pay Tubo Sol PE2 S.L. compensation for all losses suffered as a result of Spain's breaches of the ECT, including a gross-up to account for the taxation of the compensation in Spain;
>
> and in any event:

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[458] C-249, Royal Decree 960/2020 of 3 November 2020, regulating the economic regime of renewable energies for electric energy production facilities (published on 4 November 2020).

[459] *See, e.g.,* CD-1.1, Cl. Op. Statement, Part 1, Slides 14-15, 91; Cl. PHB, ¶¶ 32-35.

[460] Tr. Day 6, 110:21-25.

[461] RD-6, Resp. Closing Statement, Slides 13-18; Tr. Day 6, 111:7-112:25.

> (iii) pay Tubo Sol PE2 S.L. pre-award interest at a rate of equivalent to Spanish 10-year bond yields compounded monthly; and
>
> (iv) pay Tubo Sol PE2 S.L. post-award interest, at a rate higher than the Spanish 10-year bond yields compounded monthly from the date of the award until full payment thereof; and
>
> (v) pay the Claimants the costs of this arbitration on a full-indemnity basis all expenses that the Claimants have incurred or will incur in respect of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants.[462]

275. The Respondent's request for relief, as expressed in its Post-Hearing Brief dated 29 October 2021, is as follows:

> In view of the arguments put forward in its Memorials and during the Hearing, the Kingdom of Spain respectfully requests the Arbitral Tribunal that:
>
> a) It partially declares its lack of jurisdiction;
>
> b) It rejects all claims on the merits, as the Kingdom of Spain has not breached the ECT;
>
> c) In the event that the Tribunal were to decide that it has jurisdiction to hear the present dispute and to find the Respondent liable for breaching the ECT, that it dismisses all of the Claimants' damages claims, as the Claimants has no right to the compensation requested; and
>
> d) To order the Claimants to pay all costs and expenses derived from this arbitration, including all expenses, arbitrators' fees, and the fees of the legal representatives of the Kingdom of Spain, their experts and advisors, as well as any other cost or expense that has been incurred, all of this

[462] Cl. Email of 24 September 2021 (attaching Revised Prayer for Relief and a comparison of such to the version in the Cl. Reply) (emphasis in original). As explained in Section V.B(2) below, this request for relief was to some extent a reformulation of the version included in the Claimants' prior pleadings, but the Tribunal does not accept the Respondent's objection thereto. In their Cost Submission, the Claimants further specified their request for relief concerning costs as follows: "[T]he Claimants respectfully request that the Tribunal grant an award pursuant to Article 61(2) of the ICSID Convention ordering that the Kingdom of Spain bear the costs of this arbitration, as well as the Claimants' costs for legal representation, in the amount of **€ 4,444,800.50**" and "submit that they should not be liable for any of the Respondent's costs." Cl. Costs, ¶¶ 19-20 (emphasis in original).

including a reasonable rate of interest from the date on which these costs are incurred and the date of their actual payment.[463]

V. JURISDICTION AND ADMISSIBILITY

276. The Parties' positions on jurisdiction and admissibility are summarized in the sections that follow. At the outset, the Tribunal notes that it has considered all of the Parties' arguments in their written and oral submissions, whether or not a particular contention is expressly described. The absence of reference to a contention should not be taken as an indication that the Tribunal did not consider that matter.

A. OVERVIEW

(1) The Claimants' Affirmative Case on Jurisdiction

277. The Claimants submit that (i) they and their investments qualify for protection under the ECT; [464] and (ii) the requirements for ICSID jurisdiction are met.[465]

278. According to the Claimants, each of the requirements of ECT Article 26 is satisfied in the present case.[466] In particular, the Claimants submit that:

a) Spain is a Contracting Party to the ECT.[467]

b) Each of the Claimants qualifies as an "Investor of another Contracting Party" in accordance with ECT Article 1(7)(a)(ii). EBL is a cooperative incorporated under the laws of Switzerland. Tubo Sol is a Spanish company that shall be treated as a national of another Contracting State pursuant to ECT Article 26(7), by virtue of EBL's majority and controlling 51% equity interest in Tubo Sol prior to and at the time the Disputed Measures were adopted,

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[463] Resp. PHB, ¶ 172. In its Cost Submission, the Respondent further specified its request for relief concerning costs as follows: "Respondent respectfully requests that the Tribunal grant an award pursuant to Article 61(2) of the ICSID Convention ordering that the Claimants bear the costs of this arbitration, as well as the Respondent's costs for legal representation, in the amount of **EUR 3,059,630.99**" and "submits that it should not be liable for any of the Claimants' arbitration or representative costs." Resp. Costs, ¶¶ 17-18 (emphasis in original). The Respondent further "reserve[d] the right to seek additional costs arising subsequent to the filing of the Statement of Costs and to make any further submissions concerning Claimants' Statement of Costs." Resp. Costs, ¶ 19.

[464] Cl. Mem., ¶¶ 155-177.

[465] Cl. Mem., ¶¶ 178-189.

[466] Cl. Mem., ¶ 156.

[467] Cl. Mem., ¶ 157.

EBL's substantial financial interest in Tubo Sol, and its substantial influence over the management and operation of the company since 2009.[468]

c) The dispute relates to an "Investment" in Spain, in accordance with ECT Article 1(6).[469] In particular, the Claimants assert that their investments in Spain's CSP sector:

> [I]nclude, without limitation, [Tubo Sol] and the Plant (Article 1(6)(b)); EBL's shareholding and debt interests in [Tubo Sol] (Article 1(6)(b)); claims to money (Article 1(6)(c)); returns (Article 1(6)(e)); and rights conferred by law (including those conferred under the RD 661/2007 regime) (Article 1(6)(f)).[470]

d) Because the Claimants directly and indirectly own and operate a power-generation facility in Spain, their investments are associated with "an Economic Activity in the Energy Sector" in accordance with ECT Articles 1(4) and 1(5).[471] The investment was made well after the entry into force of the ECT for Spain and Switzerland (16 April 1998);[472] and the investment is located in the territory ("Area") of Spain as required by ECT Article 26(1).[473]

e) Spain gave its consent to arbitration pursuant to ECT Article 26(3), and the Claimants gave theirs by filing the Request for Arbitration.[474] Further, the dispute concerns a breach of ECT Article 10 (which is in Part III of the ECT) and as such it meets the subject matter requirement in ECT Article 26(1).[475]

f) The Claimants have complied with the three-month cooling off period prescribed in ECT Article 26(1), and the Claimants have not submitted the dispute to courts or administrative tribunals of Spain.[476] According to the Claimants, they notified Spain of the dispute on 19 February 2018 and requested negotiations; a meeting was held on 16 March 2018 at the

[468] Cl. Mem., ¶¶ 158-166.
[469] Cl. Mem., ¶¶ 167-175.
[470] Cl. Mem., ¶ 170.
[471] Cl. Mem., ¶ 171.
[472] Cl. Mem., ¶ 172.
[473] Cl. Mem., ¶ 173.
[474] Cl. Mem., ¶ 174.
[475] Cl. Mem., ¶ 175.
[476] Cl. Mem., ¶¶ 176-177.

offices of the Secretary of State for Energy; and thereafter, having failed to reach an agreement, a decision was made to initiate this arbitration.[477]

279. The Claimants further contend that all the requirements for ICSID jurisdiction are met.[478] In particular, the Claimants submit that:

a) The dispute is a legal dispute, as it relates to Spain's breaches of obligations under the ECT and international law.[479]

b) The dispute arises directly out of an investment that qualifies as such both for purposes of ECT Article 1(6) and Article 25(1) of the ICSID Convention.[480] In particular, the Claimants argue that in light of the ECT Contracting Parties' agreement on the meaning of the term "Investment" embodied in ECT Article 1(6), it follows that the Claimants' assets and interests qualifying as an "Investment" under that provision also amount to an "investment" for purposes of Article 25(1) of the ICSID Convention.[481]

c) The dispute involves an ICSID Contracting State (Spain), and each of the Claimants is or shall be considered a "national of another Contracting State" pursuant to Article 25(2)(b) of the ICSID Convention.[482] EBL is incorporated in Switzerland, an ICSID Contracting State.[483] Tubo Sol was a juridical person national of Spain on the date of consent to arbitration, and ECT Article 26(7) sets forth the Parties' agreement to treat it as a "national of another Contracting State," by reason of EBL's (Swiss) control at all relevant times, *i.e.*, from the time the dispute arose to the present day.[484] EBL's control is evidenced by its 51% majority ownership of Tubo Sol, its factual control over Tubo Sol's board of directors and its role in the daily management and operation of Tubo Sol.[485]

d) The Parties have consented in writing to ICSID jurisdiction as required by Article 25 of the ICSID Convention. Pursuant to ECT Article 26(5)(a)(i), this requirement is satisfied by

[477] Cl. Mem., ¶ 176.
[478] Cl. Mem., ¶ 179.
[479] Cl. Mem., ¶ 180.
[480] Cl. Mem., ¶¶ 181-182.
[481] Cl. Mem., ¶ 182.
[482] Cl. Mem., ¶¶ 183-188.
[483] Cl. Mem., ¶ 185.
[484] Cl. Mem., ¶¶ 187-188.
[485] Cl. Mem., ¶ 188.

virtue of Spain's consent given in ECT Article 26(3), and the Claimants' consent given in the Request for Arbitration.[486]

(2) The Respondent's Objections on Jurisdiction

280. The Respondent raises three main jurisdictional objections, namely: (i) that the Tribunal lacks jurisdiction *ratione personae* concerning claims for the benefit of the "public investors," that is, IWB (City of Basel), Elektrizitätswerk der Stadt Zürich ("**EWZ**") (City of Zürich), Elektrizitätswerke des Kantons Zürich ("**EKZ**") (Canton of Zurich) and Energy Wasser Bern ("**EWB**") (City of Berne);[487] (ii) that the Tribunal lacks jurisdiction *ratione materiae* and *ratione personae* concerning claims for the benefit of an EU investor, namely Novatec;[488] and (iii) that the Tribunal lacks jurisdiction over the claims under ECT Article 10(1) arising out of the TVPEE.[489] These objections are addressed below at Sections V.B, V.C and V.D.

281. In its Post-Hearing Brief, the Respondent confirmed that its first two objections (regarding benefits potentially accruing to the "public investors" and an EU investor) relate to issues of "standing," in the sense that the Claimants are said to have standing to claim damages only with respect to the 51% of Tubo Sol (and hence the Plant) that EBL "control[s]."[490] However, the Respondent insists that this lack of standing is jurisdictional, as it results from (i) the absence of an investment beyond EBL's 51% shareholding as of the date of the dispute; and (ii) the absence of a qualifying investor in relation to the remaining 49%, as the shareholders of that 49% do not themselves meet the jurisdictional requirements to submit any claim to arbitration.[491]

282. As a general matter, the Respondent contends that the Claimants have the burden to demonstrate that the 49% of the shares of Tubo Sol for which they also claim damages are held by protected foreign investors, a burden which the Claimants have failed to meet. Notwithstanding this burden of proof point, the Respondent goes on to submit that the entities controlling 49% of the shares do not qualify as protected investors (*see* Sections V.B, V.C below).[492]

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[486] Cl. Mem., ¶ 189.
[487] Resp. C-Mem., § III.A; Resp. Rej., § III.A.
[488] Resp. C-Mem., § III.B; Resp. Rej., § III.B.
[489] Resp. C-Mem., § III.C; Resp. Rej., § III.C.
[490] Resp. PHB, ¶ 16.
[491] Resp. PHB, ¶ 16.
[492] Resp. Rej., ¶ 11.

283. In response to questions by the Tribunal, the Respondent stated in its Post-Hearing Brief that (i) its jurisdictional objections are "partial" such that, regardless of their disposition, the Tribunal would have to proceed to the merits; and (ii) the Tribunal would have no need to reach issues of jurisdiction if no liability is found.[493]

284. Aside from its three main jurisdictional objections, the Respondent also raised an objection – framed alternatively as a matter of admissibility or jurisdiction – with regard to the claim arising out of the Further Disputed Measure, *i.e.*, RDL 17/2019.[494] This objection is addressed below at Section V.E.

285. With these introductory remarks in mind, the Tribunal summarizes below the Parties' specific contentions on the various objections.

B. FIRST OBJECTION: LACK OF JURISDICTION OVER CLAIMS BENEFITING "PUBLIC INVESTORS"

(1) The Parties' Positions

a. The Respondent's Position

286. The Respondent argues that, in addition to the Claimants in this arbitration, IWB (City of Basel), EWZ (City of Zürich), EKZ (Canton of Zurich) and EWB (City of Berne) are "public investors" that are "involved" in the PE2 Plant.[495]

287. According to the Respondent, by virtue in particular of the Shareholders' Arbitration Agreement, the investors in the Plant agreed on arrangements for the distribution among them of any compensation arising out of this arbitration, as well as for collaboration in decision making and sharing of information and costs.[496] Under that agreement, any compensation awarded is to be distributed in accordance with Tubo Sol's shareholder structure as of July 2011.[497] As a result, the Respondent argues, IWB, EWZ, EKZ and EWB are acting as "*de facto*" claimants and partial "real beneficiaries" in this arbitration despite being unprotected "public investors,"[498] contrary to the

[493] Resp. PHB, ¶ 15.

[494] Resp. PHB, ¶¶ 7-14.

[495] Resp. C-Mem., ¶¶ 66-67.

[496] Resp. C-Mem., ¶¶ 8, 54, 68-69 (referring to C-113, 2018 Share and Loan Purchase Agreement); Resp. Rej., ¶¶ 121-122 (referring to C-147, Shareholders' Arbitration Agreement).

[497] Resp. Rej., ¶ 122 (referring to C-147, Shareholders' Arbitration Agreement).

[498] Resp. C-Mem., ¶¶ 9, 63-64, 70.

provisions in Article 25 of the ICSID Convention and ECT Article 26.[499] Therefore, the Respondent submits that the Tribunal lacks jurisdiction *ratione personae* for the "part of the claim" that could benefit IWB, EWZ, EKZ and EWB.[500]

288. The Respondent emphasizes that Article 25 of the ICSID Convention requires that a dispute arise between a Contracting State and a national of another Contracting State, and that ICSID jurisdiction does not encompass a dispute between two States.[501] The same is true of ECT Article 26, which covers only disputes between an ECT Contracting Party and an Investor of another ECT Contracting Party.[502] As IWB, EWZ, EKZ and EWB could not directly resort to arbitration under these provisions, the Respondent argues, it is also inappropriate for them to do so "through" the Claimants, thereby circumventing Article 25 of the ICSID Convention and ECT Article 26.[503] According to the Respondent, arbitral doctrine recognizes that it is appropriate to look for "the beneficiary of a given interest."[504]

(i) IWB, EWZ, EKZ and EWB Are *De Facto* Claimants

289. The Respondent argues that IWB, EWZ, EKZ and EWB are "acting as the actual Claimants" in this proceeding, with virtually the same rights and obligations as "the formal Claimants."[505] It contends that, contrary to the Claimants' submissions, the Shareholders' Arbitration Agreement is a relevant factor, and that the situation in this case is not comparable to the distribution of proceeds of an award to shareholders of a company in the form of dividends, for a number of reasons.[506] First, the current shareholders in Tubo Sol do not coincide with those acting as "*de facto*" claimants

[499] Resp. C-Mem., ¶¶ 4, 53.

[500] Resp. C-Mem., ¶¶ 52, 74-76; Resp. Rej., ¶¶ 12, 139.

[501] Resp. C-Mem., ¶¶ 57-58.

[502] Resp. C-Mem., ¶ 59.

[503] Resp. C-Mem., ¶¶ 71, 76. *See also* Resp. Rej., ¶ 83.

[504] Resp. C-Mem., ¶¶ 72-73 (relying on RL-9, *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 (Annulment Proceeding), Decision on Annulment of the Award, 2 November 2015 ("***Occidental* Annulment**"), ¶¶ 259-262, 273-278; RL-96, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion Professor Brigitte Stern, 5 October 2012; RL-86, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 ("***Impregilo***"); RL-97, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim Ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 ("***PSEG***")). In instances where the Parties have introduced the same legal authority multiple times, the Tribunal cites to both legal authority numbers, except when referring to the Parties' submissions citing a legal authority, in which case the Tribunal indicates only the legal authority number cited by the Parties themselves.

[505] Resp. Rej., ¶ 140.

[506] Resp. Rej., § III.A.(1)(1.1.) and ¶ 61.

in this arbitration: in particular, IWB sold its stake to EBL in 2018, but nonetheless under the Shareholders' Arbitration Agreement, IWB would still benefit from an award.[507] Second, the involvement of the "*de facto*" claimants goes beyond that of a mere shareholder, as they have participated in the decision to initiate the arbitral proceeding, share decision making powers and costs, have an obligation to cooperate and provide information and are entitled to share in the results of the award.[508] Third, the Respondent argues, the function of Tubo Sol's participation as a Claimant in addition to EBL can only be to allege damages beyond those that impact EBL, in other words, those allegedly impacting IWB, EWZ, EKZ and EWB (and Novatec, addressed separately at Section V.C below).[509] Finally, the Respondent rejects the Claimants' argument that that the Respondent has held contrary views in other proceedings, considering that to be irrelevant because each proceeding is different.[510]

290. The Respondent suggests that, in the circumstances of this case, a "perfect identity" of interests can be presumed between Tubo Sol and the participants in the Shareholders' Arbitration Agreement. It analogizes this situation to a hypothetical scenario discussed in the *Eskosol* case, involving *seriatim* claims brought by a local company and by the foreign shareholders who wholly owned it.[511]

291. The Respondent further submits that the Claimants have failed to establish that 49% of Tubo Sol is controlled by protected investors.[512] The Respondent notes that it is not disputed (i) that at the time the dispute arose EBL controlled 51% of Tubo Sol, (ii) that in this proceeding the Claimants seek to recover 100% of the alleged damage to Tubo Sol, and (iii) that Tubo Sol *itself* "should have" access to ICSID arbitration by virtue of ECT Article 26(7), "provided that" it is controlled by a qualified foreign investor.[513] However, the Respondent disagrees on the scope of Tubo Sol's

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[507] Resp. Rej., ¶¶ 61-62.

[508] Resp. Rej., ¶ 63.

[509] Resp. Rej., ¶ 65.

[510] Resp. Rej., ¶ 69.

[511] Resp. Rej., ¶¶ 125-127 (quoting the statement in CL-103, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017 ("***Eskosol* 41(5) Decision**"), ¶ 167, that "there may be certain circumstances in which a foreign shareholder and the local company in which it holds shares have such identical interests that it would be abusive to permit arbitration of a given dispute by one after the other already has concluded an arbitration over the same dispute"). The Tribunal notes that the Resp. Rej. erroneously attributes this quote to a different decision in *Eskosol* on the record as RL-132.

[512] Resp. Rej., § III.A.(1)(1.2).

[513] Resp. Rej., ¶ 70. Although Resp. Rej., ¶ 70 states that EBL controlled "49%" of the shares at the time the dispute arose, the Tribunal understands that to be a typographical error in light of other statements made by the Respondent immediately thereafter in that same section. *See, e.g.*, Resp. Rej., ¶ 71 (asserting that "the control accredited by the Claimants is limited to … 51% …").

standing. In the Respondent's view, Tubo Sol's standing is limited to *the extent to which* it is controlled by a foreign investor, and the Claimants have only accredited control over 51% of Tubo Sol by EBL, a Swiss cooperative.[514] The Respondent contends that the Claimants have failed to show that control over the remaining 49% of Tubo Sol is held by an investor within the meaning of Article 25 of the ICSID Convention; indeed, the Respondent has established that said 49% is held by Swiss "public investors" and a German investor (Novatec), who do not qualify as protected investors.[515] It follows, the Respondent argues, that the Tribunal must reject the claim pertaining to 49% of the alleged damage caused, which would result in the benefit of entities "whose identity, control and nature have not been justified" by the Claimants.[516] The Respondent submits that should the Tribunal decide to determine if the claim for the remaining 49% meets the requirements of the ICSID Convention and the ECT, it must then determine the control and nature of such entities through its power to order a Party to produce documents under ICSID Arbitration Rule 34(2)(a).[517]

(ii) IWB, EWZ, EKZ and EWB are "Agents" of the Swiss Confederation

292. While reiterating that the burden of proof falls on the Claimants to establish jurisdiction over 49% of the claim, the Respondent submits that the evidence on record demonstrates that this portion of the claim concerns entities "controlled by the Swiss Confederation" (namely IWB, EWZ, EKZ and EWB) and an intra-EU investor (Novatec).[518]

293. Referring to IWB, EWZ, EKZ and EWB, whom the Respondent characterizes as "*de facto*" claimants, the Respondent submits that their conduct "must be attributed for the purposes of determining the jurisdiction of the Arbitral Tribunal to the Swiss Confederation, as it is conduct attributable to the city of Basel, the city of Zurich, the canton of Zurich and the city of Bern."[519] The Respondent contends that the issue of attribution for purposes of jurisdiction under Article 25 of the ICSID Convention and ECT Article 26 should be analyzed using the customary international law principles on attribution of conduct to States, which are codified in Articles 5 and 8 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**").[520] In particular, the Respondent submits that: (i) "acts of a legal person

[514] Resp. Rej., ¶ 71.
[515] Resp. Rej., ¶¶ 72, 74.
[516] Resp. Rej., ¶ 78.
[517] Resp. Rej., ¶¶ 79-80.
[518] Resp. Rej., ¶ 81. The Respondent's contentions regarding Novatec are summarized at § V.C(1)a below.
[519] Resp. Rej., ¶ 86. *See also* Resp. Rej., ¶ 84.
[520] Resp. Rej., ¶¶ 87-92.

should be considered as acts of a State when the legal person acts in a *governmental*, non-commercial *capacity*"; and (ii) "acts of a legal person should be considered as acts of a State when the legal person performs such acts under the *instructions, direction or control of that State*."[521] According to the Respondent, it is established that the question of attribution of conduct to the State is relevant for jurisdictional purposes.[522]

294. In the Respondent's submission, the burden falls on the Claimants to establish whether IWB, EWZ, EKZ and EWB operate as "commercial investors" or "agents of the Swiss Confederation," as the Claimants have the burden to establish jurisdiction and greater access to the relevant information.[523] Instead, the Claimants have failed to show that these entities are "genuine commercial investors," and argue that their capacity as "public entities" does not prevent them from accessing arbitration.[524] It follows that "the part of the claim" corresponding to these entities' investment in Tubo Sol must be dismissed for lack of evidence.[525] Put another way, according to the Respondent, once it is shown that these entities are *de facto* claimants, it falls on the Claimants to demonstrate that these entities meet the requirements of ICSID jurisdiction, failing which any claims redounding to their benefit must be rejected.[526]

295. Without prejudice to these arguments about burden of proof, the Respondent submits that a number of factors confirm that IWB, EWZ, EKZ and EWB cannot be considered "commercial investors" and that their conduct must be attributed to the Swiss Confederation.[527] The Respondent contends that these entities (i) "operate under the control and direction of different Swiss territorial entities" and (ii) "exercise elements of governmental authority."[528] The Respondent submits in particular that these entities have been described by Tubo Sol as "public companies dedicated to providing public services" for the cities of Basel, Zurich, Bern and the canton of Zurich,[529] and as companies "*owned* by the cities of Basel, Zurich, Bern and the canton of Zurich."[530] Moreover, the Respondent points out, IWB was recognized as a "public-law institution" in the Investment Agreement that, in

[521] Resp. Rej., ¶ 87 (emphasis in original).
[522] Resp. Rej., ¶ 94.
[523] Resp. Rej., ¶ 95.
[524] Resp. Rej., ¶¶ 96-98.
[525] Resp. Rej., ¶ 98.
[526] Resp. Rej., ¶ 100.
[527] Resp. Rej., ¶ 99.
[528] Resp. Rej., § III.A.(2)(2.2), ¶ 101.
[529] Resp. Rej., ¶ 102.
[530] Resp. Rej., ¶ 103 (emphasis in original).

2009, lay the foundation for the eventual purchase of Tubo Sol shares.[531] The Respondent adds that these entities require authorization from the Swiss public authorities to carry out their activities.[532]

296. The Respondent further asserts that these "public investors exercise elements of governmental authority and enjoy prerogatives and advantages" that distinguish their mission from a purely commercial activity.[533] In particular, the Respondent contends that:

- IWB is an "establishment under public law" governed by public (not private) law; at the time of the investment it had no legal personality and was a part of the city of Basel; it is tax-exempt; and while it has subsequently acquired legal personality, it continues to perform public functions, has regulatory power in connection with tariffs, is controlled by the municipal council, and has expropriation and sanction powers.[534]

- EKZ is a public law institution with public capital; it is supervised by the city council, its board is appointed by political bodies, the city council decides on the use of the company's profits, its directors are liable to the State, and it is tax-exempt.[535]

- EWB has sanction powers, exercises public functions, is a public law institution, carries administrative and financial functions delegated by the city of Berne, and it is subject to control by the municipal council.[536]

- EWZ is a "department of the industrial enterprises of the city of Zurich," and its main operations are subject to the popular vote of the city.[537]

297. The Respondent submits that the investments made by these public entities in the Plant were not of an ordinary nature, as they were encouraged by the Swiss diplomatic service, discussed in Parliament and implemented with direct involvement of the Swiss State Secretariat for Energy.[538]

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[531] Resp. Rej., ¶ 104.
[532] Resp. Rej., ¶¶ 106-108.
[533] Resp. Rej., ¶ 109.
[534] Resp. Rej., ¶¶ 109-110.
[535] Resp. Rej., ¶ 111.
[536] Resp. Rej., ¶ 112.
[537] Resp. Rej., ¶ 113.
[538] Resp. Rej., ¶¶ 115-116.

(iii) Tubo Sol May Not Claim on Its Own Behalf Damages in Favor of a Person Not Qualifying as a Foreign Investor[539]

298. The Respondent argues that, contrary to the Claimants' contentions, Tubo Sol may not claim in its own name for 100% of the damages allegedly caused by the Disputed Measures, while only being 51% owned by EBL.[540] The Respondent submits that as a Spanish company, Tubo Sol is entitled to resort to arbitration only to the extent that it is effectively controlled by a "foreign investor" as required by ECT Article 26(7). Therefore, it may not claim damages in favor of an entity that does not qualify as a foreign investor under the ICSID Convention and the ECT.[541] For the Respondent, it would be contrary to international law to allow Tubo Sol to make a claim for compensation exceeding what would correspond to the share of damages of the foreign investor who controls it.[542]

299. According to the Respondent, in alleging that Tubo Sol's separate legal personality allows it to bring a claim in its name for the entirety of the damage it allegedly has suffered, the Claimants miss that the issue here is not whether Tubo Sol is a protected investor, but rather, to what extent it is controlled by a protected investor.[543]

300. Put another way, the Respondent submits that the admissibility of Tubo Sol's claim for "damages caused" to the Swiss and German investors would depend on whether that claim would be admissible had it been submitted by those other investors.[544] That is not the case here, the Respondent says, given the "public" nature of the Swiss investors and the intra-EU status of the German investor.[545]

b. The Claimants' Position

301. In the Claimants' view, the Respondent's objection based on the public nature of IWB, EWZ, EKZ and EWB has no basis. The Claimants contend that the objection can be dismissed outright because these entities are not claimants in this arbitration,[546] but even if they were (*quod non*), Article 25 of

[539] Resp. Rej., ¶ 120.
[540] Resp. Rej., ¶ 118.
[541] Resp. Rej., ¶¶ 120, 131.
[542] Resp. Rej., ¶ 131.
[543] Resp. Rej., ¶ 133.
[544] Resp. Rej., ¶¶ 137-139.
[545] *See* Resp. Rej., ¶¶ 139-140. The Respondent's contentions regarding the intra-EU investor are summarized at § V.C(1)a below.
[546] Cl. Reply, ¶¶ 30, 35.

the ICSID Convention and ECT Article 26 do not limit eligibility for arbitration to privately owned entities.[547]

(i) The Minority Shareholders are Not Claimants and Tubo Sol Has Standing in Its Own Right

302. The Claimants' primary position is that the Tribunal need not consider the standing of Tubo Sol's minority shareholders, as they are not claimants in this arbitration. The Claimants in this case are EBL and Tubo Sol, and the latter has standing to bring a claim in its own right for the full quantum of damages caused to it by the Disputed Measures.[548] Accordingly, the Claimants say, the Tribunal must dismiss the Respondent's objection that Tubo Sol does not have standing to claim for the entirety of the damage suffered by the Plant.[549] (This contention, described further below, also applies with respect to the Respondent's Second Objection, addressed below at Section V.C.)

303. According to the Claimants, it is undisputed not only that EBL, IWB, EWZ, EKZ, EWB and Novatec together are the "ultimate shareholders" of Tubo Sol, but also that under ECT Article 26(7), Tubo Sol is a Claimant in its own right, by virtue of EBL's control.[550] The disagreement relates to the Respondent's contention that Tubo Sol does not have standing to bring a claim for the entirety of the loss it has suffered because part of its claim (the Respondent says) is brought effectively on behalf of shareholders that would have no standing to sue on their own behalf.[551]

304. In the Rejoinder on Jurisdiction, the Claimants noted that the Respondent has raised this issue in several contexts, as relevant not only to jurisdiction but also to the merits and quantum. By contrast, the Claimants stated that "this is a question of jurisdiction," and therefore they would deal with the Respondent's submissions in that context.[552] In their Post-Hearing Brief, however, the Claimants argued that "while framed as a jurisdictional point, Spain's attempt to draw these non-Claimant entities into this dispute is only to: (i) delay the relevant date on which the Tribunal should assess the Claimants' legitimate expectations (merits); and (ii) reduce damages."[553] Accordingly, for the Claimants, "regardless of Spain's position on the date of investment and quantum, it is uncontested

[547] Cl. Reply, ¶ 31.
[548] Cl. Reply, ¶ 35.
[549] Cl. Reply, ¶ 85. *See also* Cl. Rej. Jur., ¶ 14.
[550] Cl. Reply, ¶ 37.
[551] Cl. Reply, ¶ 38.
[552] Cl. Rej. Jur., ¶ 15.
[553] Cl. PHB, ¶ 218.

that the Tribunal has jurisdiction to hear EBL and Tubo Sol's claims."[554] Be that as it may, in the Claimants' view, the Respondent's objection is baseless.[555]

305. First, the Claimants say that Tubo Sol has standing in its own right to bring a claim pursuant to ECT Article 26(7) and Article 25 of the ICSID Convention, by virtue of EBL's foreign (Swiss) control,[556] which is uncontested.[557] Tubo Sol's standing allows it to claim for the full amount of the damage it has suffered, because it "is claiming in its own name and not as a nominee of, or on behalf of, other claimants."[558] Contrary to the Respondent's contentions, Tubo Sol is not a mere "nominal" claimant conveying "*de facto*" claims of its shareholders, but rather, is the entity that has "directly suffered the damage" arising out of the Disputed Measures.[559] Accordingly, the nature or nationality of the Tubo Sol's minority shareholders has no impact on Tubo Sol's standing to bring an ECT claim for the "whole" of the loss it has suffered.[560]

306. For the Claimants, the Respondent confuses questions of standing, merits, and quantum. The Claimants contend that if the Tribunal has jurisdiction to hear Tubo Sol's claims, then Tubo Sol has standing to claim for the entire damage it has suffered, regardless of who its shareholders are, because Tubo Sol is claiming "on its own behalf," not on behalf of its shareholders.[561] It is therefore unnecessary, in the Claimants' view, for the Tribunal to determine whether the minority shareholders, who are not claimants in this arbitration, would qualify as "investors" for purposes of Article 25 of the Convention. Indeed, that inquiry is "outside of the Tribunal's remit."[562]

307. According to the Claimants, the Respondent also confuses how Tubo Sol's standing pursuant to ECT Article 26(7) affects the assessment of damages. In the Claimants' view, "damages caused to a project company and damages caused to its shareholders are distinct from one another," and in

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[554] Cl. PHB, ¶ 219.

[555] Cl. Reply, § II.1.

[556] Cl. Reply, ¶¶ 39(a), 43-44, 48.

[557] Cl. Rej. Jur., ¶ 16.

[558] Cl. Reply, ¶ 45. *See also* Cl. Rej. Jur., ¶¶ 40-41.

[559] Cl. Reply, ¶ 48.

[560] Cl. Reply, ¶ 48. *See also* Cl. Rej. Jur., ¶ 21. Relatedly, the Claimants also contend that (i) because these other shareholders are not the claimants in this arbitration, Spain is incorrect in asserting that on the merits, the Tribunal must examine the expectations as of the date in which all of the shareholders had invested in Tubo Sol (Cl. Rej. Jur., ¶ 17); and (ii) with respect to damages, the amount of damages "should correspond to the harm which the breach has caused to the claimant entity," and as there is no dispute that Tubo Sol has standing to bring its claim, "it is the damage caused to [Tubo Sol] which should be assessed" (Cl. Rej. Jur., ¶ 18).

[561] Cl. Rej. Jur., ¶ 10. *See also* Cl. Rej. Jur., ¶¶ 41, 44.

[562] Cl. Rej. Jur., ¶ 16.

this case, the claim concerns the damages caused to Tubo Sol.[563] The Claimants further contend that the composition of Tubo Sol's share capital is not relevant because in this case there is no "danger of double recovery" for the damage caused to Tubo Sol; "the Claimants are not claiming for damage caused to [Tubo Sol] and damage caused to EBL's shareholding, but only for damage caused to [Tubo Sol]."[564] The Claimants further clarify that Tubo Sol's claim is brought jointly with EBL because "EBL is [Tubo Sol's] controlling shareholder for the purposes of jurisdiction; because, … the companies' interests are aligned …; and because, as EBL was the controlling shareholder when [Tubo Sol] invested in the Plant, its legitimate expectations should be assessed with reference to those of EBL."[565] However, the Claimants argue, this does not detract from Tubo Sol's standing to claim for the entire loss it has suffered.[566]

308. Second, for the Claimants, the Respondent's objection attempts to insert additional jurisdictional requirements that do not exist in either the ICSID Convention or in the ECT.[567] Thus, the Respondent apparently accepts that Tubo Sol meets the requirements of Article 25(2)(b) of the ICSID Convention and ECT Article 26(7) to bring a claim, but then adds a requirement that in so doing, Tubo Sol can claim only for a portion of its damages equivalent to the percentage of its shareholding held by its controlling shareholder (an investor of another Contracting Party under the ECT). The Claimants say that this added requirement (i) leads to "absurd results";[568] (ii) contradicts findings in other cases;[569] and (iii) does not accord with the understanding of a company as a separate and indivisible legal person, in accordance with which the damage to a company is not "equated" with the damages to its shareholders.[570]

309. The Claimants' position is that, under ECT Article 1(7), when a company is the "Investor," this concerns the entirety of the company; therefore, the Respondent's contention that only 51% of Tubo Sol can be an "Investor" is incorrect.[571] Moreover, the Claimants argue, where an investor

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[563] Cl. Rej. Jur., ¶ 19.

[564] Cl. Rej. Jur., ¶ 19 (emphasis in original).

[565] Cl. Rej. Jur., ¶ 54. *See also* Cl. Rej. Jur., ¶ 19.

[566] Cl. Rej. Jur., ¶ 54.

[567] Cl. Rej. Jur., § 2.2.

[568] Cl. Rej. Jur., ¶¶ 23-26.

[569] Cl. Rej. Jur., ¶ 27 (referring to CL-93, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 ("***Masdar***"), ¶¶ 145, 697(a) and CL-98, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019 ("***NextEra***"), ¶¶ 252, 682(i)).

[570] Cl. Rej. Jur., ¶¶ 28-30.

[571] Cl. Rej. Jur., ¶ 31.

has the same nationality as the respondent State (as does Tubo Sol), for purposes of Article 25(2)(b) of the ICSID Convention and ECT Article 26(7), "the test for … standing is that it is an investor which has made an investment in the territory of a Contracting Party to the ECT, and that it was at the time controlled by an investor of another Contracting Party to the ECT on the date on which the dispute was submitted to arbitration."[572] Once that "foreign control" test is satisfied, the investor has standing as if it were a national of another Contracting State, and accordingly "can claim for any and all damage it has suffered," without limitation to the "extent of its control" by the foreign national.[573] Put another way, in the Claimants' view, the proportion of shares held by the controlling entity is only relevant as a factor "to prove the existence of control," along with other potentially relevant factors (such as an ability to influence management and operation).[574] After control is established, the identity of the shareholders becomes irrelevant for jurisdictional purposes, and the Tribunal "is not permitted to take the other shareholders into account."[575]

310. Third, the Claimants argue that the Respondent misreads the case law on which it relies, and wrongly asserts that consistent arbitral case law recognizes that it is appropriate to look at the beneficiary of a given interest for jurisdictional purposes.[576] The Claimants accept that in "limited circumstances, and where the ECT so provides, a claimant's standing to bring a claim can result from its beneficial ownership," as is the case with Tubo Sol, which derives its standing from EBL's foreign control.[577] The Respondent, however, relies on cases that differ from the present case in important respects, namely, (i) they are not brought under the ECT; (ii) "in none of the cases did the claimant concerned have standing to bring the entire claim in its own name" (by contrast with Tubo Sol's standing in its own right); and (iii) "in each of the cases Spain cites, the relevant claimant was trying to claim on behalf of another entity or lacked standing to bring a claim" (by contrast with Tubo Sol who is bringing a claim in its own right for damages it has itself suffered, and not on behalf of others).[578]

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[572] Cl. Rej. Jur., ¶ 32.

[573] Cl. Rej. Jur., ¶¶ 32-33.

[574] Cl. Rej. Jur., ¶ 33. *See also* Cl. Rej. Jur., ¶ 43.

[575] Cl. Rej. Jur., ¶ 34.

[576] Cl. Reply, ¶¶ 39(b), 49.

[577] Cl. Reply, ¶ 50.

[578] Cl. Reply, ¶ 71 (emphasis in original), and ¶¶ 50, 73. *See also* Cl. Reply, ¶¶ 52-58, 72 (referring to RL-9, *Occidental* Annulment, arguing that, in that case the claimant "attempted to claim on behalf of a third party entity, where that third party was not covered by the relevant treaty but beneficially owned 40% of the investment" and that "[i]n contrast to the facts in *Occidental* …, [Tubo Sol] is the direct owner of 100% of the Plant and the amount of damages claimed

311. As for the Respondent's reliance on *Eskosol*, the Claimants submit that (i) the statement in that case that in certain circumstances it may be impermissible for a local company and its foreign shareholder to bring separate claims one after the other is inapposite to the present case, where no such *seriatim* claims are pursued; and (ii) *Eskosol* itself recognized that a shareholder's claim for "reflective loss through an entity in which it holds shares" cannot be equated automatically to that entity's claim for "direct losses." In the Claimant's view, the latter proposition contradicts the premise of the Respondent's objection, *i.e.*, that Tubo Sol's claims are somehow identical to those of its non-claimant shareholders.[579] Other tribunals have reached similar conclusions, the Claimants say.[580]

312. Fourth, the Claimants contend that the Shareholders' Arbitration Agreement is irrelevant to the question of jurisdiction.[581] Once Tubo Sol's standing is established, it can claim for the entire damage it has suffered, regardless of the identity of the shareholders.[582] This is so because Tubo Sol is "claiming, in its own name, for the entirety of the loss which the Respondent's actions have caused to the Plant, of which it is the 100% owner."[583] Therefore, internal corporate agreements concerning the subsequent distribution of any recovery are irrelevant to the determination of Tubo Sol's standing, or the determination of its entitlement to damages.[584] That said, the Claimants emphasize that they have never hidden from either the Tribunal or the Respondent the purported "informal claimants," having referred to them in the Request for Arbitration and in the Memorial.[585]

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corresponds to the financial impact of the Disputed Measures on '[the Tubo Sol] project company.'"); Cl. Reply, ¶¶ 59-62, 72 (referring to RL-86, *Impregilo*, arguing that in that case "where the relevant investment vehicle did not itself have standing to bring a claim, Impregilo was not permitted to claim damages on behalf of other investors" and that "[i]n contrast to the facts in *Impregilo*, [Tubo Sol] has a separate legal personality of its own and standing to bring this claim in its own name for the entirety of the damage that it has suffered."); Cl. Reply, ¶¶ 50, 64-70, 74 (referring to RL-97, *PSEG*, arguing that, in that case "the investor which lacked standing had not made a protected investment pursuant to the relevant investment treaty, because its only right was an option to invest," and that "[i]n contrast to *PSEG*, the minority shareholders in [Tubo Sol] are not claimants in this proceeding, nor are they claiming for any damages caused directly to them (i.e. for any expenses they made concerning the investment). [Tubo Sol] is claiming in its own name and for the entirety of the damage that only it has suffered."). *See also* Cl. Rej. Jur., ¶¶ 44-49.

[579] Cl. Rej. Jur., ¶¶ 50-52 (referring to CL-103, *Eskosol* 41(5) Decision, ¶¶ 166-167).

[580] Cl. Rej. Jur., ¶ 53.

[581] Cl. Reply, ¶ 39(c); Cl. Rej. Jur., ¶¶ 59, 66.

[582] Cl. Rej. Jur. ¶ 60.

[583] Cl. Reply, ¶ 76.

[584] Cl. Reply, ¶ 76.

[585] Cl. Rej. Jur., ¶ 7 (citing Cl. Mem., ¶ 115; Cl. Reply, ¶ 37; C-103, Tubo Sol Presentation "Tubo Sol Puerto Errado 2 Thermosolar Plant, What is it, who are we and where are we?", 16 October 2013; C-110, EBL Presentation "Solar Thermal Electricity: Changes in Spanish Tariff System," 22 October 2015); Cl. Rej. Jur., ¶ 69 (citing also Request for Arbitration, ¶ 57 and C-19, Shareholders' Agreement between Tubo Sol Murcia, S.A., EWZ (Deutschland) GmbH,

313. The Claimants accept that the Shareholders' Arbitration Agreement provides that any recovery in these proceedings will be shared among Tubo Sol's shareholders in proportion to their shareholding.[586] They contend, however, that this is "no different to any other arbitration claim in which a company with shareholders is the recipient of an arbitral award and those shareholders have the right (whether directly or by way of distribution of dividends) to share in those proceeds."[587] The Claimants submit that the question of Tubo Sol's standing to bring a claim is separate from the issue of who stands to benefit from a potential damages award; as in the majority of claims, it is the shareholders who ultimately stand to benefit, but this does not affect the Tribunal's jurisdiction.[588] That the non-claimant shareholders of Tubo Sol will participate in the funding and share the proceeds of the arbitration does not make them Claimants.[589] The Respondent's contentions that the other shareholders are equal participants in the arbitration, and participate in relevant decision making, rest on documents that are "insufficient and do[] not mean that the other entities are claimants."[590] As for the Respondent's additional suggestion that the Shareholders' Arbitration Agreement raises potential concerns about conflicts akin to those triggered by third party funding, the Claimants simply observe that the identity of Tubo Sol's shareholders has always been disclosed, and the enquiry ends there.[591]

314. Fifth, according to the Claimants, the Respondent has taken the view in other cases that only the direct owner of a renewable energy installation can claim damages arising out of the measures that are said to have harmed those installations.[592] While the Respondent maintains that the other cases present different issues, it has failed to explain what the purported differences are, the Claimants contend.[593]

EKZ Renewables S.A., Berna Energia Natural España S.L.U., EBL, IWB Industrielle Werke Basel, and Tubo Sol, 27 June 2011).

[586] Cl. Reply, ¶ 78.

[587] Cl. Reply, ¶ 79.

[588] Cl. Rej. Jur., ¶ 20.

[589] Cl. Rej. Jur., ¶ 49.

[590] Cl. Rej. Jur., ¶ 61.

[591] Cl. Rej. Jur., ¶¶ 63-64, 69.

[592] Cl. Reply, ¶¶ 39(d), 80 (referring to CL-91, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A R.L v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 ("***Eiser***"), ¶¶ 232-249; CL-105, *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶¶ 91-127; CL-106, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019 ("***Cube* Decision**"), ¶¶ 171, 176, 179; CL-99, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019 ("***9REN***"), ¶ 183).

[593] Cl. Rej. Jur., ¶ 55.

315. Finally, the Claimants dispute the Respondent's assertion that having shown that Tubo Sol's "other" shareholders (aside from EBL) are *de facto* claimants, it falls on the Claimants to prove the standing of those other shareholders to bring ECT claims.[594] The Claimants submit that they have demonstrated that Tubo Sol has standing to bring its own claim, and that is the end of the matter.[595]

(ii) The Public Nature Objection

316. The Claimants contend that the points described above are sufficient to dismiss the Respondent's First Objection. However, they address *ad cautelam* the Respondent's contentions relating to the public nature of IWB, EWZ, EKZ and EWB, proceeding for that purpose as if those entities were claimants in this arbitration (*quod non*).[596] The Claimants submit that the Respondent's objection must also fail on this basis.[597]

317. First, the Claimants contend that Article 25 of the ICSID Convention makes no distinction between investors that are private entities and those that are State-owned entities.[598] Relying on statements by Mr. Broches, the Claimants argue that "for the purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function."[599] Moreover, the Claimants submit, arbitral jurisprudence is to the same effect, and contradicts the Respondent's argument that only "private" investors can act as claimants in an ICSID arbitration.[600]

318. For the Claimants, the test is therefore "whether or not the other Swiss shareholders were acting with governmental authority."[601] In the present case, however, the Respondent has not provided any evidence to suggest that IWB, EWZ, EKZ and EWB "were acting as agents for the Swiss government or otherwise discharged an essentially governmental function" in connection with their

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[594] Cl. Rej. Jur., ¶ 37.

[595] Cl. Rej. Jur., ¶ 37.

[596] Cl. Reply, App. 6, ¶ 2. *See also* Cl. Rej. Jur., ¶¶ 11, 73-74.

[597] Cl. Reply, App. 6, ¶¶ 99-100. *See also* Cl. Rej. Jur., ¶ 11.

[598] Cl. Reply, App. 6, ¶ 5.

[599] Cl. Reply, App. 6, ¶ 6 (quoting CL-157, C. Schreuer, *The ICSID Convention: A Commentary*, CUP 2nd ed. 2009, p. 161, ¶ 271).

[600] Cl. Reply, App. 6, ¶¶ 7-8 (referring to RL-99, *Československá Obchodní Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶¶ 16-17, 27 and CL-179, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶¶ 31-47).

[601] Cl. Rej. Jur., ¶ 11.

investment in the Plant.[602] The Claimants dispute the Respondent's contention that the standing of these entities is a matter for the Claimants to establish, observing that, as the Party objecting to jurisdiction, it falls on the Respondent to make its case for lack of jurisdiction.[603]

319. Second, according to the Claimants, the Respondent's contention that the Swiss shareholders' actions are attributable to the Swiss State pursuant to Articles 5 and 8 of the ILC Articles is an argument raised for the first time in the Rejoinder, that in any event fails.[604] As an initial matter, the Claimants question the Respondent's reliance on the ILC Articles, arguing that (i) they deal only with issues of a State's responsibility for challenged conduct, and are not relevant to matters of standing; and (ii) the contention that the ILC Articles are relevant to jurisdiction because ECT Article 26(6) includes principles of customary international law as part of the applicable law fails, because ECT Article 26(6) "does not determine questions of jurisdiction."[605]

320. In any event, the Claimants argue that "[i]n fact, the other Swiss shareholders' investments in the Plant were purely commercial transactions, which therefore cannot be attributed to the State of Switzerland."[606] Acts which consist of "purely commercial activity" cannot be attributed to a State, as the commentary to the ILC Articles and ICSID case law confirm.[607] The Claimants add that, contrary to the Respondent's submissions, it is for the Respondent to demonstrate that "these entities are controlled by the State and are acting in the exercise of governmental functions,"[608] which the Respondent has not done.[609] Relying on *Stadtwerke*, the Claimants submit that attribution to the Swiss State cannot be established "purely on the basis of [the Swiss shareholders] being controlled by various Swiss cities and cantons,"[610] as the "investment itself would have to involve governmental activity."[611]

321. The Claimants remark that they "do not contest that the Swiss non-claimant entities may carry out governmental functions such as statutory tasks in their respective Swiss cantons and cities," but

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[602] Cl. Reply, App. 6, ¶ 8. *See also* Cl. Rej. Jur., ¶¶ 11, 80.

[603] Cl. Rej. Jur., ¶ 79.

[604] Cl. Rej. Jur., ¶¶ 76-78.

[605] Cl. Rej. Jur., ¶ 78.

[606] Cl. Rej. Jur., ¶ 11. *See also* Cl. Rej. Jur., ¶¶ 78, 88.

[607] Cl. Rej. Jur., ¶¶ 85-86.

[608] Cl. Rej. Jur., ¶ 81 (emphasis in original).

[609] Cl. Rej. Jur., ¶¶ 82, 84.

[610] Cl. Rej. Jur., ¶¶ 82-83 (relying on CL-180, *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 ("***Stadtwerke***"), ¶¶ 133-134).

[611] Cl. Rej. Jur., ¶ 84.

submit that "the activity at issue in this arbitration" is a "purely profit-making investment in a foreign power plant" and not an "exercise of governmental authority."[612] Moreover, for the Claimants, the Respondent's efforts to demonstrate that the Swiss investors are entities "controlled by the State" are to no avail, because for purposes of attribution under the ILC Articles the test remains whether there was an "exercise of governmental authority."[613] Nor is the involvement of the Swiss ambassador and the Swiss Minister for Energy relevant to establish that the investment was made in an exercise of "government authority," as governments often get involved when large private companies incorporated in their countries invest in other States.[614]

322. Third, the Claimants reject the Respondent's contention that the reference to "Investor" in ECT Article 26 concerns only private entities, because ECT Articles 1(7) and 26 require only that companies "be organised in accordance with the [applicable] laws of the … Contracting State in order to qualify as an 'Investor'."[615] According to the Claimants, this conclusion is confirmed by arbitral jurisprudence in other cases against Spain, which also recognize that the ECT makes no clear distinction between private and State-owned companies, and reject the view that a claimant must be equated to a State by virtue of its ownership structure.[616]

(2) The Tribunal's Analysis

323. It is undisputed that the Claimants each have jurisdiction to pursue ECT claims, and to seek damages at least to a certain extent. The Respondent does not challenge EBL's status as a cooperative incorporated under the laws of Switzerland, nor that as such, EBL is qualified as an "Investor of another Contracting Party" under ECT Article 1(7)(a)(ii), who may bring ICSID proceedings against Spain under ECT Article 26. Nor does the Respondent dispute that at all relevant dates, EBL held a controlling interest in Tubo Sol, with the effect that Tubo Sol is qualified to be treated as a "national of another Contracting State" under ECT Article 26(7) and Article 25(2)(b) of the ICSID Convention, and thus may pursue an ECT claim in its own name. Article 26(7) provides as follows:

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[612] Cl. Rej. Jur., ¶ 87.

[613] Cl. Rej. Jur., ¶ 89.

[614] Cl. Rej. Jur., ¶ 90.

[615] Cl. Reply, App. 6, ¶ 9.

[616] Cl. Reply, App. 6, ¶¶ 9-12 (referring to CL-90, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016 ("***Charanne***"), ¶ 414; CL-93, *Masdar*, ¶¶ 145, 166, 170-172; CL-180, *Stadtwerke*, ¶ 134; CL-178, *Landesbank Baden-Württemberg et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "intra-EU" Jurisdictional Objection, 25 February 2019, ¶¶ 97-98).

> An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a 'national of another Contracting State' and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a 'national of another State.'[617]

324. As the Respondent thus concedes, "the Parties agree that [Tubo Sol] should have access to the [ICSID] international arbitration mechanism … provided that it is controlled by a foreign investor."[618] Stated otherwise by the Respondent, Tubo Sol "has the right to use this forum …."[619] The Respondent also states plainly that at least some of the Claimants' claims "will have to proceed to a merits analysis no matter what."[620]

325. In these circumstances, the Tribunal does not see the Respondent's First Objection as presenting a true jurisdictional issue. There are two (and only two) Claimants invoking the Tribunal's jurisdiction, and each of these satisfies the stated requirements to serve as a claimant in an ECT case proceeding under the ICSID Convention. The Claimants' standing to serve as such is not affected by whether *other* companies that hold minority stakes in Tubo Sol could have asserted ECT claims in their own names. The minority shareholders have not sought to do so.

326. Rather, the objection properly is one that concerns *entitlement to relief,* assuming *arguendo* that a basis for liability can be demonstrated. The Claimants have asserted a claim for 100% of the loss that Tubo Sol allegedly suffered on account of the Disputed Measures; the Respondent says they can pursue a claim only for that portion of Tubo Sol's loss which corresponds to EBL's ownership stake in Tubo Sol. The Respondent bases its proposition on two points: (i) that the shareholders in Tubo Sol other than EBL allegedly would not qualify on their own for ECT protection, and (ii) that Tubo Sol's shareholders (and a former shareholder that sold its interest to EBL after most of the Disputed Measures) have agreed to have Tubo Sol promptly distribute any award proceeds to them *pro rata*. The Respondent confirms that its core contention thus relates to the Claimants' entitlement to damages: "that the arbitral tribunal should reject the claim in respect of 49% of the

[617] CL-1/RL-20, ECT, Article 26(7).

[618] Resp. Rej., ¶ 70 (emphasis omitted).

[619] Resp. Rej., ¶ 120.

[620] Resp. PHB, ¶ 15.

alleged damage caused to the solar thermal plant," since recovery of that 49% would "result in the benefit of entities" other than EBL.[621]

327. As a threshold matter, the Claimants' original framing of their Request for Relief arguably fed confusion as to which Claimant was seeking payment of a damages award, and for whose injury. In their Memorial, the Claimants sought an Award of "full compensation to *the Claimants* for all losses suffered *by them*."[622] In their Reply, the Claimants similarly sought an award to "the Claimants" of "compensation for all losses suffered."[623] The use of the plural "Claimants," and the seeming reference to compensation for "losses" they had suffered collectively, prompted discussion about the different nature of the two Claimants' investments, and accordingly of their alleged harm. To wit: Tubo Sol's investment was in the PE2 Plant, while EBL's investment was in Tubo Sol shares. If Tubo Sol was asserting a claim for harm that it incurred *directly*, through Spain's reduction in feed-in tariffs for energy that the Plant produced, could EBL simultaneously assert a damages claim based on harm it incurred *indirectly*, through diminution in the value of its Tubo Sol shares, *i.e.*, a reflective loss?

328. The Claimants clarified in their Rejoinder on Jurisdiction and at the Hearing that there was no "danger of double recovery," because "it is the damages caused to [Tubo Sol] that are being claimed," and "the Claimants are not claiming for damage caused … to EBL's shareholding."[624] The Tribunal noted at the Hearing, however, that this proposition was not apparent on the face of the Request for Relief the Claimants had included in their Memorial and Reply, and invited them to make their position clearer in an amended version.[625] The Claimants subsequently did so, submitting on 24 September 2021, a "Revised Prayer for Relief," which now specified that any

[621] Resp. Rej., ¶ 78; *see also* Tr. Day 1, 157:6-12 (arguing that "the Claimants … should never be awarded the damages to be attributed to these [other] entities").

[622] Cl. Mem., ¶ 373(b) (emphasis added).

[623] Cl. Reply, ¶ 766(c)(ii).

[624] Cl. Rej. Jur., ¶ 19; *see also* Tr. Day 1, 10:19-11:3 ("Tubo Sol is bringing this claim in its own right, and it's asking for compensation for the entirety of the damages that it has suffered as a result of the disputed measures. … We are not seeking compensation of the harm suffered by Tubo Sol's shareholders.").

[625] Tr. Day 5, 48:20-50:6 ("[W]e will ask you in due course to clarify … what the precise framing is of the request for relief," as from the written submission it was "not clear if the request is that any monetary award be awarded to the Claimants plural, essentially jointly, or if the request … is that the award be only in favour of the operating entity. One way or the other, the Tribunal would wish clarity as to exactly what is being requested to award to whom."); *see also* Tr. Day 6, 206:1-17 (reminding Claimants of this request, and emphasizing that this was not to be "a wholesale reinvention of the claim," but simply a clarification of "what they presently are seeking," subject to discussion by both Parties in the Post-Hearing Briefs).

damages awarded should be paid to Tubo Sol (*i.e.*, not to EBL).[626] While the Respondent thereafter objected to this revision and the Tribunal took the matter under advisement,[627] the Tribunal now confirms that it does not view the Claimants' revision as improper. The Claimants did not thereby introduce a new theory of entitlement to relief, but rather conformed their request to the clarifications previously offered, and thereby eliminated any uncertainty as to what relief was being sought and by whom.

329. With the Claimants' Request for Relief thus clarified, the Respondent's First Objection really concerns the extent of a *local entity's right to recovery*, when its jurisdiction derives from its being controlled by a qualified foreign investor, but that foreign investor does not own all of its shares. The question is whether such an entity may claim for *all* the harm it allegedly incurred – as opposed to only a proportion of harm, corresponding to the percentage stake of the qualified foreign investor – in circumstances where any recovery it obtains will be shared promptly with others who allegedly could not have claimed for relief on their own.

330. The starting point for analysis is the ECT. As discussed above, ECT Article 26(7) establishes that a local entity will be treated *as if* it were a foreign national, and as such is qualified to be an "Investor" for purposes of submitting an ECT claim, *if* it is "controlled by Investors of another Contracting Party" on the applicable dates. Neither this provision, nor anything else in the ECT, states that the local entity's qualification to bring claims is nonetheless restricted, *only to the extent of* the shareholding held by the qualified foreign investor. That type of restriction could have been imposed by the Treaty, but it was not.

331. The same is true of Article 25(2)(b) of the ICSID Convention, which defines a "National of another Contracting State" as, *inter alia*, "any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the *parties have agreed* should be treated as a national of another Contracting State for the purposes of this Convention" (emphasis added). The Article 25(2)(b) requirement of an agreement between the parties to the dispute is satisfied by the investor's acceptance of the offer of arbitration contained in the ECT, including the terms of ECT Article 26(7) discussed above. The effect of this is that a local entity with qualifying foreign control is henceforth treated as a "National of another Contracting State" for *all purposes* of the ICSID Convention, including consent to arbitration under Article 25(1).

[626] *See* Cl. Email of 24 September 2021 (attaching Revised Prayer for Relief and a comparison of such to the version in the Cl. Reply).

[627] *See* Resp. Letter of 28 September 2021; Cl. Letter of 5 October 2021; Tribunal's Ruling of 25 October 2021.

Again, nothing in the ICSID Convention introduces a caveat or restriction, suggesting that the local entity is only qualified to claim a *proportion of its losses* corresponding to the shareholding of its controlling foreign owner.

332. The Tribunal acknowledges the Respondent's argument that without such restrictions, other shareholders in a local entity are likely to benefit *indirectly* from any damages the local entity recovers through arbitration. This potentially includes shareholders who would not have been entitled to assert a treaty claim on their own, for example because they are nationals of the respondent State or of third countries. That is a consequence, however, that the Contracting Parties to the ECT and the ICSID Convention could have foreseen, and which they could have addressed in the treaty text had they wished to do so. The role of a tribunal is to determine what the Contracting Parties to a treaty provided, *not* to determine how best to address policy concerns that the Contracting Parties could have addressed through alternate drafting choices but did not. As prior tribunals (presided by the same arbitrator as this case) have noted on other occasions:

> States are free to adopt whatever treaty text they prefer, including text that is likely to address common situations as well as text addressing circumstances that are unlikely to arise. States are also free to mutually amend prior treaties, if they conclude that the text to which they had agreed – as interpreted through a VCLT analysis – is proving ill-suited to their common objectives. Alternatively, States may seek to issue joint interpretations with prospective effect, to clarify that they had actually intended a meaning beyond what the ordinary meaning of the treaty text might suggest.
>
> However, absent State invocation of such tools to clarify on a mutual basis their intentions for future cases, an arbitral tribunal must proceed on the basis of a VCLT analysis of the *existing* text to which they have agreed. It is not within a tribunal's remit to override the drafting choices evident in a particular treaty, in order to substitute a different test that does not flow from the ordinary meaning of that text in the context of surrounding provisions. Otherwise stated, the task of a tribunal is not to make policy choices about the preferable design of an investment arbitration system, but rather to respect and enforce the choices already made by the Contracting Parties, to the extent these can be divined through the interpretative tools that the VCLT provides.[628]

[628] CL-240, *Daniel W. Kappes et al. v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020 ("***Kappes***"), ¶ 158 (quoting *Nissan Motor Co. Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019 ("***Nissan***"), ¶¶ 216-217).

333. The Tribunal's interpretation of the existing ECT and ICSID Convention text is not novel. Other tribunals have found that local entities have standing to claim for 100% of their losses, even in circumstances where some of their shareholders could not have initiated arbitration on their own.

334. For example, in *Eskosol*, the liquidator of an Italian company brought an ECT claim against Italy, basing its jurisdiction on the Belgian nationality of the company's majority shareholder, Blusun S.A. An unusual feature of the case was that Blusun S.A. already had brought (and lost) an ECT claim on its own behalf, without joining Eskosol as a party to the proceedings, and indeed even objecting to the liquidator's request that Eskosol be permitted to join the *Blusun* case, in order that the interests of the whole project company could be represented (including indirectly the interests of its minority shareholders and creditors).[629] After Eskosol accordingly initiated its *own* ECT case, Italy sought to dismiss it, first as "manifestly without legal merit" under ICSID Arbitration Rule 41(5),[630] and thereafter as a matter of admissibility, invoking the doctrines of *res judicata* and abuse of rights. In dismissing these objections, the *Eskosol* tribunal first observed as follows, regarding the ECT's provisions on investor standing:

> The ECT authorizes a variety of entities to proceed as qualified 'Investor[s]' under its terms. This includes *foreign* investors like Blusun, bringing suit relating to investments that they 'own[] or control[] directly or indirectly,' including 'a company or business enterprise, or shares, stock or other forms of equity participation in a company or business enterprise.' But it also includes *local companies* like Eskosol, which are expressly permitted to bring claims in their own name provided that they meet the foreign control requirements of Article 26(7). Italy itself admits that in principle, both Blusun and Eskosol could be legitimate investors under the ECT. A shareholder's claim for its reflective loss through an entity in which it holds shares cannot be equated automatically to that entity's claim for its direct losses.[631]

335. Having established the proposition that the local company had standing to sue in its own name, the *Eskosol* tribunal also found that "[t]he fact that the minority shareholders in Eskosol are Italian nationals, who would not have been qualified to pursue a proceeding in their own names, does not affect the analysis." That was because, "[w]here an international treaty authorizes a claim to be brought by a local company, that company speaks for itself, and not as a vehicle only for the

[629] CL-211/RL-157, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020 ("***Eskosol* Award**"), ¶ 265.

[630] CL-103, *Eskosol* 41(5) Decision, ¶ 4.

[631] CL-103, *Eskosol* 41(5) Decision, ¶ 166 (citing ECT Articles 1(6)(b), 26(1) and 26(7)) (emphasis in original).

interests of whichever shareholders might have sued on their own behalf on the basis of their qualifying nationality."[632]

336. Of particular relevance to the issue in this case, the *Eskosol* tribunal then explained that under the ECT framework, "the local company may seek redress for 100% of the losses it allegedly suffered from the challenged State measures, and not simply for some prorated portion of those losses reflecting the percentage of its shares that are owned by qualifying foreign nationals."[633] This was true irrespective of how any proceeds from a successful claim ultimately might be distributed to shareholders of various nationalities:

> If the company is successful in proving both liability and damages, the end result may well be some eventual indirect benefit to its shareholders (including both the qualified foreign shareholders and other shareholders of non-qualifying nationalities), but that does not follow automatically as a matter of economic analysis, since – depending on the company's circumstances – there may be others (such as creditors) who hold priority claims ahead of any shareholder distribution. In any event, the ultimate distribution of any recovery by a local company has no impact on the company's right under the ECT to bring a claim on its own behalf for the full extent of its losses, even if some of its shareholders may be nationals of the host State or of third countries who could not have brought ECT claims on their own behalves.[634]

337. The Respondent has not cited any cases reaching a contrary finding, *i.e.*, that a local entity whose assets are harmed by adverse State action may recover only damages that are pro-rated to the extent that the entity's shares are owned by foreign nationals who independently would qualify to bring treaty claims. Instead, the Respondent's authorities generally involve inapposite situations, such as (i) where the claimant owned only 60% of an expropriated investment, yet tried to recover 100% of the damages on the basis that it acted as "nominee" for the "beneficial owner and controller of the remaining 40% interest"[635] (*Occidental*), or (ii) where one partner to a joint venture sued in its own name, in connection with a contract by the joint venture, but sought to recover the joint

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[632] CL-211/RL-157, *Eskosol* Award, ¶ 266.

[633] CL-211/RL-157, *Eskosol* Award, ¶ 266.

[634] CL-211/RL-157, *Eskosol* Award, ¶ 266. The *Eskosol* tribunal accepted the "awkwardness" that if Eskosol recovered sufficiently to allow distribution to shareholders after resolving priority debt obligations, Blusun itself could benefit indirectly from Eskosol's recovery, despite previously failing in its direct claim against Italy. It deemed that anomaly due to the "odd circumstances" of a majority shareholder not having aligned interests with the company in which it held shares, but "not a reason in principle to strip a current litigant of a right to arbitration that the ECT expressly grants it, to pursue claims on its own behalf." CL-211/RL-157, *Eskosol* Award, ¶ 267 (emphasis omitted).

[635] RL-9, *Occidental* Annulment, ¶ 258.

venture's full damages (*Impregilo*).[636] In those situations, tribunals rejected the claimants' efforts to recover damages beyond the extent of their own ownership interests. In *Occidental*, the ultimate finding was that "international law is uncontroversial: … [it] grants standing and relief to the owner of the beneficial interest – not to the nominee,"[637] and thus the claimant could sue only for its own 60% interest, not as nominee on behalf of a third party not protected by the relevant treaty.[638] In *Impregilo*, the tribunal found that the claimant could not act "in a representative capacity," to "advance claims in these proceedings on behalf of the other participants in" the joint venture; "[t]he fact that Impregilo may be empowered to advance claims on behalf of its partners is an internal contractual matter between the participants of the Joint Venture," but it "cannot, of itself, impact upon the scope of Pakistan's consent as expressed in the BIT."[639]

338. Such situations are not analogous to the one here. Tubo Sol is a real company, owning 100% of the Plant, and not a mere nominee or trustee acting for beneficiaries. The fact that it has shareholders of its own does not change its status as an independent legal entity with its own investment to protect. Because Tubo Sol owned the Plant itself, it was the entity that allegedly sustained losses in consequence of the Disputed Measures. In seeking to recover for such losses, as authorized by the ECT, Tubo Sol is acting for itself. There has been no demonstration that Tubo Sol is a sham entity, whose independent status and authority to sue on its own behalf should be disregarded on that basis.

339. Indeed, the only real basis the Respondent invokes for such an exception is the Shareholders' Arbitration Agreement. However, the Tribunal does not see the arrangements established in that Agreement as sufficient to disregard Tubo Sol's independent standing under the ECT. In the ordinary course of business, shareholders have it within their power to direct companies to retain net income and reinvest it in operations, or alternatively to distribute it to shareholders. The fact that Tubo Sol's shareholders have agreed to the latter arrangement, in the contingent event of an arbitral award in Tubo Sol's favor, does not render Tubo Sol a sham. The award proceeds still would be paid to Tubo Sol in the first instance and still would be subject to taxation to the same extent as any other Tubo Sol income (a proposition that the Claimants do not dispute).[640] What

[636] RL-86, *Impregilo*.

[637] RL-9, *Occidental* Annulment, ¶ 259.

[638] RL-9, *Occidental* Annulment, ¶¶ 262, 273.

[639] RL-86, *Impregilo*, ¶¶ 144, 146, 151, 153.

[640] *See* Tr. Day 6, 21:22-24 (The Claimants stating in their closing argument that "the fact that [award proceeds] may stay on [Tubo Sol's] accounts for five minutes/an hour/ten months doesn't change that it will be taxed on those"). The

Tubo Sol does thereafter with the net proceeds, as a result either of its shareholders' advance contractual agreements or alternative agreements to be reached later, is not the Tribunal's concern. In particular, the agreement to distribute eventual award proceeds to Tubo Sol's shareholders, and to a former shareholder who sold its stake subject to such agreement, does not make those contingent recipients into "*de facto* claimants" for whom ECT standing must be independently demonstrated before Tubo Sol may seek the full measure of its own direct losses. Nor are those recipients transformed into "*de facto* claimants" by virtue of their contractual agreement to support the actual Claimants, financially or in terms of decision making, with the pursuit of ECT claims.

340. For these reasons, the Tribunal denies the Respondent's First Objection. Tubo Sol qualifies as a Claimant under the ECT, by virtue of EBL's undisputed controlling interest in it. As such, Tubo Sol has standing to claim for the full measure of its alleged losses, irrespective of whatever contractual agreements its shareholders may have concluded regarding the distribution of any recovery. For this reason, there is no need for the Tribunal to reach the subsidiary question of whether either the ECT or the ICSID Convention limit jurisdiction only to privately owned entities, and accordingly whether Tubo Sol's minority shareholders (whom the Respondent classifies as "public investors") would have had standing to assert claims on their own. None of those shareholders are asserting ECT claims, so the issue does not properly arise.

C. SECOND OBJECTION: LACK OF JURISDICTION OVER CLAIMS BENEFITING NOVATEC

(1) The Parties' Positions

a. The Respondent's Position

341. The Respondent contends that the Tribunal lacks jurisdiction to hear the part of the claim that would benefit Novatec, a German investor.[641] According to the Respondent, Novatec has an interest in the Plant and in this arbitration, and it is one of the beneficiaries under the Shareholders' Arbitration Agreement.[642] Given that under the ECT and EU law, an EU investor may not submit to arbitration

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only dispute is whether any monetary award to Tubo Sol should be subject upfront to a so-called "tax gross-up," a debate that arises in connection with *quantum*, not jurisdiction or standing.

[641] Resp. C-Mem., ¶¶ 77, 219.

[642] Resp. C-Mem., ¶¶ 79, 215-216; Resp. Rej., ¶¶ 121-122.

a claim against an EU Member State,[643] it is inappropriate for an intra-EU investor to resort to arbitration indirectly, the Respondent says, through the claim filed by the Claimants.[644]

342. According to the Respondent, this conclusion follows from an interpretation of ECT Article 26(4), pursuant to ECT Article 26(6).[645] The Respondent contends that ECT Article 26(1) requires that the dispute arise between an ECT "Contracting Party" and an "Investor of another Contracting Party," which "implies" the exclusion of intra-EU disputes.[646] Moreover, this reading of the ECT is also supported by the decision of the Court of Justice of the European Union ("**CJEU**") in its Judgment in Case C-284/16 Republic of Slovakia/Achmea BV ("***Achmea* Judgment**").[647]

(i) There is No Consent Under the ECT to Arbitrate Disputes Concerning the Interpretation and Application of EU Law[648]

343. The Respondent argues that an interpretation of the ECT pursuant to its text, object and purpose supports the conclusion that there is no consent to arbitrate intra-EU disputes in ECT Article 26.[649] This is so because (i) ECT Article 26 only concerns arbitration of disputes arising out of violations of Part III of the ECT, and EU Member States could not be bound by Part III of the ECT as their integration into the EU meant acceptance of the primacy of EU law and the transfer of their competences to the EU;[650] (ii) the definition of Regional Economic Integration Organization ("**REIO**") in ECT Article 1(3) recognizes that there are matters that must be negotiated by the EU because the EU Member States have transferred their competence on those matters to the EU, including issues of fundamental freedoms and State aid;[651] and (iii) ECT Articles 25, 1(3) and 36(7) recognize the principle of primacy of EU law.[652]

344. Furthermore, the Respondent argues that the introduction of a disconnection clause into the ECT was not necessary to preserve the primacy of EU law.[653] The Respondent submits that it is a

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[643] Resp. C-Mem., ¶ 78.

[644] Resp. C-Mem., ¶¶ 81-82, 217-218, 220.

[645] Resp. C-Mem., ¶ 85.

[646] Resp. C-Mem., ¶ 84.

[647] Resp. C-Mem., ¶ 86 (referring to RL-5, Judgment of the CJEU, Case C-284/16, *Republic of Slovakia/Achmea BV*, 6 March 2018).

[648] Resp. C-Mem., § III(B)(3).

[649] Resp. C-Mem., ¶ 165; Resp. Rej., ¶ 157.

[650] Resp. C-Mem., ¶¶ 166-168.

[651] Resp. C-Mem., ¶¶ 169-170.

[652] Resp. C-Mem., ¶¶ 171-173.

[653] Resp. C-Mem., ¶ 183.

"generally accepted practice as international law" and "international custom" that "the EU can apply the disconnection clause of an international convention or treaty to intra-EU disputes or matters regardless of whether or not such a clause is made explicit in the text of the convention or treaty."[654] This follows, the Respondent argues, from many examples showing that the primacy of EU law is a well-established, consistent and repeated practice, allowing "disconnection from international treaties, with or without the expression of a disconnection clause, when it relates to intra-EU matters."[655]

(ii) Alternatively, Any Conflict Between EU Law and the ECT Must Be Resolved in Favor of EU Law

345. In the alternative, should the Tribunal reject the Respondent's interpretation of ECT Article 26, the Respondent argues that there would be a conflict between the ECT and EU law which must be resolved in favor of EU law pursuant to the Vienna Convention on the Law of Treaties ("**VCLT**") Articles 30 and 59.[656] The Respondent submits that these VCLT rules are "residual" given that EU law has its own special conflict rules, but in any event lead to the same result.[657]

346. The Respondent contends that the issue of incompatibility of arbitration clauses with EU law is not a question of what kind of legal order confers better treatment, but rather, the key principle is that in intra-EU relations, EU law should take precedence over any other international legal order in the event of conflict.[658] Any conflict, the Respondent argues, should be resolved in accordance with the principle of primacy of EU law, recognized by ECT Article 25, the CJEU and Article 351(1) of the Treaty on the Functioning of the European Union ("**TFEU**").[659] The Respondent explains that pursuant to EU law, any international agreement must be interpreted in accordance with the EU Treaties, and when such an interpretation is not possible, it must be disapplied.[660]

347. According to the Respondent, ECT Article 16 is inapplicable to resolve a conflict between the ECT and EU law, because it is a provision "clearly intended" to regulate the relationship between the ECT and BITs.[661] Furthermore, for the Respondent, ECT Article 16 is not a rule of conflict, but an

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[654] Resp. Rej., ¶ 193.
[655] Resp. Rej., ¶ 184. *See also* Resp. Rej., ¶¶ 185-190.
[656] Resp. Rej., ¶ 158. *See also* Resp. C-Mem., ¶¶ 179, 182, 192.
[657] Resp. Rej., ¶¶ 210-213.
[658] Resp. C-Mem., ¶¶ 176, 178.
[659] Resp. C-Mem., ¶¶ 186, 189; Resp. Rej., ¶ 212.
[660] Resp. Rej., ¶ 211.
[661] Resp. Rej., ¶¶ 175-177.

interpretative precept.[662] But even assuming *arguendo* that ECT Article 16 applied to resolve a possible conflict between EU law and the ECT, the Respondent argues that the ECT should not prevail because (i) the ECT does not afford investors substantive rights more favorable than EU law; (ii) ECT Article 26 does not provide for arbitration as the sole dispute resolution mechanism, and instead, it also contemplates resort to ordinary or administrative courts without establishing which mechanism is more favorable;[663] and (iii) ECT Article 26(6) provides that the dispute must be resolved in accordance with the ECT and other principles and rules of international law, and therefore, the ECT and EU law must be applied on equal footing.[664]

348. Furthermore, according to the Respondent, resort to the conflict rule of *lex posterior* in VCLT Article 30(4) also leads to the conclusion that EU law prevails in the event of a conflict,[665] because the principle of primacy of EU law was codified in the Lisbon Treaty in 2007.[666]

(iii) EU Law is International Law Applicable to this Case and a Matter of Public Order

349. The Respondent submits that EU law is applicable law in this arbitration pursuant to ECT Article 26(6).[667] According to the Respondent, the applicable law provision in ECT Article 26(6) refers to the "issues in dispute," and therefore that provision governs matters of jurisdiction just as it does merits and quantum issues.[668] Furthermore, its reference to "applicable rules and principles of international law" requires the application of the rules and principles of EU law as international law.[669] According to the Respondent, this has been recognized by arbitral case law,[670] by the CJEU in the *Achmea* Judgment,[671] and more recently by the CJEU in the *Komstroy* Judgment.[672]

350. The Respondent further submits that in this case, the Tribunal is called upon to "interpret and apply the rules and principles of [EU] law as international law," because (i) fundamental freedoms are

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[662] Resp. Rej., ¶ 213.

[663] Resp. C-Mem., ¶ 185. *See also* Resp. Rej., ¶¶ 162-163, 168, 172.

[664] Resp. C-Mem., ¶ 186.

[665] Resp. C-Mem., ¶¶ 190-191.

[666] Resp. C-Mem., ¶ 210; Resp. Rej., ¶ 213.

[667] Resp. C-Mem., ¶ 88.

[668] Resp. C-Mem., ¶¶ 89-90; Resp. Rej., ¶ 144.

[669] Resp. C-Mem., ¶¶ 89-91.

[670] Resp. C-Mem., ¶¶ 94-96; Resp. Rej., ¶ 147.

[671] Resp. C-Mem., ¶ 93.

[672] Resp. PHB, ¶ 71 (citing RL-166, Judgment of the CJEU (Grand Chamber), *République de Moldavie v. Komstroy LLC*, Case C-741/19, 2 September 2021 ("***Komstroy* Judgment**"), ¶ 31).

affected in an investment that should be considered intra-EU, to the extent that any award would benefit Novatec; and (ii) the dispute concerns an essential institution of EU law: State aid.[673]

351. Thus, for the Respondent, in this case, EU law has a triple dimension: (i) it is applicable international law, in accordance with ECT Article 26(6); (ii) it is applicable domestic law of an EU Member State; and (iii) it is a fundamental fact that shapes the legitimate expectations of an investor.[674]

352. The Respondent further notes that EU law is characterized by its independent legal source (the EU Treaties) and by its primacy over the laws of EU Member States.[675]

(iv) ECT Article 26(6) Requires that this Dispute be Excluded from the Tribunal's Jurisdiction[676]

353. According to the Respondent, EU law "affects all the issues that are the subject of this arbitration,"[677] and the Tribunal cannot avoid its application in its triple nature of international law, domestic law and "*de facto* law."[678]

354. In particular, the Respondent submits that, through the Claimants, Novatec seeks payment of compensation arising from a subsidy scheme that the EC has qualified as State aid, while matters of State aid are within the exclusive competence of the EC.[679] In the Respondent's view, this Tribunal is being asked to resolve whether the Plant is entitled to a certain amount of State aid.[680] However, arbitral tribunals are not empowered to make pronouncements on the essential pillars of EU law, since the autonomy of EU law, its primacy and distribution of competences are only guaranteed through the exclusive competence of the CJEU.[681] According to the Respondent, the EC itself has indicated that arbitral tribunals are not empowered to authorize the granting of State aid.[682]

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[673] Resp. C-Mem., ¶ 91; Resp. Rej., ¶ 145.
[674] Resp. C-Mem., ¶ 97; Resp. Rej., ¶ 148.
[675] Resp. C-Mem., ¶ 92; Resp. Rej., ¶ 146.
[676] Resp. C-Mem., § III(B)(2)(2.2).
[677] Resp. C-Mem., ¶ 114.
[678] Resp. C-Mem., ¶ 122.
[679] Resp. C-Mem., ¶¶ 98-99.
[680] Resp. C-Mem., ¶ 101.
[681] Resp. C-Mem., ¶¶ 98, 104.
[682] Resp. C-Mem., ¶ 104 (referring to RL-3, 2017 EC State Aid Decision, ¶ 165).

355. The Respondent further argues that matters of EU law are also important in the delimitation of legitimate expectations and the scope of the FET standard, as the EC recognized in the 2017 EC State Aid Decision, which forms part of EU law and is therefore binding on arbitral tribunals called upon to apply EU law.[683] For the Respondent, the binding nature of EU decisions on EU Member States also follows from ECT Article 1(3).[684]

356. In the Respondent's submission, the ECT's substantive standards must be interpreted in a manner consistent with EU law, which is international law directly applicable to the merits of the dispute pursuant to ECT Article 26(6). According to the Respondent, the *Komstroy* Judgment has recently confirmed that EU Law is international law for purposes of ECT Article 26(6) and, as such, must be applied by the arbitral tribunal.[685]

357. The Respondent also takes the view that EU rules on competition law and State aid are also "imperative rules of public order,"[686] and contends that any arbitral award that does not respect the rules of EU law, in particular rules of public policy such as in matters of State aid, may be annulled under the New York Convention and the applicable domestic laws of the State under which the annulment is sought.[687]

(v) The *Achmea* Judgment and Its Application to the Present Case

358. The Respondent submits that in the *Achmea* Judgment, the CJEU found that "an arbitration clause in a bilateral investment treaty concluded between EU Member States (intra- Community BIT) is incompatible with [EU] Law and the autonomy of the EU legal system."[688] According to the Respondent, this judgment is the confirmation of a "trend" in the decisions of the CJEU dating back to 2000.[689] More particularly, the Respondent submits that the *Achmea* Judgment held that:

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, … under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring

[683] Resp. C-Mem., ¶¶ 105-108 (referring to RL-3, 2017 EC State Aid Decision, ¶¶ 158, 164, 166).
[684] Resp. C-Mem., ¶ 111.
[685] Resp. PHB, ¶ 71 (citing RL-166, *Komstroy* Judgment, ¶ 31).
[686] Resp. C-Mem., ¶ 115. *See also* Resp. Rej., ¶ 149.
[687] Resp. C-Mem., ¶ 120. *See also* Resp. Rej., ¶ 152.
[688] Resp. C-Mem., ¶¶ 123-124 (citing RL-5, *Achmea* Judgment).
[689] Resp. C-Mem., ¶¶ 125 and 126-138 (discussing various judgments and opinions of the CJEU).

> proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[690]

359. In reaching this conclusion, the Respondent argues, the CJEU established the following principles: (i) the EU Treaties have established a system to preserve the autonomy of the EU legal order and ensure consistency in the interpretation of EU law; (ii) pursuant to Article 19 of the Treaty on the European Union ("**TEU**"), it is for the EU national courts and the CJEU to ensure the application of EU law in the EU Member States, and EU law is not limited to primary law but also to secondary rules and their interpretation by the CJEU; (iii) the EU judicial system has as its cornerstone the procedure for preliminary rulings established in Article 267 of the TFEU, which ensures a dialogue between the CJEU and the courts of the EU Member States to ensure uniformity; and (iv) that given the nature and characteristics of EU law, it "form[s] part of the legislation in force in each Member State and to derive from an international agreement between Member States."[691]

360. The Respondent submits that the *Achmea* Judgment found that an arbitral tribunal in an international investment arbitration, such as the one underlying that case, did not comply with the above principles, and it was therefore incompatible with EU law.[692] According to the Respondent, the CJEU reasoned that: (i) an arbitral tribunal was not part of the EU judicial system, and did not qualify as a tribunal of a EU Member State within the meaning of Article 267 of the TFEU; (ii) as a result, the arbitral tribunal did not have the right to refer a preliminary ruling to the CJEU; (iii) investment tribunals derive from a treaty in which the parties have agreed to deviate from the system of judicial remedies in Article 19(1) of the TEU, despite the fact that those disputes "may ***affect the application or interpretation of EU legislation*** and, therefore, should be subject to the EU judicial system, in accordance with Article 19 TEU and Article 344 TFEU"; (iv) through the arbitration clause, the EU Member States parties to the BIT "established a mechanism to resolve disputes between an investor and a Member State that could prevent such disputes from being resolved in such a way as to ensure the full effectiveness of EU Law, even though they may affect the interpretation or application of such law"; and (v) in accordance with the BIT in question, the decision of the arbitral tribunal is final such that judicial review by a national tribunal only proceeds to the extent permitted by national law.[693]

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[690] Resp. C-Mem., ¶ 139 (quoting RL-5, *Achmea* Judgment, ¶ 62).

[691] Resp. C-Mem., ¶ 140 (citing RL-5, *Achmea* Judgment, ¶¶ 35-37, 41).

[692] Resp. C-Mem., ¶ 141.

[693] Resp. C-Mem., ¶¶ 141-142 (emphasis in original) (citing RL-5, *Achmea* Judgment, ¶¶ 45, 48, 51, 55-56).

361. On the basis of the foregoing, the Respondent submits that "Article 267 and Article 344 TFEU make the BIT arbitration clause incompatible with EU law because it does not guarantee the essential values of the [EU]," including, the primacy and autonomy of the EU legal system, the distribution of competences, mutual trust among EU Member States, the duty of loyal cooperation, and the removal of disputes concerning the EU Treaties from the EU legal system.[694]

362. For the Respondent, the same conclusion also applies to ECT arbitration.[695] In particular, while the *Achmea* Judgment was rendered in the context of a BIT, its principles are equally applicable in the ECT context, "when the dispute … concerns a matter which, like the State Aid regime, is essential within the [EU] legal system" and "affects the autonomy of the EU legal system."[696] The conclusions in *Achmea* are not dependent on the bilateral nature of the underlying treaty, and the judgment itself refers to "international agreements" (which the ECT is).[697] The EC has also made clear that the *Achmea* Judgment is also relevant in the ECT context.[698]

363. Moreover, the Respondent argues, the pillars of the *Achmea* Judgment are also met in this case, namely (i) that the Tribunal is called upon to interpret and apply EU law (in particular, the dispute concerns matters of EU law on State aid); (ii) that the EU principle of autonomy is infringed because the CJEU cannot exercise its function of ensuring full application of EU law through the mechanism of requests for preliminary ruling under Article 267 of the TFEU; and (iii) that the Award is not subject to review by the court of an EU Member State.[699] Furthermore, by virtue of Articles 267 and 344 of the TFEU both Spain and Germany (Novatec's State of nationality) are required to give primacy to EU law and not to submit EU law disputes to bodies outside the EU system.[700]

364. The Respondent takes issue with the Claimants' attempt to distinguish the ECT's applicable law provision from that of the BIT at issue in *Achmea*, emphasizing that, pursuant to ECT Article 26(6),

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[694] Resp. C-Mem., ¶ 143.

[695] Resp. C-Mem., ¶ 144.

[696] Resp. C-Mem., ¶ 145. *See also* Resp. C-Mem., ¶ 164.

[697] Resp. C-Mem., ¶¶ 146, 148-149. *See also* Resp. Rej., ¶¶ 195-196.

[698] Resp. C-Mem., ¶ 158 (referring to RL-87, Communication from The European Commission to The European Parliament and The Council on the Protection of intra-EU investment, COM (2018) 547/2, 19 July 2018).

[699] Resp. C-Mem., ¶¶ 151-156.

[700] Resp. C-Mem., ¶ 157.

the Tribunal is required to apply EU law.[701] According to the Respondent, the analysis of this issue is not affected by the fact that the EU is a signatory to the ECT.[702]

(vi) Institutions of the EU Have Already Ruled on the Intra-EU Objection

365. Aside from the pronouncements of the CJEU in the *Achmea* Judgment, the Respondent also submits that other institutions of the EU have already ruled on the intra-EU objection.[703]

366. In that regard, the Respondent relies in CJEU Opinion 1/17 in the context of CETA. The Respondent submits that this document confirms the reasoning in the *Achmea* Judgment, and finds CETA compatible with EU law on the basis that a CETA tribunal will "never apply EU law," in contrast with ECT Article 26(6), which requires application of EU law.[704]

367. The Respondent further relies on a declaration by EU Member States dated 15 January 2019, concerning the legal consequences of the *Achmea* Judgment signed by 22 EU Member States ("**First Declaration**").[705] For the Respondent, the First Declaration reinforces the conclusion that the arbitral tribunal lacks jurisdiction in an intra-EU dispute, both as a matter of interpretation of the ECT, or as a matter of resolving the conflict between the ECT and EU law.[706] The Respondent also refers to a second declaration dated 16 January 2019 signed by 5 EU Member States, which chose not to express a view as to the legal consequences of the *Achmea* Judgment to intra-EU disputes under the ECT until the CJEU gave an express opinion ("**Second Declaration**"),[707] and to Hungary's separate declaration to the effect that the *Achmea* Judgment was silent in respect to the ECT ("**Hungary's Declaration**").[708]

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[701] Resp. Rej., ¶ 197.

[702] Resp. C-Mem., § III(B)(2.3)(d); Resp. Rej., ¶ 195.

[703] Resp. Rej., § III(B)(6).

[704] Resp. Rej., ¶¶ 204-205.

[705] Resp. C-Mem., ¶¶ 194-195 (citing RL-89, Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 15 January 2019).

[706] Resp. C-Mem., ¶¶ 194, 211; Resp. Rej., ¶ 214.

[707] Resp. C-Mem., ¶¶ 194-195 (citing RL-90, Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 16 January 2019).

[708] Resp. C-Mem., ¶¶ 194, 196 (citing RL-91, Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 16 January 2019). The Respondent argues, however, that Hungary's Declaration must be assessed in light of Hungary's position in case law about the "incompatibility of intra-EU arbitrations." Resp. C-Mem., ¶ 196.

368. The Respondent submits that the First Declaration is a fundamental element in the interpretation of the ECT, pursuant to VCLT Article 31(3)(a),[709] as it reflects an agreement between the signatory EU Member States that are Contracting Parties to the ECT on the interpretation of ECT Article 26.[710] Moreover, the Respondent argues, the interpretative force of the First Declaration is not limited by the fact that it was not signed by all the ECT Contracting Parties, as VCLT Article 31(3)(a) merely requires an agreement between the parties, but it does not distinguish whether this refers to "*all*" the parties.[711]

b. The Claimants' Position

369. In the Claimants' view, the Respondent's objection based on the intra-EU nature of Novatec has no basis, and should be dismissed outright because Novatec is not a Claimant in this arbitration.[712] The Claimants contend that the Respondent's insistence on the intra-EU objection, especially in a case in which the German entity is not a claimant, should have cost consequences.[713] But even if Novatec were a claimant (*quod non*), the objection still must fail, the Claimants say, because intra-EU disputes are not excluded from the scope of ECT Article 26.[714]

370. As indicated in Section V.B(1)b(i) above, discussing the First Objection, the Claimants' primary position is that the Tribunal need not consider the standing of Tubo Sol's minority shareholders as they are not claimants in this arbitration, and Tubo Sol has standing to bring a claim in its own right for the entirety of the damages caused to it by the Disputed Measures.[715] Thus, the Claimants' contentions in that regard, described in further detail above, also apply to this Second Objection. To avoid repetition, the following paragraphs summarize only the Claimants' additional contentions regarding the Intra-EU Objection itself.

371. Therefore, according to the Claimants, even if the Tribunal were to consider it necessary to examine the standing of Novatec, it should conclude that the Respondent's Intra-EU Objection has no

[709] Resp. Rej., ¶ 208.
[710] Resp. Rej., ¶ 209.
[711] Resp. Rej., ¶ 215 (emphasis added).
[712] Cl. Reply, ¶¶ 30, 35; Cl. Rej. Jur., ¶ 92.
[713] Cl. Reply, ¶ 32.
[714] Cl. Reply, ¶ 32.
[715] Cl. Reply, ¶¶ 35, 85; Cl. Rej. Jur., ¶ 14.

merit.[716] The Claimants emphasize that every tribunal that had heard an intra-EU objection, as of the date of the Claimants' pleadings, had rejected it.[717]

(i) EU Law Is Not Relevant to Determine Jurisdiction or the Merits

372. The Claimants deny that EU law constitutes applicable international law to the determination of jurisdiction or the merits.[718] They submit that ECT Article 26(6) does not apply to determine the applicable law on jurisdiction, because questions of jurisdiction are not subject to the applicable law on the merits, as confirmed by the tribunal in *Vattenfall*, as well as other tribunals.[719] Pursuant to ECT Article 26(1), the "issues in dispute" are claims concerning Part III of the ECT.[720] For the Claimants, "only the ECT and customary international law and not EU law are relevant to determining the Tribunal's jurisdiction over the claim."[721] More specifically, the Claimants argue that "[t]he law applicable to the issue of the Tribunal's jurisdiction is the ECT itself, and in particular, Article 26(4), which contains the Parties' consent to arbitration."[722]

373. The Claimants' position is therefore that EU law is irrelevant to the assessment of jurisdiction in this case, and that "the fact that EU law may have some international law components does not make it relevant to the Tribunal's jurisdiction."[723]

374. The Claimants further oppose the Respondent's contention that the Tribunal is called upon to apply EU law on the ground that this dispute involves EU fundamental freedoms and State aid, and argue that this point is not relevant to questions of jurisdiction.[724] This is so, the Claimants say, because the claims in this case are based on the ECT and customary international law (not EU law), and EU law is only relevant to provide context.[725]

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[716] Cl. Reply, App. 6, ¶¶ 14, 100; Cl. Rej. Jur., ¶ 136.

[717] Cl. Reply, App. 6, ¶ 14; Cl. Rej. Jur., ¶ 12.

[718] Cl. Reply, App. 6, ¶ 15.

[719] Cl. Reply, App. 6, ¶ 17 (referring to CL-131, *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 ("***Vattenfall***"), ¶¶ 114-116, 121-122). *See also* Cl. Reply, App. 6, ¶ 18; Cl. Rej. Jur., ¶¶ 96-98.

[720] Cl. Reply, App. 6, ¶ 17.

[721] Cl. Rej. Jur., ¶ 95.

[722] Cl. Rej. Jur., ¶ 98.

[723] Cl. Rej. Jur., ¶ 109.

[724] Cl. Reply, App. 6, ¶ 19.

[725] Cl. Reply, App. 6, ¶ 20.

(ii) The ECT Expresses Spain's Consent to Arbitrate Intra-EU Disputes

375. First, the Claimants argue that the ordinary meaning of ECT Article 26 leads to the conclusion that it applies even on an intra-EU basis. The provision refers to disputes between *any* ECT Contracting Party and an investor of *any* other Contracting Party, and it contains no exception concerning intra-EU disputes.[726] The Claimants submit that this finding has been adopted by numerous other tribunals hearing the same objection from Spain in other ECT cases.[727]

376. Second, according to the Claimants, the ECT's recognition of REIOs does not lead to a different conclusion.[728] The Claimants contend that there is no support for the proposition that EU Member States were not competent to commit to the protection of foreign direct investment when signing the ECT, which is a mixed agreement signed both by the EU Member States and the EU itself.[729] Spain signed and ratified the ECT as a Contracting Party in its own right without any reservations or a disconnection clause,[730] and under international law, a State cannot take refuge in the notion that it exceeded its competence to excuse a breach of international law.[731]

377. Moreover, the Claimants argue, the Respondent's reliance on the recognition of REIOs in ECT Articles 1(2), 1(3) and 25 to support this objection is misplaced and has been rejected by numerous tribunals.[732] With respect to ECT Article 1(2) and 1(3), the Claimants submit that "[t]he 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."[733] As to ECT Article 25, the Claimants contend that it simply "provides that MFN treatment does not oblige EU Member States to extend the rights of the EU internal market to investors from beyond the EU," and says nothing about the intra-EU application of ECT Article 26.[734] Finally, the Claimants contend that the reference to the "Area" of the other Contracting Party

[726] Cl. Reply, App. 6, ¶¶ 22-24.
[727] Cl. Reply, App. 6, ¶¶ 25-26.
[728] Cl. Reply, App. 6, § 3.2(b).
[729] Cl. Reply, App. 6, ¶ 29.
[730] Cl. Reply, App. 6, ¶ 30.
[731] Cl. Reply, App. 6, ¶ 31.
[732] Cl. Reply, App. 6, ¶¶ 32-33.
[733] Cl. Reply, App. 6, ¶ 33.
[734] Cl. Reply, App. 6, ¶ 34.

in ECT Article 26(1) refers to the territory of the particular EU Member State that is a party to the dispute, in accordance with ECT Article 1(10) (not to the EU).[735]

378. Third, the Claimants emphasize that the ECT contains no disconnection clause.[736] The Claimants note that it is undisputed that the ECT does not include an express disconnection clause, and oppose the Respondent's contention that the inclusion of such a clause was unnecessary due to the full harmonization between the ECT and EU law.[737] The Claimants argue that the Respondent is incorrect in arguing that because certain aspects of EU law are part of customary international law, any international treaty involving the EU or EU Member States automatically includes a disconnection clause.[738] In the Claimants' submission, implying a disconnection clause in the ECT would run counter to the ECT Contracting Parties' intentions at the time they entered into the treaty. Among other things, "the EU was well aware of the potential for inclusion of a disconnection clause, and had even proposed the idea during the negotiation of the ECT"; the absence of such a clause from the final version indicates its intentional omission from the ECT.[739] Moreover, the Claimants further argue that the Respondent's contention that EU law is customary international law does not help the Respondent's case, given that ECT Article 26(6) does not apply to jurisdiction.[740]

379. For the Claimants, absent a disconnection clause, there is no doubt that the ECT applies to intra-EU disputes,[741] and the absence of such a clause in the ECT is meaningful, as the ECT does contain other provisions specifying how the ECT applies with respect to other international treaties, *i.e.*, Annex 2 to the Final Act of the European Energy Charter Conference.[742] In the Claimants' submission, "for the ECT not to apply to intra-EU disputes there would have to be an express disconnection clause."[743] The Claimants argue that to conclude that ECT Article 26 does not apply

[735] Cl. Reply, App. 6, ¶ 35.
[736] Cl. Reply, App. 6, § 3.2(c); Cl. Rej. Jur., ¶ 111.
[737] Cl. Reply, App. 6, ¶ 36; Cl. Rej. Jur., ¶ 112. *See also* Cl. Rej. Jur., ¶¶ 114-115.
[738] Cl. Rej. Jur., ¶ 117.
[739] Cl. Rej. Jur., ¶ 118 (citing CL-131, *Vattenfall*, ¶¶ 203-206).
[740] Cl. Rej. Jur., ¶ 114.
[741] Cl. Reply, App. 6, ¶ 37; Cl. Rej. Jur., ¶¶ 112-113.
[742] Cl. Reply, App. 6, ¶ 38.
[743] Cl. Rej. Jur., ¶ 113.

intra-EU would require reading an implicit disconnection clause into the ECT, an argument that has been rejected by multiple arbitral tribunals in claims against Spain.[744]

380. Finally, in the Claimants' submission, the Respondent's interpretation of ECT Article 26 is contrary to the treaty's object and purpose.[745] In particular, the Claimants contend that ECT Article 26 must be interpreted in good faith, and good faith requires that if the ECT Contracting Parties intended to exclude intra-EU disputes, they had to include a "clear and express" exclusion to that effect, which they have not done.[746]

(iii) The Respondent's Reliance on EU Authorities is Misplaced

381. According to the Claimants, the *Achmea* Judgment is not relevant to this dispute, even if Novatec were a claimant.[747] The Claimants adduce several reasons for this conclusion.

382. First, the Claimants say, the CJEU in the *Achmea* Judgment addresses a particular BIT and not the ECT.[748]

383. Second, the *Achmea* Judgment makes clear that it applies only to a treaty concluded by EU Member States, not one concluded by the EU itself, as in the case of the ECT.[749]

384. Third, the applicable law provision in the BIT underlying the *Achmea* Judgment was "notably different" from ECT Article 26(6). ECT Article 26(6) provides that disputes shall be resolved solely on the basis of the ECT and the applicable rules and principles of international law; Article 26 is not open to claims for breaches of EU law, and this Tribunal is not being called to apply EU law, whereas the BIT in *Achmea* required the arbitral tribunal to apply EU law.[750] The Claimants submit that their position regarding the *Achmea* Judgment has been endorsed by numerous tribunals, including the tribunal in *Vattenfall*.[751]

385. Fourth, the question in the *Achmea* Judgment was whether the underlying BIT was compatible with the TFEU, considering that the BIT had been concluded before one of its contracting States acceded

[744] Cl. Reply, App. 6, ¶ 40. *See also* Cl. Rej. Jur., ¶ 113.
[745] Cl. Reply, App. 6, § 3.2(d). *See also* Cl. Rej. Jur., ¶ 116.
[746] Cl. Reply, App. 6, ¶ 41.
[747] Cl. Reply, App. 6, § 3.3(a), and ¶ 58.
[748] Cl. Reply, App. 6, ¶ 43.
[749] Cl. Reply, App. 6, ¶¶ 45-47, 50(i).
[750] Cl. Reply, App. 6, ¶¶ 48, 50(ii); Cl. Rej. Jur., ¶ 120.
[751] Cl. Reply, App. 6, ¶ 51 (citing *e.g.*, CL-131, *Vattenfall*, ¶¶ 162, 164, 213).

to the EU. That issue is of no relevance here, as Germany already had acceded the EU when it ratified the ECT.[752]

386. Fifth, the present case is an ICSID arbitration, while the arbitration underlying *Achmea* was seated in Germany, and thus subject to the German law provisions on annulment of awards. By contrast, ICSID awards cannot be annulled on grounds that the recognition and enforcement of the award is contrary to public policy or in fundamental breach of EU law.[753]

387. Sixth, this Tribunal derives its jurisdiction from the ECT, and it is not bound by the decisions of EU institutions.[754] The Claimants thus argue that the *Achmea* Judgment is not binding on this Tribunal, which is called to apply the ECT (not EU law).[755] To the contrary, the Claimants say, it is EU institutions that are bound to enforce any award issued by an ECT tribunal.[756]

388. Nor do the other CJEU authorities prior to the *Achmea* Judgment cited by the Respondent support its case, according to the Claimants.[757]

389. In response to the Respondent's reliance on the July 2018 communication of the EC to the European Parliament and Council, stating its view that the reasoning in the *Achmea* Judgment applies equally to ECT arbitrations, the Claimants argue that this opinion merely reflects the EC's views and is not legally binding.[758]

390. Nor does the CJEU Opinion 1/17 of 2019 on the Comprehensive Economic and Trade Agreement ("**CETA**") support the Respondent's position, and indeed, it supports the Claimants' case, they say. That is because the Opinion accepted that, given that a CETA tribunal would be called to decide disputes only pursuant to CETA and international law, there would be no danger of that tribunal engaging in the interpretation of EU law; the Claimants argue that the same is true in ECT cases.[759] The Claimants reject the Respondent's contention that ECT Article 26(6) requires the Tribunal to

[752] Cl. Reply, App. 6, ¶ 52.
[753] Cl. Reply, App. 6, ¶¶ 53-55.
[754] Cl. Reply, App. 6, ¶ 56.
[755] Cl. Reply, App. 6, ¶ 43.
[756] Cl. Reply, App. 6, ¶¶ 56-57.
[757] Cl. Reply, App. 6, § 3.3(b).
[758] Cl. Rej. Jur., ¶ 121.
[759] Cl. Rej. Jur., ¶¶ 122-127.

apply EU law, and submit that EU law merely constitutes factual background in this case, and that State aid is irrelevant here.[760]

(iv) There is No Conflict between EU Law and the ECT, and Should There Be One, the ECT Prevails

391. The Claimants submit that no incompatibility between the ECT and EU law has arisen as a result of the *Achmea* Judgment.[761] This is so because the ECT and the EU Treaties concern different subject matters.[762] According to the Claimants, as the ECT grants investors rights additional to those existing under EU law, there can be no inconsistency between both regimes.[763]

392. In any event, even if it were considered that there is a risk of incompatibility, the ECT would prevail.[764] According to the Claimants, this follows from (i) the plain language of the conflict-of-laws clause in ECT Article 16;[765] (ii) the terms of ECT Article 26(8), which requires the EU as an ECT Contracting Party to carry out and enforce ECT awards;[766] (iii) provisions of EU law that recognize that treaties to which the EU is a party prevail over EU law, in particular, Article 216(2) of the TFEU;[767] and (iv) VCLT Articles 30 and 59, which (contrary to the Respondent's contention) lead to the conclusion that the ECT would also prevail under a VCLT analysis, as the ECT is *lex posterior*.[768]

393. The Claimants label as irrelevant the Respondent's contention that the VCLT supplies only a residual rule on conflicts whereas EU law has a special conflict rule (namely, the primacy of EU law), because EU law is not the applicable law to this dispute.[769] To decide on any conflict, the Tribunal may only apply international law or the terms of the ECT itself.[770]

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[760] Cl. Rej. Jur., ¶ 125.
[761] Cl. Reply, App. 6, ¶ 70.
[762] Cl. Reply, App. 6, ¶ 70.
[763] Cl. Reply, App. 6, ¶ 73. *See also* Cl. Rej. Jur., ¶ 107.
[764] Cl. Reply, App. 6, ¶ 74. *See also* Cl. Rej. Jur., ¶ 100.
[765] Cl. Reply, App. 6, ¶ 75.
[766] Cl. Reply, App. 6, ¶ 76.
[767] Cl. Reply, App. 6, ¶ 77.
[768] Cl. Reply, App. 6, ¶ 78.
[769] Cl. Rej. Jur., ¶ 103.
[770] Cl. Rej. Jur., ¶ 103.

394. The Claimants further oppose the Respondent's contention that, for the purposes of VCLT Articles 30 and 59, EU law is *lex posterior* because the Lisbon Treaty postdates the ECT.[771] That said, the Claimants argue that even if that were the case, there would still be problems with the Respondent's argument, because (i) according to the Respondent's own submission, EU law would be both prior and posterior to the ECT, which cannot be right; (ii) the Respondent's reliance on Declaration 17 as codifying the principle of primacy is misplaced, because that declaration only addresses priority of EU law over agreements concluded by EU Member States "insofar as those agreements take effect within national law";[772] and (iii) even if the EU Treaties were *lex posterior*, this would not impact ECT Article 26, because the later treaty only supersedes the prior one to the extent of any incompatibility, and there is no incompatibility.[773]

395. According to the Claimants, the Respondent is incorrect in its allegation that ECT Article 16 is not a rule on conflict resolution, but only an interpretative precept.[774] For the Claimants, Article 16 is "precisely a conflict resolution rule, and one which very clearly states that no subsequent international agreement involving the EU or its Member States can, in any way, allow a party to derogate from its dispute resolution obligations under Part V of the ECT."[775] Relying on *Vattenfall*, the Claimants submit that the specific provision on conflicts in ECT Article 16 prevails over the *lex posterior* rule in the VCLT.[776]

396. Nor is the Respondent correct in its allegation that ECT Article 16(2) would allow Spain to derogate from its obligations under ECT Article 26, the Claimants say, because "Article 16(2) of the ECT is not engaged in this case, as the ECT and EU law do not cover the same subject matter" and "[e]ven if it were, … the protections available to investors under the ECT are, … superior to those under EU law."[777]

[771] Cl. Rej. Jur., ¶ 104.
[772] Cl. Rej. Jur., ¶ 105.
[773] Cl. Rej. Jur., ¶ 105.
[774] Cl. Rej. Jur., ¶ 106.
[775] Cl. Rej. Jur., ¶ 106.
[776] Cl. Rej. Jur., ¶ 106 (citing CL-131, *Vattenfall*, ¶ 217).
[777] Cl. Rej. Jur., ¶ 107.

(v) The EU Member State Declarations Support the Claimants' Case

397. The Claimants contend that none of the 15 January 2019 declarations issued by EU Member States on the legal consequences of the *Achmea* Judgment support the Respondent's position.[778]

398. As to the content of the declarations, according to the Claimants, (i) the First Declaration (of 22 States) does not purport to set out the consequences of the *Achmea* Judgment under public international law, only under EU law;[779] (ii) the First Declaration also draws distinctions between the legal consequences of the *Achmea* Judgment for BITs and the ECT;[780] (iii) the First Declaration only refers to the prevalence of EU law over BITs;[781] and (iv) the Second Declaration (of 5 States) and Hungary's Declaration emphasize the different consequences of the *Achmea* Judgment for bilateral investment treaties and the ECT.[782]

399. The Claimants therefore submit that, contrary to the Respondent's contentions, the declarations are not relevant to the present arbitration.[783] In particular, the Claimants argue that the declarations do not provide any evidence of an original intention by the EU Member States to exclude the intra-EU application of ECT Article 26.[784] Moreover, they say, the First Declaration does not constitute an agreement between EU Member States on the authentic interpretation of ECT Article 26, because (i) it does not fall within the definition of subsequent agreement within the meaning of VCLT Article 31(3)(a);[785] (ii) it was not signed by all the Contracting Parties to the ECT;[786] and (iii) the First Declaration post-dates the commencement of this arbitration, and jurisdiction is to be determined by reference to the date in which the proceedings are instituted.[787] Spain's consent under the ECT became irrevocable once accepted by the Claimants.[788] Relying on *Eskosol*, the

[778] Cl. Reply, App. 6, ¶ 80.
[779] Cl. Reply, App. 6, ¶ 82.
[780] Cl. Reply, App. 6, ¶ 83.
[781] Cl. Reply, App. 6, ¶ 84.
[782] Cl. Reply, App. 6, ¶¶ 86-87.
[783] Cl. Reply, App. 6, ¶¶ 88-98; Cl. Rej. Jur. ¶ 135.
[784] Cl. Reply, App. 6, ¶¶ 88-90.
[785] Cl. Reply, App. 6, ¶¶ 92-93. *See also* Cl. Rej. Jur., ¶ 130.
[786] Cl. Reply, App. 6, ¶ 95. *See also* Cl. Rej. Jur., ¶¶ 129, 131-132.
[787] Cl. Reply, App. 6, ¶ 97.
[788] Cl. Reply, App. 6, ¶ 98.

Claimants submit that these declarations were merely "interpretative declarations" which were not capable of modifying treaty obligations.[789]

400. The Claimants therefore argue that, as of the date of their pleading, there was "neither (i) a finding of the [CJEU] regarding the compatibility of the ECT with EU law; nor (ii) any agreement among EU Member States (including between the 22 signatories to the Declaration) to extend the consequences of *Achmea* to the ECT."[790]

(2) The Tribunal's Analysis

401. The Tribunal has recounted at length the Parties' arguments regarding "intra-EU" issues, in fairness to the substantial briefing the Parties devoted to these issues in their respective submissions. The Tribunal certainly accepts the importance of resolving these issues in any true intra-EU case, *i.e.*, in any treaty claim brought by an EU-based claimant against another EU Member State.

402. This, however, is not such a case. As discussed above in the Tribunal's analysis of the First Objection, there are only two Claimants in this case. EBL is a Swiss investor, and thus no intra-EU issue arises in connection with its claim. Tubo Sol is a national of Spain, whom both the ECT and the ICSID Convention expressly provide should be treated as if it were a national of Switzerland, on account of EBL's undisputed controlling interest at all times relevant to the dispute. In these circumstances, the standing of EBL and Tubo Sol to bring claims against Spain does not properly turn on any intra-EU issue, *i.e.*, whether a national of one EU Member State may bring an ECT claim against another EU Member State. No such national has presented a claim in this case.

403. Rather, the Respondent's argument with respect to its Second Objection boils down to a different and novel proposition: that even though a European company may have standing under the ECT to sue its home State, by virtue of its control by a non-EU company, any *damages* that company might prove should be reduced proportionately, if the recovery will indirectly benefit another (non-claiming) entity that is a national of another EU Member State. This proposition depends on the same kind of "veil-piercing" theory that the Respondent propounded in connection with its First Objection: that tribunals should look *beyond* the nationality of a legally separate and independent claimant, in order to examine the nationalities not only of its controlling shareholder (made relevant

[789] Cl. Rej. Jur., ¶ 134 (citing CL-183, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019 ("***Eskosol* Intra-EU Decision**"), ¶¶ 223-226).

[790] Cl. Reply, App. 6, ¶ 85.

expressly by the ECT Article 26(7) and Article 25(2)(b) of the ICSID Convention), but also of each of its minority shareholders, in order to determine the extent to which they ultimately might stand to benefit from any recovery.

404. If this theory were accepted, the ramifications could be far-reaching. In principle, a tribunal could never take at face value the nationalities of the parties before it, for purposes of determining their standing to seek their own damages. It would need instead to inquire about who in turn owned each claimant, on the basis that such upstream owners would indirectly benefit from a successful award. It would then need to examine the nationality of each derivative beneficiary, in order to determine whether any of *them* were nationals of another EU Member State, thus purportedly triggering an "intra-EU" issue.

405. Nothing in either the ECT or the ICSID Convention requires such an analysis, as noted above with respect to the analogous issue of benefits flowing indirectly to alleged "public investors." Those treaties state that a domestic company suing its own State shall be treated as a national of its controlling shareholder, "full stop"; they do not say that this standing is only "to the extent" of that control, or that the identity or nationality of minority shareholders is relevant in any way.

406. Notably, as to this point, the Respondent does not contend that EU law compels the result it seeks. A claimant's standing to seek damages under the ECT is an issue of jurisdiction, and numerous tribunals have found that even in true *intra*-EU disputes (which this is not), the ECT's applicable law clause (Article 26(6)) cannot be interpreted to extend EU law to issues of jurisdiction.[791] But even *arguendo* (if one were to take the opposite view on applicable law), this is not an area on which there is any putative conflict between the two bodies of law. The Respondent has not cited any decision of any European court attempting to bar or limit ECT jurisdiction in the circumstances at hand, *i.e.*, where a company incorporated in a European host State is predominantly owned and controlled by a *non-EU company*. Certainly, neither the *Achmea* Judgment nor the *Komstroy*

[791] *See, e.g.,* CL-131, *Vattenfall*, ¶¶ 114-116, 121 (explaining that ECT Article 26(6) by its terms refers to "the issues in dispute," which refers back to the "disputes" referenced in ECT Article 26(1), namely those concerning an alleged breach of the obligations under Part III of the ECT, not the dispute settlement provisions in Part V); CL-95/RL-92, *Foresight Luxembourg Solar 1 S.À.R.L., Foresight Luxembourg Solar 2 S.À.R.L., Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A., GWM Renewable Energy II S.P.A. v. Kingdom of Spain*, SCC Arbitration V (2015/150), Final Award, 14 November 2018 ("***Foresight***"), ¶ 218 (similarly concluding that ECT Article 26(6) "applies to the merits of the case and not to jurisdiction"); CL-183, *Eskosol* Intra-EU Decision, ¶ 113 (finding the *Vattenfall* analysis "persuasive" and noting that it is also consistent with ECT Article 26(3)(a), which states that the Contracting Parties' "unconditional consent" to international arbitration is "subject only to subparagraphs (b) and (c)" of Article 26(3), and "by exclusion therefore not to any additional restrictions on jurisdiction potentially lurking in Article 26(6)").

Judgment touched on the standing of *non-EU claimants* to seek damages for the full extent of their injuries, on account of some partial benefit that might flow, indirectly, to upstream minority shareholders of different nationalities. There was no discussion in either case to suggest that the CJEU had even turned its attention to the issue of derivative shareholder benefits, much less that the CJEU considered that EU law should apply in that context, to restrict the scope of potential recovery of a claimant that otherwise had jurisdiction to sue on its own behalf.

407. In other words, the Second Objection asks the Tribunal not only to accept that EU law is part of the law relevant to the Claimants' standing to seek damages (which the Tribunal expressly rejects), but also (in that event) to make what essentially would be *new findings of EU law*, that go well beyond what the EU courts have ever postulated. The Tribunal considers that this would be particularly inappropriate in a context where the Respondent itself insists that only EU courts (and not ECT tribunals) are empowered to interpret and apply EU law.[792]

408. In any event, the text of the ECT and the ICSID Convention compels the Tribunal to deny the Second Objection. The identity of Tubo Sol's minority shareholders is simply not relevant to Tubo Sol's standing under the ECT and the ICSID Convention to bring claims for the full extent of the damages it allegedly incurred from the acts challenged in this case.

409. For the avoidance of doubt, this finding does not address the separate issue of whether EU law principles (including regarding State aid) are relevant to the *merits* of this dispute, either as part of the applicable substantive law of an ECT proceeding (as the Respondent contends) or, at minimum, as a fact that bears on the legitimate expectations of any investor in the electricity sector of an EU Member State. That is *not a jurisdictional issue*, and therefore it is deferred for discussion in subsequent sections of this Award, Sections VI.C (on applicable law) and VII.D(2) (on Claimants' legitimate expectations) below.

[792] *See, e.g.,* Resp. C-Mem., ¶ 141 (discussing the *Achmea* Judgment).

D. THIRD OBJECTION: LACK OF JURISDICTION OVER THE ARTICLE 10(1) CLAIM ARISING OUT OF THE TVPEE

(1) The Parties' Positions

a. The Respondent's Position

410. The Respondent submits that the Tribunal lacks jurisdiction to hear the claim for breach of ECT Article 10(1) arising out of the TVPEE introduced by Law 15/2012, for lack of consent.[793] This is so, the Respondent argues, because (i) the consent in ECT Article 26 only concerns disputes arising out a breach of an obligation in Part III of the ECT;[794] and (ii) pursuant to ECT Article 21, ECT Article 10(1) does not give rise to obligations concerning taxation measures.[795] As there is no obligation under Article 10(1) that could have been breached by the TVPEE,[796] it follows that Spain has not given its consent to arbitrate said dispute.[797] The Respondent emphasizes that the same jurisdictional objection has been unanimously upheld by all other tribunals that have been faced with it.[798]

(i) The Taxation Carve-Out

411. The Respondent contends that, pursuant to ECT Article 21, the ECT neither establishes rights nor imposes obligations on its Contracting Parties with regard to taxation measures (the "**Taxation Carve-Out**"), with certain exceptions stipulated in Article 21(2) to (5), which relate to ECT Articles 7(3), 10(2) and 10(7), 29(2) to (6) and 13.[799] Given that ECT Article 10(1) is not among these exceptions, the Respondent argues, it follows clearly that Article 10(1) does not impose any obligations with respect to taxation measures.[800] In the event of conflict between ECT Article 21 and any other provision of the Treaty, the former prevails.[801]

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[793] Resp. C-Mem., ¶¶ 221-222, 328; Resp. Rej., ¶ 280.
[794] Resp. C-Mem., ¶¶ 238, 327(ii); Resp. Rej., ¶ 279(iii).
[795] Resp. C-Mem., ¶¶ 224, 327(iv); Resp. Rej., ¶ 279(v).
[796] Resp. C-Mem., ¶¶ 234-235, 327(iv); Resp. Rej., ¶ 279(v).
[797] Resp. C-Mem., ¶¶ 242, 327(v). *See also* Resp. C-Mem., ¶ 240; Resp. Rej., ¶ 279(vi).
[798] Resp. C-Mem., ¶¶ 325-326; Resp. Rej., ¶¶ 275-278.
[799] Resp. C-Mem., ¶¶ 243-246.
[800] Resp. C-Mem., ¶¶ 251, 254.
[801] Resp. C-Mem., ¶ 244.

(ii) The TVPEE is a Taxation Measure

412. The Respondent submits that the TVPEE qualifies as a "Taxation Measure" within the meaning of ECT Article 21(7)(a)(i).[802] In particular, for the Respondent, the TVPEE qualifies as a "provision relating to taxes of the domestic law of the Contracting Party" (namely, Spain).[803]

413. The Respondent explains that the TVPEE is an annual 7% tax levied on activities for production and incorporation of electricity into the electrical system, applicable to production of electricity by both renewable and conventional installations.[804] Its taxable base is the total amount received by the taxpayer for the production and incorporation of electricity into the system, and the tax accrues on the last day of the taxable period.[805]

414. The Respondent argues that the applicable law to determine whether a given provision qualifies as a "provision[] relating to taxes" is the domestic law of the ECT Contracting Party.[806] This follows from the wording of ECT Article 21(7)(a)(i), from case law and literature recognizing that an international treaty may define a term by reference to domestic law, and from the Convention on Double Taxation between Spain and Switzerland, which must be taken into account pursuant to VCLT Article 31(3)(c).[807] That said, the Respondent submits that it is also possible to conclude that the determination should be made pursuant to international law, in light of the applicable law provision in ECT Article 26(6).[808]

415. Under either view, the Respondent argues, the TVPEE qualifies as a tax within the meaning of ECT Article 21(7)(a)(i).[809] This is so because (i) Law 15/2012 is part of Spain's domestic legislation, it being a law enacted by Parliament in accordance with the ordinary legislative procedure;[810] and (ii) the provisions on the TVPEE are "relating to taxes" whether under the Spanish domestic law concept of tax, or under the international one.[811]

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[802] Resp. C-Mem., ¶¶ 255, 268, 324; Resp. Rej., ¶ 279(ii).
[803] Resp. C-Mem., ¶ 256.
[804] Resp. C-Mem., ¶¶ 227-231.
[805] Resp. C-Mem., ¶¶ 230, 232.
[806] Resp. C-Mem., ¶ 258.
[807] Resp. C-Mem., ¶¶ 259-263.
[808] Resp. C-Mem., ¶ 265.
[809] Resp. C-Mem., ¶ 266.
[810] Resp. C-Mem., ¶¶ 267, 269.
[811] Resp. C-Mem., ¶¶ 267, 272, 323; Resp. Rej., ¶ 223.

416. The Respondent contends that, under its domestic law, the TVPEE undoubtedly constitutes a tax, as confirmed by the Spanish Constitutional Court's ruling on the constitutionality of the TVPEE;[812] by the Spanish Directorate General for Taxes;[813] and by other reputable organizations such as the Institute of Accounting and Accounts Auditing.[814] According to the Respondent, under Spanish law the notion of taxation is embodied in Article 2 of Law 58/2003. The TVPEE qualifies because it is a "direct tax" levied on activities for production and incorporation of electricity into the electrical system, that applies to both renewable and conventional facilities, with a 7% rate, levied on the total amount received by the taxpayers in the exercise of the taxable activity.[815] The Respondent observes that the TVPEE also is an expense that qualifies as a deductible from the Corporate Tax.[816]

417. In the Respondent's submission, the TVPEE also constitutes a tax from the perspective of international law, pursuant to the criteria established by arbitral case law, and as ratified by the European Commission's 2014 ruling on the TVPEE's compliance with EU law.[817] This cannot be ignored, the Respondent says, in light of the applicable law provision in ECT Article 26(6), which refers to "applicable rules and principles of international law."[818]

418. In particular, the Respondent submits that arbitral case law has established the defining characteristics for a tax, all of which are met by the TVPEE. Those characteristics are: (i) that it is established by law (Law 15/2012); (ii) that it imposes an obligation on a class of persons (those performing the activities of production and incorporation of electricity into the system); and (iii) that it involves paying money to the State for public purposes (as shown by its inclusion as public revenue in the Spanish General State Budget, from which public expenditures are financed).[819]

419. The Respondent opposes the Claimants' contention that the determination of whether a measure constitutes a tax for purposes of the ECT necessitates an additional analysis of the measure's "economic effects."[820] In particular, the Respondent submits that the analysis of the "good faith"

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[812] Resp. C-Mem., ¶¶ 274, 284-287; Resp. Rej., ¶ 224.
[813] Resp. Rej., ¶ 224.
[814] Resp. C-Mem., ¶ 280.
[815] Resp. C-Mem., ¶¶ 275-277.
[816] Resp. C-Mem., ¶ 281.
[817] Resp. C-Mem., ¶¶ 288-289. *See also* Resp. C-Mem, ¶¶ 313, 321; Resp. Rej., ¶ 226.
[818] Resp. Rej., ¶ 228.
[819] Resp. C-Mem., ¶¶ 297-301, 303, 306, 311-312.
[820] Resp. Rej., ¶¶ 231-232.

nature of the tax which was applied in *Yukos* is inapposite here, where there is no analogue to the "extraordinary circumstances" that surrounded that case.[821] Nor is the other precedent cited by the Claimants (*Antaris*) comparable, in the Respondent's view.[822] For the Respondent, it is not appropriate to carry out an analysis of the economic effects of a measure to determine if it qualifies as a tax, as the relevant factor is "its legal operation."[823]

420. That said, the Respondent contends that, even if the Tribunal were to carry out the analysis suggested by the Claimants, it should conclude that the TVPEE is a "*bona fide* tax measure."[824] In particular, the Respondent submits that the TVPEE does not discriminate against renewable energy producers, but rather applies to both conventional and renewable producers in the same way.[825] Further, there is no discrimination in terms of its legal and economic impact on the renewable sector,[826] as the TVPEE is a direct tax that is not passed on by the taxpayer to anybody else,[827] but is one of the costs that is incorporated into the calculations of subsidies paid to renewable producers.[828] The Respondent rejects the Claimants' characterization of the TVPEE as a disguised tariff cut for renewable energy producers, stating that its only purpose is to collect revenue for the State to be used for public purposes.[829] The TVPEE is integrated into the State's General Budget, and it contributes to the resources for the financing of public expenditures.[830] Finally, the Minister of Industry, Energy and Tourism never asserted that the TVPEE's objective was indirectly to reduce premiums; he simply said that to achieve the goal of sustainable electricity the options were to increase revenues for the system or to reduce costs.[831]

421. In any event, the Respondent contends, the burden to demonstrate bad faith falls on the Claimants, and they have not done so.[832]

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[821] Resp. Rej., ¶ 233 (referring to RL-110, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 ("***Yukos***"), ¶ 1407).

[822] Resp. Rej., ¶ 234 (referring to CL-113, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018 ("***Antaris***")).

[823] Resp. Rej., ¶¶ 235-236.

[824] Resp. Rej., ¶¶ 237, 279(ii).

[825] Resp. Rej., ¶¶ 238-241, 250.

[826] Resp. Rej., § III.C (3)(3.2), ¶ 255.

[827] Resp. Rej., ¶¶ 256-259.

[828] Resp. Rej., ¶¶ 260-262, 265.

[829] Resp. Rej., ¶¶ 267-268.

[830] Resp. Rej., ¶¶ 269-270.

[831] Resp. Rej., ¶ 273.

[832] Resp. Rej., ¶ 237.

b. The Claimants' Position

422. The Claimants submit that Spain's objection is without merit and should be dismissed.[833] In short, the Claimants argue that the Taxation Carve-Out in ECT Article 21 applies only to *bona fide* taxation measures, and the TVPEE is not a *bona fide* tax.[834]

423. The Claimants oppose the Respondent's reliance on other awards that have previously ruled on this objection. They argue that in those other cases the tribunals found that the claimants had not met the burden of establishing that the TVPEE was not a *bona fide* tax, which the Claimants have done in this case, and that this Tribunal is not bound by those decisions and must reach its own conclusions based on the evidence before it.[835]

(i) Article 21 Applies Only to *Bona Fide* Taxation Measures

424. The Claimants submit that ECT Article 21 applies only to *bona fide* taxation measures.[836] In particular, the Claimants submit:

425. First, that ECT Article 21 must be interpreted in accordance with the principle of good faith in VCLT Article 31(1), which leads to the conclusion that the Respondent cannot avoid liability by "framing a harmful measure as a tax" to then rely on the literal wording of the Taxation Carve-Out.[837] Further, the principle of good faith is a "relevant rule of international law" that the Tribunal must take into account pursuant to VCLT Article 31(3)(c).[838] Therefore, for the Claimants, the principle of good faith requires not only that (i) the Tribunal interpret ECT Article 21 in good faith; but also that (ii) the Respondent observe its treaty obligations and exercise its rights under the ECT in good faith.[839] Relying on *Yukos*, the Claimants submit that the object and purpose of ECT Article 21 was not to enable a State to frame its conduct as a taxation measure to achieve unlawful results with impunity.[840] The Claimants oppose the Respondent's attempt to distinguish *Yukos* on the basis

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[833] Cl. Rej. Jur., ¶ 161.

[834] Cl. Reply, ¶¶ 86-88. The Claimants refer to this measure as the 7% Levy, but for simplicity and uniformity in this Award, the summary in this section refers to the measure as the TVPEE.

[835] Cl. Rej. Jur., ¶¶ 159-160.

[836] Cl. Reply, § II(2)(2.2).

[837] Cl. Reply, ¶¶ 89, 91.

[838] Cl. Reply, ¶ 94.

[839] Cl. Reply, ¶ 95.

[840] Cl. Reply, ¶ 97 (referring to CL-111, *Yukos*, ¶ 1407).

that it concerned "extraordinary circumstances," and submits that the proposition in *Yukos* is one of principle.[841]

426. Second, the principle of good faith "pervades all aspects of investor-State relations," and requires a State not to violate requirements of consistency and estoppel.[842] Thus, when performing its treaty obligations, and seeking to avail itself of exemptions under a treaty, a State must not act in a manifestly inconsistent manner or "flout" the binding international law principle of estoppel.[843] This means, the Claimants argue, 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."[844] Put another way, good faith prevents the Respondent from abusing its right to taxation and using the literal wording of ECT to deprive the Claimants from their rights to fair and equitable treatment.[845]

427. Third, the Claimants say that in order to apply the Taxation Carve-Out, the Tribunal must be satisfied that the TVPEE is a *bona fide* tax, and the State's labelling of the measure at such does not suffice for this purpose.[846] Relying on *Antaris*, the Claimants contend that the Tribunal must look to the "substance" of the measure (as distinguished from its form), to avoid an abuse of ECT Article 21.[847] According to the Claimants, the *Antaris* tribunal also analyzed whether a measure was a tax within the scope of ECT Article 21 in accordance with considerations of international law, concluding that Article 21 could only apply to State action directed at raising "general" revenue for the State – a condition the Claimants say is not met here, as the purpose of the TVPEE was solely to reduce the Tariff Deficit.[848]

428. The Claimants challenge the Respondent's contention that a tribunal may only look at the "legal operation" of a taxation measure, not its "economic effect," and submit that the authority on which the Respondent relies does not support the Respondent's point.[849] Moreover, according to the

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[841] Cl. Rej. Jur., ¶ 140.
[842] Cl. Reply, ¶¶ 103-104.
[843] Cl. Reply, ¶ 108.
[844] Cl. Reply, ¶ 106.
[845] Cl. Reply, ¶ 107.
[846] Cl. Reply, ¶¶ 99-100.
[847] Cl. Reply, ¶¶ 101-102 (relying on CL-113, *Antaris*, ¶ 249). *See also* Cl. Rej. Jur., ¶¶ 144-145.
[848] Cl. Rej. Jur., ¶¶ 147-148.
[849] Cl. Rej. Jur., ¶ 141.

Claimants, the Respondent also relies on an inapposite authority to contend that the Tribunal must defer to the Spanish authorities' assessment of the TVPEE.[850]

429. Fourth, the Claimants submit that the determination of whether a taxation measure is *bona fide* "must … be inferred from the conduct of the State," in light of the totality of the State's pattern of conduct, and "on the balance of probabilities."[851] In other words, the Claimants submit, the Tribunal is not confined by a notion that a tax must be considered *bona fide* unless there is "conclusive proof" that it was a sham.[852] Therefore, in the present case, the question for the Tribunal is "whether the implementation of the [TVPEE] 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 … ."[853] Moreover, the Claimants argue, the latitude given by the ECT concerning taxation measures makes it "fundamental" for the Tribunal to establish the "real purpose" of the measure.[854]

430. According to the Claimants, in this case, there is "*prima facie* evidence that the [TVPEE] is arbitrary, discriminatory and was intended merely to cut the FIT that Spain had promised would remain stable," and therefore "the Tribunal may draw inferences in favour of the Claimants … ."[855] Furthermore, when a taxation measure is *prima facie* arbitrary or discriminatory, the burden switches to the Respondent to provide a rational explanation for its conduct.[856]

(ii) The TVPEE is Not a *Bona Fide* Measure

431. The Claimants argue that the TVPEE was not a *bona fide* taxation measure.[857] In their view, Spain's conduct demonstrates that the TVPEE is not a "real tax measure," but rather was designed to strip the Claimants' rights under RD 661/2007.[858] This is "most obvious," they argue, from two factors: (i) that the TVPEE is a tax on revenues rather than profits, in a context in which the sole revenue for the CSP plants is the feed-in-tariff;[859] and (ii) that while the funds raised through levies go to the general State budget, here the same amount of money collected from the TVPEE is then

[850] Cl. Rej. Jur., ¶ 142.
[851] Cl. Reply, ¶¶ 109-110 (relying on CL-111, *Yukos*, ¶ 514).
[852] Cl. Reply, ¶ 114.
[853] Cl. Reply, ¶ 111. *See also* Cl. Reply, ¶ 114.
[854] Cl. Reply, ¶ 112.
[855] Cl. Reply, ¶ 113.
[856] Cl. Reply, ¶ 113.
[857] Cl. Reply, § II (2)(2.3).
[858] Cl. Reply, ¶ 115.
[859] Cl. Reply, ¶ 115.

returned to the electricity system, rather than remaining in the general State budget.[860] According to the Claimants, the Respondent has failed to explain why money collected by the SES must "travel" through the State budget, which shows that the TVPEE is artificially framed as a tax.[861]

432. Furthermore, in the Claimants' submission, a number of additional factors demonstrate that the TVPEE is not a *bona fide* tax:

433. First, the Government's conduct reveals that the TVPEE was intended to be a tariff cut,[862] and that its primary purpose was not revenue raising.[863] As the TVPEE is applied to all revenues generated by the renewable energy plants, its effect is equivalent to a tariff cut or reduction on incentives, because (i) CSP plants operate in a regulated environment and all of their revenues are fixed, such that impact associated with the TVPEE cannot be passed to consumers by raising electricity prices; and (ii) the cost of paying the TVPEE is higher for renewable energy installations, because their regulated tariff by design is higher than the market price, and so the taxable basis to calculate the TVPEE is also higher.[864]

434. Moreover, the Claimants argue, before the enactment of Law 15/2012, the Government "had all but confirmed" that the measures were designed to cut the incentives afforded by RD 661/2007, as shown by statements by the Minister for Industry, Energy and Tourism in 2012.[865] For the Claimants, the TVPEE was simply a tariff cut that was presented in the form of a tax to circumvent the stabilization provision in RD 661/2007; as such, they say, it does not constitute a *bona fide* taxation measure.[866]

435. Second, the Claimants say that the TVPEE is both discriminatory and unrelated to its alleged rationale.[867] As to the former, the Claimants observe that while the TVPEE applied to all installations in Spain, "Ordinary Regime producers could pass part of the additional cost of the levy onto consumers by increasing the price of electricity sold on the market," but renewable energy producers in the Special Regime "could not because they operate in a regulated market," with the

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[860] Cl. Reply, ¶¶ 115-116.

[861] Cl. Rej. Jur., ¶ 149.

[862] Cl. Reply, ¶ 117(a) and § II (2)(2.3)(a).

[863] Cl. Reply, ¶ 118. *See also* Cl. Rej. Jur., ¶ 160.

[864] Cl. Reply, ¶¶ 123-124.

[865] Cl. Reply, ¶¶ 125-126 (citing C-27, *La Gaceta*, Press Article, "Interview with the Minister of Industry Energy and Tourism," 14 October 2012, p. 3).

[866] Cl. Reply, ¶¶ 126-127.

[867] Cl. Reply, § II (2)(2.3)(b).

result that the TVPEE was a "straightforward reduction in the CSP plants' production revenues."[868] Because the predictable effect of the measure is harsher for renewable energy generators than for conventional generators, the Claimants say that the measure cannot have been in good faith, but rather was aimed at unfairly targeting a particular sector, in direct contradiction with the commitments that induced the investment.[869] Furthermore, according to the Claimants, the Respondent's contention that the TVPEE is covered by the remuneration provided by the new regime is incorrect, and ignores the Claimants' showing that they have suffered a "massive drop" in their investment's value.[870]

436. The Claimants further submit that the discriminatory nature of the TVPEE is also shown by the fact that the measure's effects are at odds with its purported aim (supporting the environment and the environmental policy).[871] This has been confirmed by the EC and the Spanish Supreme Court, the Claimants say.[872] The Claimants note, in particular, that while the Preamble of Law 15/2012 indicates that its purpose is to benefit the environment, the TVPEE asymmetrically targets renewable energy installations, the only energy producers that provide clean energy.[873]

437. The Claimants contend that a measure that has no rational link to its purported aim is arbitrary, and when it intentionally does the opposite of what it intends to achieve, it is also *mala fide*.[874] Further, according to the Claimants, where the Government's explanation for a tax measure is inconsistent or contradictory, the tribunal may infer that it is not *bona fide*.[875]

438. In this case, the Claimants argue, the Respondent has failed to establish a rational link between the TVPEE and its professed aim of benefiting the environment.[876] Indeed, the Claimants contend that the Regulatory Dossier of Law 15/2012 shows that the Respondent introduced the TVPEE knowing that it would adversely impact renewable energy installations, but without giving any consideration to this impact.[877] Moreover, according to the Claimants, that Regulatory Dossier further

[868] Cl. Mem., ¶ 127; Cl. Reply, ¶ 129. *See also* Cl. Rej. Jur., ¶ 150.
[869] Cl. Reply, ¶ 132.
[870] Cl. Rej. Jur., ¶ 158.
[871] Cl. Reply, ¶ 133. *See also* Cl. Reply, ¶ 117(b).
[872] Cl. Reply, ¶¶ 136-137.
[873] Cl. Rej. Jur., ¶ 154.
[874] Cl. Reply, ¶ 134.
[875] Cl. Reply, ¶ 134.
[876] Cl. Reply, ¶ 138.
[877] Cl. Reply, ¶ 139.

demonstrates that no rationale was provided for the chosen tax rate, nor does that Dossier state that the amounts to be raised were calculated to pay for a specific environmental purpose, thereby suggesting that this was simply an arbitrary tariff cut.[878]

439. The Claimants take issue with the Respondent's allegation that the TVPEE had the purpose of covering costs of electricity transmission and distribution networks that have environmental effects, alleging that (i) the Respondent has not explained why the costs of those networks in place before the advent of renewable energy should be born in greater proportion by renewable energy installations; and (ii) it makes no sense to tax renewable energy installations to pay for the use of those networks, when the Claimants are required to pay an access fee precisely for that purpose.[879]

440. Third, the Claimants say that the Regulatory Dossier of Law 15/2012 reveals that the TVPEE was designed to target renewable energy installations.[880] According to the Claimants, this is shown by the Dossier's analysis of the expected income from the tax, its figures showing that the expected taxable base of the TVPEE included all incentives and premiums, and its figures showing that generators under the ordinary regime would generate and sell more electricity but pay less tax.[881] This is compounded by the fact that ordinary regime installations could raise their prices to mitigate the impact of the measure, while the renewable energy installations could not.[882]

441. Fourth, in the Claimants' view, the TVPEE can only be understood as part of a government scheme to dismantle the RD 661/2007 regime.[883] In this regard, the Claimants emphasize that the TVPEE was only the first measure that harmed their investments in a series of interconnected ones aimed at restricting and eliminating their rights under RD 661/2007,[884] and it must be considered in light of the "full regulatory assault" on the Claimants' investments.[885] It was, therefore, not a normal tax in the ordinary process of revenue raising.[886]

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[878] Cl. Reply, ¶ 140.
[879] Cl. Rej. Jur., ¶ 157.
[880] Cl. Reply, ¶ 141.
[881] Cl. Reply, ¶¶ 141-143.
[882] Cl. Reply, ¶ 144.
[883] Cl. Reply, ¶ 117(c) and § II (2)(2.3)(d).
[884] Cl. Reply, ¶¶ 147, 149.
[885] Cl. Reply, ¶ 147.
[886] Cl. Reply, ¶ 149.

(iii) The State's Characterization of the Measure as a Tax is Not Dispositive

442. The Claimants further submit that the Respondent's characterization of the TVPEE as a tax under its domestic law does not determine whether ECT Article 21 applies.[887] Moreover, according to the Claimants, whether the measure is compliant with domestic law is irrelevant, because (i) a State may not rely on its domestic law to avoid international liability; and (ii) domestic law is not applicable to the dispute between the Parties, pursuant to ECT Article 26(6).[888]

443. Nor does the analysis of the measure *vis-à-vis* the notion of a tax under international law demonstrate the *bona fide* nature of the TVPEE, according to the Claimants.[889] Referring to the three-limb concept of tax under international law proposed by the Respondent, the Claimants submit that regardless of whether that test is correct, the analysis under such test is not relevant to the issue in dispute. The Claimants contend that there is no dispute that the TVPEE was imposed through a Spanish law, or that it imposes an obligation on a class of persons, but neither of those factors shows that the TVPEE is *bona fide*.[890] Nor does the fact that the funds go to the General State budget evidence its *bona fide* nature, because otherwise, any taxation measure, no matter how egregious, would qualify as *bona fide*.[891] Moreover, the Claimants argue, the TVPEE is not applied for general purposes, but it is indeed being used to pay the Tariff Deficit.[892] Lastly, according to the Claimants, the Respondent is incorrect in arguing that the EC ruled that the TVPEE was compliant with EU law, and in any event, compliance with EU law is not relevant to the issues in dispute.[893]

(2) The Tribunal's Analysis

444. The Tribunal starts with the placement and language of the relevant ECT provision. Article 21 appears in Part IV of the ECT, entitled "Miscellaneous Provisions," and thus is not specific to Part III, which sets forth the Treaty's provisions on "Investment Promotion and Protection." Article 21(1) begins with the statement that "[e]xcept as otherwise provided in this Article, *nothing in this Treaty* shall create rights or impose obligations with respect to Taxation Measures of the

[887] Cl. Reply, ¶¶ 153-156.
[888] Cl. Reply, § II (2)(2.4)(b), ¶¶ 158-159.
[889] Cl. Reply, § II (2)(2.4)(c).
[890] Cl. Reply, ¶ 161.
[891] Cl. Reply, ¶ 162.
[892] Cl. Reply, ¶ 163.
[893] Cl. Reply, ¶ 165.

Contracting Parties" (emphasis added).[894] The next sentence of Article 21(1) illustrates the particular importance the ECT Contracting Parties attributed to this provision within the overall ECT scheme. It provides that "[i]n the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency."[895]

445. It is axiomatic that ECT Article 21(1) is an exclusionary clause, intended to carve out certain matters from the scope of the ECT as a whole. States are free to limit the scope of their treaties in any way they wish, and when they unmistakably have done so, such exclusions must be given meaning. What that meaning *is*, however – and therefore the scope and reach of any particular exclusion – is a matter of treaty interpretation that is subject to the general principles of interpretation provided by the VCLT.

446. Beginning then with the first part of Article 21(1) – "[*e*]*xcept as otherwise provided* in this Article" (emphasis added) – the following subparagraphs of Article 21 designate several ECT provisions to which the exclusion for "Taxation Measures" in Article 21(1) does not apply. These include several Articles outside the scope of Part III, namely Article 7(3) and Article 29(2) to (6), which the Contracting Parties agreed generally *would* apply to "Taxation Measures other than those on income or on capital."[896] As relevant to Part III on "Investment Promotion and Protection," Article 21(3) provides that the non-discrimination obligations of Articles 10(2)[897] and 10(7)[898] likewise *would* apply to "Taxation Measures … other than those on income or on capital," with certain specified exceptions. Article 21(5) provides that Article 13's provision regarding expropriation "shall apply to taxes," subject to a special procedure involving referral to "Competent Tax Authorities" of any allegation that "a tax constitutes an expropriation" or a "discriminatory" expropriation.[899]

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[894] CL-1/RL-20, ECT, Article 21(1).

[895] CL-1/RL-20, ECT, Article 21(1).

[896] CL-1/RL-20, ECT, Article 21(2) and (4) (addressing respectively Article 7(3) and Article 29(2) to (6)).

[897] ECT Article 10(2) obligates each Contracting Party to "endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3)," namely treatment "which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable." CL-1/RL-20, ECT, Article 10(2)-(3).

[898] ECT Article 10(7) obligates each Contracting Party to "accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments" of its own nationals or of other foreign nationals. CL-1/RL-20, ECT, Article 10(7).

[899] CL-1/RL-20, ECT, Article 21(5).

447. Subject to these exceptions, however, ECT Article 21(1) commands that "nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties."[900] The reference to "nothing in this Treaty" is all encompassing, and therefore excludes application equally of the provisions that *define the scope* of protected investors and investments (Article 1), the provisions that impose *substantive obligations* on the Contracting Parties with respect to those investors and investments (Articles 10-15), and the provisions that provide investors a *mechanism for redress* of alleged violations (Article 26). As to each of these provisions, if a "Taxation Measure" is involved, then the investor has no alleged "rights" under the ECT and the State in turn has no ECT-based obligations, even though it may have relevant duties under its domestic laws. Correspondingly, if the alleged harm to an investor was caused by a "Taxation Measure," then that measure cannot be challenged through ECT-based arbitration, even though it may be challenged through domestic law mechanisms.

448. Of direct relevance to this case, the exclusion of most ECT protections in relation to "Taxation Measures" extends to ECT Article 10(1), which is not one of the provisions carved out of the exclusion. Thus, *whatever* the meaning of the rights and obligations referenced in ECT Article 10(1), *none* of these rights and obligations apply to "Taxation Measures." Accordingly, there can be no jurisdiction for a tribunal to hear ECT claims predicated on an alleged breach of State obligations referred to in Article 10(1), or denial of investor rights, by virtue of "Taxation Measures."

449. It is therefore critically important to understand what the ECT considers to be a "Taxation Measure." The ECT does not contain a comprehensive definition, although it does say in Article 21(7)(a) that the term "includes" the following:

> (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
>
> (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.[901]

450. Notably, however, Article 21(7)(a)(i) does not define the word "taxes." Thus, while a "Taxation Measure" includes any "provision relating to taxes of the domestic law," this says more about what

[900] CL-1/RL-20, ECT, Article 21(1).

[901] CL-1/RL-20, ECT, Article 21(7)(a).

a "*Measure*" includes (*i.e.,* a "provision … of the domestic law") than what "*Taxation*" is. It does not assist particularly to specify, with circularity, that "Taxation" is something "relating to taxes."

451. The Parties in this case have debated whether the real consequence of Article 21(7)(a)(i) is to delegate the definition of "taxes" itself to domestic law, with the result that if domestic law classifies a measure as a "tax," an ECT tribunal should accept it as such. The Respondent maintains that that is the case, contending that "the Law governing the determination of whether certain provisions are provisions relating to taxes should be the domestic Law of the Contracting Party."[902] The Claimants object that a State's characterization of a measure "under its own internal law is not determinative as to whether Article 21 is applicable," noting that a *renvoi* to domestic law would leave a host State free to label any measure as a "tax," and thereby render it *ipso facto* immune from review in ECT arbitration. The Claimants contend that a tribunal therefore must go beyond merely confirming that a measure has been denominated as a tax under domestic law, and consider whether its essential characteristics qualify it as such.[903]

452. The Tribunal agrees with the Claimants in this respect. As noted above, the reference in Article 21(7)(a)(i) to "any provision … of the domestic law" may be seen as an indication of what constitutes a "Measure" for purposes of the ECT. It is analogous to other treaties that have defined the term "measure" in terms of the *types of acts* at issue. In *EnCana*, for example, the tribunal observed that the Canada-Ecuador BIT defined the term "measure" to include "any law, regulation, procedure, requirement or practice."[904] ECT Article 21(7)(a)(i) does not, however, dictate that the word "taxes," for purposes of the ECT's Taxation Carve-Out, should be interpreted entirely in deference to domestic authorities. Other ECT tribunals have concluded the same.[905]

453. Rather, given the absence of an ECT definition of the word "taxes," the Tribunal considers that it should be given its "normal meaning" using the interpretative tools available as a matter of international law, just as prior tribunals have done under other treaties that did not define the

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[902] Resp. C-Mem., ¶ 258; *see also* Resp. C-Mem., ¶ 259 (contending that this conclusion flows from "the wording of Article 21(7)(a)(i) of the ECT").

[903] Cl. Reply, ¶ 153.

[904] RL-31, *EnCana Corporation v. Republic of Ecuador*, UNCITRAL Case No. UN3481, Award, 3 February 2006 ("***EnCana***"), ¶ 141.

[905] *See, e.g.,* RL-152, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020 ("***Cavalum***"), ¶ 384 ("even if a measure is characterised as a tax by national law, the characterization by domestic law is not conclusive for the purposes of international law."); CL-106/RL-121, *Cube* Decision, ¶ 221 ("[i]t is the meaning of the term 'taxation measures' in Article 21 ECT that is material. That is a question to be approached on the basis of the principles of international law concerning the interpretation of treaties, and not, for example, upon the basis of an interpretation of EU or any other domestic law.").

concept of "taxes."[906] At the same time, in applying an international law definition of "taxes" to the circumstances of a particular case, importance must be paid *as a matter of fact* to the domestic law system at issue, including how and through whom the State customarily regulates issues of taxation.

454. Beginning with the international law meaning of the word "taxation," the Tribunal has no quarrel with the general definition set out in *EnCana* and subsequently adopted by other tribunals, namely that "[a] taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes."[907] This definition is in line with the "three basic elements of a tax" that the *Stadtwerke* tribunal derived from an independent analysis of dictionary definitions: "1) a compulsory payment obligation, 2) imposed by the state on a defined class of persons, and 3) to generate revenues for the State to be used for public purposes."[908] However, this does not mean that *every* instance of a governmental authority imposing monetary obligations necessarily is assessing a "tax"; in many if not all systems of government, fees may be required to obtain certain licenses, permits or authorizations, but this does not mean that any provision of law that imposes such fees is therefore engaging in a "taxation measure." The Tribunal thus agrees with other tribunals (including one presided by the same arbitrator as this case) that have found that the definition should include "an additional element," namely that the mandatory levy imposed for public purposes should be "without any direct benefit to the taxpayer."[909]

455. Finally, in some cases it may be necessary, "in order to distinguish in any given case between measures that involve 'taxation' and those which do not, … to move beyond a mere generalization about imposing liability to pay money to the State." As one tribunal explained, the circumstances may call for a tribunal to engage in a "more nuanced inquiry [that] may involve considerations of '*who*,' '*what*' and '*why*,' within the domestic law framework of the measures in question":

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[906] RL-31, *EnCana*, ¶ 142; RL-60, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 ("***Burlington***"), ¶ 162.

[907] RL-31, *EnCana*, ¶ 142(4); RL-59, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 174; RL-60, *Burlington*, ¶¶ 164-165.

[908] CL-180/RL-130, *Stadtwerke*, ¶ 166. The *Stadtwerke* tribunal found a fourth requirement applicable for purposes of ECT Article 21(7): that the "compulsory payment obligation" have been "imposed by government according to the Contracting Party's law." *Id.*

[909] *Nissan*, ¶ 385 (quoting *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA Case No. 2012-16, UNCITRAL Rules, Partial Final Award, 6 May 2016, ¶ 159). Although the *Nissan* case was not cited directly by the Parties, it was discussed in some of the cases they did submit (*e.g.*, CL-240, *Kappes*). The Tribunal considers it both appropriate and useful to cite *Nissan* to a limited extent.

> The 'who' question seeks to determine *which entities* are empowered under domestic law to regulate, administer, collect or refund taxes, and whether the case at hand involves the conduct of these entities .... The 'what' question in turn seeks to assess the *qualitative nature* of the acts in question, namely whether they were of the type customarily used in the State ... to deal with matters of taxation. Finally, the 'why' question examines the *purpose* of the relevant acts, including whether they were motivated principally by tax objectives.[910]

456. In this case, as in many of the prior cases cited by the Parties, there is little debate about the "who" question. As in *Duke Energy* and *Burlington*, the measure in question (the TVPEE) was imposed by an act of the national legislature (here the Parliament of Spain), which has power to enact laws assessing taxes and which apparently followed its normal procedures for doing so.

457. With respect to the "what" issue, the Tribunal also considers that the measure *qualitatively* was in the nature of a tax, with all of the formal attributes of such. It was (i) an act of Parliament that (ii) imposed an obligation on a class of persons (all electricity producers who fed power into the transmission system) (iii) to pay a sum of money, which was calculated at a uniform rate (7%) based on their economic activities, and (iv) which was payable into the State budget. In other words, the TVPEE levy imposed by Law 15/2012 fits the general definition of a "taxation measure" that international tribunals have considered to apply.[911] It also has been accepted as a valid tax under Spanish law by the Spanish Constitutional Court, which considered the TVPEE justified by an extraordinary and urgent need to make cost adjustments in the electricity sector.[912]

458. The "key issue," the Claimants say,[913] is the "why" question: was the TVPEE in fact enacted for *bona fide* tax objectives? The Claimants contend that it was not, but rather was a "backdoor" mechanism to cut tariff subsidies payable to renewable energy installations, "disguised" as a tax for ulterior purposes.[914] The Claimants note that in *Yukos*, the tribunal declined to accept Russia's "mere labelling of a measure as 'taxation'" when the evidence suggested the State's real motivation, "in the extraordinary circumstances of this case," was not to "raise[] general revenue for the State," but "in reality ... to achieve an entirely unrelated purpose (such as the destruction of a company or

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[910] *Nissan*, ¶¶ 385-386.

[911] *See, e.g.,* RL-159, *Eurus Energy Holdings Corp. v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021 ("***Eurus***"), ¶ 175; CL-180/RL-130, *Stadtwerke*, ¶ 174.

[912] R-176, Judgment 183/2014, Constitutional Court, 6 November 2014 (published on 4 December 2014) (holding that the Spanish Parliament has wide discretion to design taxes and that there is no impediment for the government to use taxes as an instrument to achieve broader public policy objectives).

[913] Cl. Reply, ¶ 86.

[914] Cl. Reply, ¶¶ 87, 145, 146, 165.

the elimination of a political opponent) ...."[915] The Claimants also note that in *Antaris*, the tribunal declined to apply the ECT's Taxation Carve-Out where it found, consistent with the view of the Czech Supreme Administrative Court, that a levy that by design applied only to solar energy producers, and was clearly motivated to reduce tariffs payable to them, could not be considered a genuine tax.[916] By the same token, the Claimants say, this Tribunal should conclude that Spain's real motive for enacting the TVPEE was to reduce the FITs payable to renewable energy producers under RD 661/2007, and that Spain's characterization of the measure otherwise (*i.e.,* as a "direct and real tax"[917]) was essentially "a sham."[918]

459. The Claimants bear the burden of demonstrating that a measure which was framed as a tax was not in fact adopted for genuine revenue-raising purposes, but rather for ulterior motives that call into question its *bona fides* as a tax. The Tribunal agrees with prior tribunals that this is a heavy burden, as "the power to tax is a fundamental sovereign right that belongs to all governments; a sovereign right they have wide discretion in exercising."[919]

460. In this case, the Claimants have not met that burden. As other tribunals have found, the TVPEE in Law 15/2012 was imposed on all producers of electricity, "so as to obtain state revenues to address a public purpose: redressing a serious budgetary imbalance that [the Spanish Government] believed would have dire consequences for the country."[920] As discussed above, the 1997 Electricity Law previously had provided that the costs of the SES – including but not limited to the subsidies granted to renewable energy providers who could not yet effectively compete in the market – would be financed only by the revenue collected from users. That construct was proving unsustainable, as system costs increasingly outstripped the user fees that the Government considered it realistic for consumers to bear. The TVPEE was an effort by the Government to obtain an additional source of

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[915] CL-111/RL-110, *Yukos*, ¶¶ 1407, 1433.

[916] CL-113, *Antaris*, ¶¶ 232-235, 250-252.

[917] C-26/C-99/R-6, Law 15/2012, Article 1 (quoting from the English translation of R-6).

[918] Cl. Reply, ¶¶ 109, 111.

[919] CL-180/RL-130, *Stadtwerke*, ¶ 169; *see also* RL-152, *Cavalum*, ¶ 393 ("it is for a claimant to meet what must be the heavy burden of showing bad faith. It would be a serious matter for a tribunal to find that the exercise of the sovereign power to tax was exercised in bad faith."); CL-191/RL-145, *Hydro Energy 1 S.a.r.l. et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020 ("***Hydro***"), ¶ 518 (same); CL-122/RL-147, *Watkins Holding S.a.r.l et al. v. Kingdom of* Spain, ICSID Case No. ARB/15/44, Award, 21 January 2020 ("***Watkins***"), ¶ 270 (considering, in a section of the Award with unanimous support, that the burden of proof in this respect is "particularly demanding, as 'States have a wide latitude in imposing and enforcing taxation law …'," quoting *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Award, 12 September 2010, ¶ 580 (on the record as CL-71)).

[920] CL-180/RL-130, *Stadtwerke*, ¶ 174.

funds to support the costs of the SES. It was not specifically aimed at the Claimants, nor at foreign investors in general, nor even solely at renewable energy producers; rather, it was a levy on the receipts of *all* electricity producers, including conventional energy producers who did not receive State subsidies in the form of Regulated Tariffs. Facially, the Tribunal sees no impropriety in Spain's determination to use a tax for this purpose.[921]

461. The Claimants' countervailing arguments are not persuasive. For example, the Claimants point to the very fact that TVPEE tax revenues were not retained in the general State budget, but rather were returned to the electricity system in the same amount, as evidence that the TVPEE was "not a real tax measure."[922] But there is nothing inherently "un-taxlike" about a State earmarking a particular source of revenue for a particular use. As the *Hydro* tribunal observed, "[a] tax does not cease to be a tax because there is a mandatory allocation of revenues received from the taxation measure."[923] Indeed, the Respondent points out that by structuring the policy in this way, an amount equivalent to the estimated annual collection of *all* taxes included in Law 15/2012 was allocated to supporting electricity system costs, including the TVPEE on both conventional and renewable producers, even though only the latter benefited from State subsidies.[924] Thus, far from evidencing a "design[] to strip away the rights of the Claimants' Plant under the RD 661/2007 regulatory regime," as the Claimants contend,[925] this can be seen as the deployment of general taxation powers for a designated public policy goal, namely, to help prop up the existing subsidy regime that was struggling under financial unsustainability.[926]

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[921] *See similarly* CL-128/RL-129, *BayWa R.E. Renewable Energy GmbH et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 ("***BayWa***"), ¶ 306 (considering that Spain had a "legitimate concern" about the burgeoning tariff deficit and it was "reasonable that the energy sector as a whole should bear at least part of the fiscal burden"); CL-180/RL-130, *Stadtwerke*, ¶ 174 (concluding that the "decision to tax may have been wise or unwise, but it was a legitimate and *bon[a] fide* exercise of governmental power"). *See also* RL-17/RL-105, *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, Arbitration SCC V2013/153, Award, 12 July 2016 ("***Isolux***"), ¶ 740.

[922] Cl. Reply, ¶¶ 115-116.

[923] CL-191/RL-145, *Hydro*, ¶ 518.

[924] Resp. C-Mem., ¶¶ 307-308 (citing R-6, Law 15/2012, Additional Provision Two; and R-185, Law 17/2012, Additional Provision Five).

[925] Cl. Reply, ¶ 115.

[926] As otherwise put by the *Cube* tribunal, "the fact that the 7% levy is recycled into the electricity system – and thereby reduces the tariff deficit," does not "somehow disentitle[] it from constituting a public purpose. That deficit is a burden on the public finances and a measure that reduces it serve[s] such a purpose. The fact that there could be other means of reducing the deficit – by increasing the cost of electricity to consumers – is a political proposition, devoid of legal content." CL-106/RL-121, *Cube* Decision, ¶ 231.

462. By the same token, the Claimants' invocation of a 2012 statement by the Minister of Industry, Energy and Tourism does not demonstrate a hidden agenda behind the TVPEE.[927] That statement acknowledged that the Government could have used tariff cuts as an alternative way of addressing the Tariff Deficit:

> 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.[928]

This was hardly a surprising statement: it stands to reason that any funding deficit for a supposedly self-sustaining system can be addressed either by reducing the costs of the system, or by increasing the revenue earned by the system. In this instance, the Government chose to do the latter, imposing taxes in equal measure on all installations that fed electricity into the grid, rather than cutting subsidies payable to certain installations. The Ministry's acknowledgment that there was an alternative option it *did not* pursue at the time (tariff reduction) is not a purported admission that the one it *did* pursue (a fiscal measure that raised revenue through a tax on all producers) was somehow a "backdoor" tariff cut.[929]

463. Of course, the effect on certain plants may have been similar. The Claimants argue that because "the sole revenues provided to the CSP plants is the FIT," a tax on revenue was equivalent in outcome to a tariff cut for the Plant.[930] The Respondent takes issue with the Claimants' economic analysis, observing that the impact of the TVPEE on renewable energy installations was ameliorated by the June 2014 Order, under which the TVPEE is a cost included in the calculation of standard facility operating costs on which subsidies are based.[931] Be that as it may, the Respondent does not appear to dispute the Claimants' broader point that the TVPEE impacted conventional electricity producers differently than renewable producers, because the former

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[927] Cl. Reply, ¶ 125 (claiming that the Minister's statement "all but confirmed that these measures were designed as a means to cut the incentives that [the Government] had committed to provide to the Claimants' Plant ….").

[928] C-27, *La Gaceta*, Press Article, "Interview with the Minister of Industry Energy and Tourism," 14 October 2012.

[929] *See* CL-94/RL-88, *Antin Infrastructure Services Luxembourg S.a.r.l. et al v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 ("***Antin***"), ¶ 319 (concluding similarly with respect to the Minister's *La Gaceta* interview).

[930] Cl. Reply, ¶ 115.

[931] RD-1, Resp. Op. Statement, Slide 53 (quoting R-60, June 2014 Order: "among the operating costs that vary depending on the production of the type facility are … the tax on the value of the production of electrical energy established by Act 15/2012").

(selling electricity to the market) may have been able to pass along some or all of the additional cost to consumers by raising prices.[932]

464. Assuming that differential impact to be true, however, a tax that is imposed at the same rate on all taxpayers is not rendered *mala fide*, simply because some taxpayers may be more economically resilient than others. The underlying nature of a measure – whether it is a "Taxation Measure" or not – must be determined by its overall characteristics, and not differentially for different tax subjects, based on their particular economic characteristics. As the *Eurus* tribunal aptly explained, the allegedly unequal impact of the TVPEE "does not, by itself, constitute evidence of bad faith," nor does it "change the character of the TVPEE as a tax. A tax does not cease to be a tax because it applies unequally or disproportionately to particular taxpayers or categories of taxpayers, and no such equality or proportionality of incidence is required by the ECT for a measure to qualify as a taxation measure."[933]

465. Finally, the Claimants' contention that the TVPEE was not well matched to certain of its stated objectives does not alter the conclusion that it was a "Taxation Measure" for purposes of the ECT. The Claimants observe that the Preamble of Law 15/2012 referred to harmonizing the Spanish tax system with a more efficient use of the environment; they argue that it was irrational in that context to impose a tax that impacted renewable energy providers.[934] But a tax does not have to be perfectly tailored to its underlying objectives to constitute a tax in the first place. Absent evidence that it was essentially pretextual (as in *Yukos*), it will still qualify in its basic *genus* as a "Taxation Measure," with the jurisdictional consequences that follow under the ECT. Indeed, tribunals should be wary not to import into that jurisdictional analysis what essentially are merits-type criticisms (*e.g.*, that a measure allegedly was arbitrary, unreasonable, or discriminatory). If a measure fundamentally qualifies as a "Taxation Measure" under the ECT, then the obligations imposed by ECT Article 10(1) do not apply, and a tribunal has no jurisdiction under ECT Article 26 to consider the alleged breach of such obligations.

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[932] Cl. Reply, ¶¶ 123, 129, 144.

[933] RL-159, *Eurus*, ¶ 179. *See similarly* RL-158, *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case No. V 2017/060, Final Award, 8 March 2021 ("***FREIF***"), ¶¶ 373-374 (observing that "[a]ny tax with general application to a particular sector will, to some extent, vary in its impacts upon individual businesses, depending upon factors such as their revenue sources and profitability"); CL-106/RL-121, *Cube* Decision, ¶¶ 224-225 (noting that "the effect of virtually any tax" is to reduce the revenue to a taxpayer, and "[t]he fact that the tax may have a greater effect on renewable producers … does not change its character. Let alone is it a basis for drawing an inference of lack of *bona fides*.").

[934] Cl. Reply, ¶¶ 133-135.

466. In conclusion, the Tribunal sees no basis for finding the TVPEE to be anything other than a "Taxation Measure" within the meaning of ECT Article 21(7). In these circumstances, the Respondent's jurisdictional objection with respect to the TVPEE is granted.

E. FOURTH OBJECTION: INADMISSIBILITY AND LACK OF JURISDICTION OVER THE CLAIM ARISING OUT OF RDL 17/2019

(1) The Parties' Positions

a. The Respondent's Position

467. The Respondent submits that the Claimants' written and oral submissions failed to identify RDL 17/2019 as one of the Disputed Measures in this arbitration, and that it was only the Second Brattle Quantum Report that did so; the Claimants then made a reference in the quantum section of the Reply to RDL 17/2019 as a Disputed Measure.[935] As a result, the Respondent objects to any claim for additional damages arising out of this measure, on the ground that (i) the measure is only a factual extension of the prior dispute and does not warrant modification of the valuation date; (ii) the claim is inadmissible; and (iii) in any event, it is outside of the Tribunal's jurisdiction.[936]

468. According to the Respondent, RDL 17/2019 is nothing but an implementation of the Initial Disputed Measures enacted in 2013-2014. Should the Tribunal consider RDL 17/2019 as a Further Disputed Measure, the Respondent submits that the claim arising out of it would be inadmissible, because the Claimants have failed to articulate it.[937] The Respondent remarks that Article 46 of the ICSID Convention concerning ancillary claims requires that said claims be "requested by a party," and argues that the Claimants have failed to make such a request with respect to RDL 17/2019. Instead, the Respondent argues, the Claimants have simply treated RDL 17/2019 as an input in the revised quantum model presented by their expert, without explaining why such measure would constitute an additional breach.[938]

469. Moreover, the Respondent submits that even if the Tribunal were to find that an ancillary claim has been asserted with respect to RDL 17/2019, the claim would fall outside the Tribunal's jurisdiction because the Claimants have made no attempt at amicable settlement of the dispute relating to this

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[935] Resp. PHB, ¶ 7 (citing Second Brattle Quantum Report, ¶ 6; Cl. Reply ¶ 653).

[936] Resp. PHB, ¶ 14.

[937] Resp. PHB, ¶¶ 9, 11.

[938] Resp. PHB, ¶ 11.

measure, as required by ECT Article 26(1).[939] Recognizing that certain tribunals have dismissed objections in connection with the negotiation requirement on the basis that negotiations would have been futile, the Respondent contends that in this case the Claimants have not demonstrated any such futility. Indeed, the Respondent observes, it is precisely on the basis of RDL 17/2019 that the Respondent has been able to settle some of the other disputes it has recently faced.[940]

b. The Claimants' Position

470. The Claimants submit that RDL 17/2019 is not an additional claim, but rather is a measure within the New Regime that already is at the heart of the dispute.[941] In the alternative, the Claimants argue that even if the claim relating to RDL 17/2019 were an additional claim, it should be admitted because it meets the criteria in Article 46 of the ICSID Convention and ICSID Arbitration Rule 40.[942] Moreover, the Claimants argue, it would also be more procedurally efficient to accept the inclusion of the measure,[943] and is necessary for the final disposition of the dispute.[944] More particularly, the Claimants contend as follows.

471. First, the Respondent's admissibility objection was not properly framed, nor was it timely.[945] Relying on ICSID Arbitration Rule 41(1), the Claimants submit that the Respondent's objection should have been made by the time of the Rejoinder, and it was not.[946] This has caused prejudice to the Claimants, as it deprived them of an opportunity to respond in writing to the admissibility objection prior to the Post-Hearing Brief, and an opportunity to respond for the first time in the Post-Hearing Brief is inadequate.[947] In fact, the Respondent has failed to bring any formal complaint as to admissibility, whether with its Rejoinder or otherwise.[948] The Claimants contend that, despite the Respondent's argument that a tribunal must rule on matters of jurisdiction whether

[939] Resp. PHB, ¶ 12.
[940] Resp. PHB, ¶ 13.
[941] Cl. PHB, ¶¶ 68, 93.
[942] Cl. PHB, ¶ 69.
[943] Cl. PHB, ¶ 69.
[944] Cl. PHB, ¶ 107.
[945] Cl. PHB, ¶¶ 69, 77.
[946] Cl. PHB, ¶¶ 81, 87-89.
[947] Cl. PHB, ¶ 83.
[948] Cl. PHB, ¶ 84, 90.

or not a formal objection was raised, this is not an objection to jurisdiction, but rather to admissibility.[949]

472. Second, the Claimants submit that the burden falls on the Respondent to prove that a claim related to RDL 17/2019 is not admissible in accordance with Article 46 of the ICSID Convention and ICSID Arbitration Rule 40, rather than for the Claimants to demonstrate the opposite.[950] In any event, the Claimants argue, the claim meets the criteria in Article 46 of the ICSID Convention and ICSID Arbitration Rule 40.[951] In particular, the Claimants argue that the claim arises directly out of the subject-matter of this dispute, because RDL 17/2019 is the last measure pursuant to the New Regime and it purports to implement Law 24/2013, another Disputed Measure. [952] The Claimants further assert that a challenge to RDL 17/2019 is within the scope of the Parties' consent and the Centre's jurisdiction.[953] In that regard, the Claimants take issue with the Respondent's contention that consent is lacking because no new trigger letter or request for arbitration was filed in connection with this claim.[954] The Claimants submit that their Trigger Letter and Request for Arbitration were widely drafted and encompassed any new measures that the Respondent might take within the New Regime, causing further harm to Tubo Sol.[955] In any event, the Claimants argue, a lack of notification of a specific measure does not deprive a tribunal of jurisdiction, as the ECT does not include a strict notice provision and Spain has been on notice since 2018 that the Claimants were challenging Spain's various changes to RD 661/2007, which would include any further measure introduced as part of the New Regime.[956] Nor is a new cooling off period necessary in relation to an ancillary claim, the Claimants say, as compliance with it is "moot" where "later measures are within the scope of the dispute outlined in the request for arbitration," even more so where negotiations would have been be futile.[957] Finally, the Claimants contend, the challenge to RDL 17/2019 was asserted in a timely manner, in particular, with the Reply – and indeed, since the

[949] Cl. PHB, ¶ 92.
[950] Cl. PHB, ¶ 75.
[951] Cl. PHB, ¶¶ 69, 76-77.
[952] Cl. PHB, ¶¶ 100-108.
[953] Cl. PHB, ¶¶ 109-116.
[954] Cl. PHB, ¶ 112.
[955] Cl. PHB, ¶¶ 68, 104, 112.
[956] Cl. PHB, ¶ 113.
[957] Cl. PHB, ¶¶ 114-115.

Memorial the Respondent was on notice that this anticipated measure could become part of the dispute.[958]

(2) The Tribunal's Analysis

473. It is axiomatic, first, that a complaint about RDL 17/2019 could not have been included in the Claimants' Request for Arbitration or Memorial, as these were filed on 15 October 2018 and 28 June 2019 respectively, and RDL 17/2019 was not issued until 22 November 2019. Nonetheless, the Claimants did make clear in those early pleadings that they objected to the application to the Plant of any changes to the RD 661/2007 tariff regime. In the Request for Arbitration, they also specifically noted that under the New Regime (as Claimants defined it), the Government was required every six years to "redefine a new pre-tax 'target' return … based on the evolution of the average yield on ten-year Government bonds," and that "[t]his first revision will take place in 2019."[959] In the Memorial, in a section entitled "The Disputed Measures violate the Claimants' legitimate expectations," the Claimants stated that "[t]he Disputed Measures are described below,"[960] and then included a subsection entitled "Review of the Reasonable Rate of Return in the Next Regulatory Period."[961] This subsection discussed, *inter alia*, (i) the fact that Law 24/2013 provided for review in 2019 of the target return for standard installations, without establishing "any clear or specific methodology or process for adjusting the 'target' return,"[962] and (ii) the publication in January 2019 of a Preliminary Draft Law that would set that rate at 7.09% based on a WACC calculation.[963] The Claimants added that following general elections in April 2019, "it is unclear whether the newly-elected government will push forward with the Preliminary Draft Law," but that the document nonetheless "evidences that under the New Regime, the Government has full discretion to alter the remuneration of [renewable energy] producers …."[964]

474. Given these statements in Claimants' early pleadings, it should not have been surprising that when RDL 17/2019 was issued in November 2019 – substituting for the Preliminary Draft Law, but reflecting many of its key aspects and setting the new rate of return for the next regulatory period – that the Claimants would complain about this as well. It is true that the Claimants did not file a

[958] Cl. PHB, ¶¶ 117-125.
[959] Request for Arbitration, ¶ 76.
[960] Cl. Mem., § 3.7 (title), ¶ 125.
[961] Cl. Mem., § 3.7(f).
[962] Cl. Mem., ¶ 140.
[963] Cl. Mem., ¶ 141.
[964] Cl. Mem., ¶ 144.

formal application to add RDL 17/2019 as a Further Disputed Measure, seeking a ruling on such a request. Nonetheless, their Reply – filed in March 2020, some four months after RDL 17/2019 – did make quite clear, in its Executive Summary, that the Claimants viewed RDL 17/2019 as "*another Disputed Measure* … which causes further harm to the Claimants' investment …."[965] The Claimants stated that RDL 17/2019 "builds upon and closely resembles the Preliminary Draft Law" that they had described in their earlier Memorial.[966] RDL 17/2019 was further discussed in the Reply, in sections entitled "The New Regime frustrates the Claimants' legitimate expectations"[967] and "The implementation of the New Regime was not transparent."[968] These were clearly sections delineating the Claimants' merits claims, and not simply those explaining their calculation of damages. Indeed, each of these references preceded the further mentions of RDL 17/2019 in the context of quantum, which the Respondent erroneously suggests were the sole mentions of this development in the Claimants' Reply.[969]

475. The Respondent clearly was on notice that the Claimants were attempting to add RDL 17/2019 to the case, because it included a subsection on that measure in a merits portion of its responsive Rejoinder submission, entitled "The Disputed Measures maintain the essential elements of the remuneration system of the LSE 1997, are reasonable and proportionate."[970] In this section, the Respondent acknowledged its understanding that in the Reply, "the Claimants seem to include, as the last Measure in Dispute, Royal Decree-Act 17/2019 of 22 November."[971] The Respondent explained the rationale and contents of RDL 17/2019, concluding with a subsection entitled "The Claimants' complaints regarding RD-Act 17/2019 are without any basis."[972]

476. In these circumstances, it would place form over substance to reject RDL 17/2019 as a Further Disputed Measure simply on the basis that the Claimants unilaterally added it in their Reply, without formally requesting permission from the Tribunal to do so. Even if such a request were required – which the Tribunal addresses below, in the context of ICSID Arbitration Rule 40 – the

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[965] Cl. Reply, ¶ 27 (emphasis added).

[966] Cl. Reply, n. 16 (citing Cl. Mem., ¶¶ 141-144).

[967] Cl. Reply, § III(4)(4.3)(b) (title), ¶ 509.

[968] Cl. Reply, § III(4)(4.4) (title), ¶¶ 542-551.

[969] *See* Resp. PHB, ¶ 7 (claiming that "the Claimants failed to announce in their written pleadings that RD-Act 17/2019 … was a '*Disputed Measure*'. While The Brattle Group made very clear in their Rebuttal Report that [it] was now part of the Disputed Measures, the Reply on the Merits did not include such a message … until … the midst of their assessment on quantum ….").

[970] Resp. Rej., § IV.M (title), and sub-section § IV.M.5.

[971] Resp. Rej., ¶ 1123.

[972] Resp. Rej., ¶¶ 1123-1153; and § IV.M.5 (5.4) (title).

Respondent was not prejudiced by the manner in which the Claimants proceeded. Similarly, however, the Claimants were not prejudiced by the manner in which the Respondent complained,[973] despite the Claimants objecting that "Spain has not properly framed any admissibility objection, much less brought it at the proper time."[974] The Tribunal considers that *both* Parties had a full and fair opportunity to address the merits of RDL 17/2019, as the Claimants articulated their complaints about that measure in their Reply. Both Parties did indeed avail themselves of this opportunity.

477. In these circumstances, the real jurisdictional or admissibility argument between the Parties boils down to a narrow issue. The Tribunal need not decide whether either the ECT or the ICSID Convention and Arbitration Rules prevent a claimant from raising part way through an arbitration additional claims that it could have included in its initial Memorial but failed to include; the only "new" element in this case concerns a State action occurring *after* the Memorial. Nor does this case involve issues of tardiness, where a claimant sat on its rights for a substantial period in the arbitration, seeking to add a new complaint only late in the proceedings. The Claimants included complaints about RDL 17/2019 in their first scheduled pleading after its issuance (the Reply). Accordingly, the only real question from a jurisdictional or admissibility standpoint is whether the ECT or the ICSID Convention and Arbitration Rules bar a claimant from including in its Reply a complaint about *new* State conduct, without first issuing a separate request for amicable settlement and waiting a subsequent three months, as ECT Article 26(2) requires prior to the initiation of ECT proceedings.

478. The Tribunal's first observation regarding this issue is that ECT Article 26(2) is framed in terms of "disputes," not "claims." Article 26(1) defines the type of "disputes" that can be submitted to arbitration, namely "[d]isputes … relating to an Investment … which concern an alleged breach of an obligation … under Part III …."[975] Article 26(2) states that if "such disputes" cannot be amicably settled within three months of a request for amicable settlement, the investor may choose to submit "it" (*i.e.*, such "dispute") for resolution.[976] Article 26 does not discuss what happens later, *after* initiation of arbitration, in the event that a claimant considers new developments to warrant submission of new claims. There is no reference in that provision, or elsewhere in the ECT, to the issue of amendments or additions to claims once a dispute has been submitted to arbitration.

[973] Resp. Rej., ¶¶ 1124-1125.
[974] Cl. PHB, ¶ 69.
[975] CL-1/RL-20, ECT, Article 26(1).
[976] CL-1/RL-20, ECT, Article 26(2).

479. It is relevant, however, that ECT Article 26(4) refers to several alternative sets of procedural rules that may apply to an arbitration, including the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Rules, or the arbitration rules of the Stockholm Chamber of Commerce. The ECT was clearly prepared with knowledge of these rules, and nothing in the Treaty text suggests an intent to displace those rules with respect to the admissibility of additional claims. In the case of ICSID Convention proceedings, the relevant rule is ICSID Arbitration Rule 40, the main purpose of which is to regulate when new claims may be asserted in the context of an ongoing proceeding, and alternatively when they may need to be pursued (if at all) through the commencement of a separate proceeding. ICSID Arbitration Rule 40(1) provides as follows:

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
>
> (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

480. The three paragraphs of ICSID Arbitration Rule 40 may be seen as addressing, respectively, the substantive, temporal and procedural requirements for admissibility of an ancillary claim. The Tribunal considers these requirements in turn below.

481. First, with regard to the substantive requirements, the admissibility of a new claim is governed by the same regime whether the claim at issue is characterized as an "incidental" or an "additional" claim.[977] The applicable test has two components. First, a tribunal must consider under ICSID Arbitration Rule 40(1) whether the new claim would be "within the scope of the consent of the parties and … otherwise within the jurisdiction of the Centre," meaning that on a *prima facie* basis it "could have been admitted … for further proceedings had it had been included in an original

[977] The difference between these two terms was discussed in a decision by the *Aris Mining* tribunal, presided by the same arbitrator as this Tribunal. *See* CL-214/RL-161, *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020 ("***Aris Mining***"), ¶ 148.

request for arbitration."[978] The second requirement is that the claim "aris[es] directly out of the subject-matter of the dispute." For this purpose, the Tribunal agrees with prior tribunals that:

> [T]he subject matter of the dispute cannot be defined strictly by the boundaries of the original legal claims, or the test would become a tautology requiring that any new claims arise directly from prior claims, which by definition any 'additional' claim (as distinct from a purely 'incidental' claim) could never satisfy. For the test to have any meaning, 'the dispute' must be defined as having an objective subject matter that is broader than the original legal claims themselves, so as to allow for the possibility of an 'additional' claim that is distinct from the prior claims, but still arises directly out of the same *subject matter* of the general dispute.[979]

482. This interpretation is also "consistent with the framing of the unofficial commentary on the original 1968 ICSID Arbitration Rules, which queries whether adjudication of the ancillary claims is necessary to 'achieve the final settlement of *the dispute*,' as distinct from the final settlement only of the original *claims*. The commentary envisions that this will occur only where there is a close 'factual connection' between the original and ancillary claims …."[980]

483. Applying these principles to the case at hand, the Tribunal considers that there is sufficient linkage between the Claimants' original claims (concerning the Initial Disputed Measures) and the new claim concerning RDL 17/2019 to satisfy the requirements of ICSID Arbitration Rule 40(1). First, the Respondent has never suggested that the Claimants' complaints about RDL 17/2019 fall outside the scope of the ECT generally, and they clearly do not: the complaints relate "to an Investment … which concern an alleged breach of an obligation … under Part III …."[981] As for a factual connection between the original and the new claim, this is essentially agreed by both Parties, since they both frame RDL 17/2019 as simply the implementation of a scheduled six-year review mechanism that already was part of the case as one of the Initial Disputed Measures.[982]

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[978] CL-214/RL-161, *Aris Mining*, ¶ 149 (quoting CL-231, *Lao Holdings N.V. et al. v. Lao People's Democratic Republic*, ICSID Case Nos. ARB(AF)/16/2 and ADHOC/17/1, Procedural Order No. 3, 14 November 2017, ¶ 7).

[979] CL-214/RL-161, *Aris Mining*, ¶ 150 (emphasis in original).

[980] CL-214/RL-161, *Aris Mining*, ¶ 151 (quoting ICSID Rules and Regulations 1968 (with commentary)) (emphasis added).

[981] CL-1/RL-20, ECT, Article 26(1).

[982] *See, e.g.,* Cl. PHB, ¶¶ 93, 102 ("The Claimants' firm position is that the RDL 17/2019 claim is not an additional or ancillary claim," but rather "purports to implement Law 24/2013, itself a Disputed Measure in this arbitration"); Resp. PHB, ¶ 9 ("RD-Act 17/2019 is nothing but the mere implementation of 2013-2014 Measures").

484. As for the second requirement of ICSID Arbitration Rule 40 – addressing the temporal requirement for asserting an ancillary claim that meets the substantive admissibility requirement set forth in ICSID Arbitration Rule 40(1) – ICSID Arbitration Rule 40(2) distinguishes between (i) ancillary claims that may be presented as a matter of right ("not later than in the reply"), and (ii) those that may be presented later only with Tribunal authorization ("unless the Tribunal … authorizes the presentation of the claim at a later stage in the proceeding"). The Tribunal has found above that the Claimants sufficiently raised their complaints about RDL 17/2019 in their Reply.

485. Finally, the third provision in ICSID Arbitration Rule 40 addresses the procedural implications of admission of an ancillary claim, to ensure an opportunity for the other party to file observations. Taken together with ICSID Arbitration Rule 40(2), which allows claimants to file ancillary claims as late as their reply on the merits, the text suggests that ancillary claims may be permitted even if only one round of responsive briefing still may be afforded in the written stage of the proceeding (*i.e.*, in a respondent's rejoinder memorial). As a prior tribunal has noted, this is again consistent with the unofficial commentary to ICSID Arbitration Rule 40.[983] Here, the Respondent had the opportunity to address the RDL 17/2019 claim in its Rejoinder, as that claim had been articulated by the Claimants in their Reply, and as noted above, it availed itself of that opportunity.

486. For these reasons, the Tribunal considers that the substantive, temporal and procedural requirements of ICSID Arbitration Rule 40 have been met, and therefore that the claim regarding RDL 17/2019 – *as framed in the Claimants' Reply* – is admissible as a Further Disputed Measure, in addition to being within the Tribunal's jurisdiction to decide. In these circumstances, there is no requirement under the ECT of a new request for consultations or a new cooling-off period, much less for the filing of a new request for arbitration commencing a separate new ICSID proceeding.[984] The object and purpose of the ECT's requirements in that regard are met by observing the safeguards for ancillary claims established within ICSID Arbitration Rule 40.[985]

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[983] CL-214/RL-161, *Aris Mining*, ¶ 155.

[984] *See similarly* CL-91/RL-62/RL-63, *Eiser*, ¶¶ 317-318 (concluding that there was no requirement of a new waiting period under the ECT for claims about further Spanish regulatory measures arising after the arbitration commenced, since these were "not a new dispute or disputes," but simply "new development[s]" in a "single dispute" claiming that "through an evolving series of measures changing the economic regime for CSP plants, Respondent violated its obligations under the ECT").

[985] *See similarly* CL-240, *Kappes*, ¶ 198 ("The Tribunal accepts that there are several purposes of [notice of intent and waiting period] requirements, including to enable the respondent State to investigate the claim, conduct such dispute settlement negotiations as it considers appropriate, and to take initial steps to organize its defense prior to the proceedings getting underway. Once an arbitration has commenced, the addition of an ancillary claim does not

487. At the same time, the Tribunal is troubled that the Claimants waited until the Hearing to articulate a particular complaint about RDL 17/2019 that was distinct from the complaint on which they focused in their Reply. In the Claimants' Reply, the focus was on the "further harm to the Claimants' investment" resulting from RDL 17/2019's introduction of a 7.09% rate of return,[986] and the fact that the 7.09% had been calculated by reference to the WACC of the renewable energy sector, "de-link[ing]" the reasonable return calculation from the Spanish ten year bond.[987] While the Claimants noted that RDL 17/2019 permitted installations that were not challenging the various regulatory modifications since RD 661/2007 to remain for two regulatory cycles under the 7.398% return rate of RDL 9/2013,[988] that aspect was not framed as an independently wrongful feature of the regulation, much less as a direct assault on ECT rights. The Respondent accordingly focused in the Rejoinder on the complaints that the Claimants had emphasized in their Reply. The Respondent addressed the reasons for the further rate reduction since RDL 9/2013 and for using sector-wide WACC to calculate the 7.09% rate.[989]

488. It was only at the Hearing that the Claimants newly characterized the 7.09% rate as "penalis[ing]" installations "for having exercised … [legal] rights." The Claimants now described that aspect as "the most astonishing measure" of all, a behavior that was "truly appalling" and "outrageous" and that "relates directly to these proceedings"[990]:

> … Tubo Sol has brought those proceedings in order to be compensated for the harm that was caused to it by Spain's measures; but because it has done so, PE2 has seen its permitted return dropped as a direct result of these proceedings. So it is worse off because it has the nerve to try to enforce its rights by seeking compensation from you, members of the Tribunal.
>
> Spain is saying, 'I'm not going to let you do that.' Spain is also saying to all international tribunals, including you, 'We will find a way not to comply with your award. Whatever compensation you grant, we will get that back one way or the other, and we've already started doing that.'[991]

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significantly prejudice these objectives, provided that the claim is related to the existing dispute and is added early enough in the proceedings that the State will have appropriate opportunity to investigate, discuss and respond. These are precisely the objectives that ICSID Arbitration Rule 40 seeks to safeguard.")

[986] *See* Cl. Reply, ¶ 27.

[987] Cl. Reply, ¶ 543.

[988] Cl. Reply, ¶¶ 545-546.

[989] Resp. Rej., ¶¶ 1129-1153.

[990] Tr. Day 1, 93:1-94:2.

[991] Tr. Day 1, 94:4-17.

489. As the Respondent protested during the Hearing, this complaint about a penalty for the exercise of protected ECT rights (and a warning to international arbitral tribunals) is nowhere to be found in the Claimants' Reply.[992] The Respondent protested the late introduction of this argument during the Hearing. It added that if the Tribunal nonetheless wished further briefing on the issue, the Respondent could submit a legal opinion from Clifford Chance, explaining that the approach was consistent with a "general principle in Spanish administrative law: in Spain, the government provides the citizens with an economic incentive not to sue the Respondent. … This is nothing new in Spain."[993] As discussed in Section II.F above, the Respondent subsequently applied to introduce a Clifford Chance legal opinion to demonstrate this alleged consistency, to which the Claimants then objected, on the grounds that this would be "a new independent expert report, but one submitted via the backdoor" too late in the proceedings.[994]

490. The Tribunal denied introduction of the Clifford Chance legal opinion, explaining that it "does not at this juncture accept a need for additional post-hearing evidentiary submissions," while "reserving the right to come back to the Parties in due course should it have specific questions."[995] In the Tribunal's view, expanding the evidentiary record after the Hearing to delve into Spanish administrative law practices, on the basis of a new legal opinion that inevitably would prompt a request for an evidentiary response and quite likely calls for a new round of witness examinations, would have been disruptive to the orderly conduct of proceedings. At the same time, the Tribunal considers that the Claimants should not reap the benefits of withholding these particular complaints until the Hearing, thus depriving the Respondent of the chance to address them squarely in its Rejoinder, including (if it wished) through the introduction at that time of a legal opinion which could have been subject to examination and argument at the Hearing. The Tribunal thus considers it appropriate, while allowing the Claimants to add RDL 17/2019 as a Further Disputed Measure as referenced in their Reply,[996] not to admit the specific litigation-penalty complaint about this measure that the Claimants articulated clearly only at the Hearing. The discussion of RDL 17/2019 in the Liability section below accordingly focuses on its implications for the Plant's rate of return,

[992] Tr. Day 6, 108:7-17 (noting that "this is not the way the case on Royal Decree-Act 17/2019 was presented in the Reply on the Merits. In their Reply, the Claimants made a case based on the alleged reduction in the return").

[993] Tr. Day 6, 108:22-109:12.

[994] Cl. Letter of 5 October 2021, ¶ 22.

[995] Tribunal's Ruling of 25 October 2021.

[996] Cl. Reply, ¶ 27.

not on alleged punishment of Claimants for exercising their ECT rights or alleged warnings to ECT tribunals about awarding potential relief.

VI. APPLICABLE LAW

491. Before addressing the Parties' positions on issues of liability, it is appropriate to identify the law that is applicable to the merits analysis in this ECT case.

A. THE CLAIMANTS' POSITION

(1) The ECT

492. According to the Claimants, Article 42(1) of the ICSID Convention indicates that the applicable law is the rules of law agreed by the parties to the dispute.[997] The Claimants contend that in an ECT arbitration, the parties have agreed the rules of law applicable to the substance of the dispute through ECT Article 26(6), which provides that a tribunal shall "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."[998] Thus, the Claimants submit that the ECT is the primary source of law. Where the ECT is silent, the Claimants submit that the Tribunal should apply customary international law and general principles of international law.[999]

493. In accordance with VCLT Articles 31 and 32, the Claimants set out the context, object and purpose of the ECT.[1000] The Claimants' view is that the ECT is unique in that it sets out a legal framework for a single sector: energy.[1001] The Claimants argue that the ECT was designed to address the characteristics of investments in the energy sector, in particular their long-term and capital-intensive nature.[1002] As a result, the Claimants submit that such investments are particularly sensitive to non-commercial risks, such as regulatory and political changes.[1003]

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[997] Cl. Mem., ¶¶ 190-191.

[998] Cl. Mem., ¶ 192.

[999] Cl. Mem., ¶ 192.

[1000] Cl. Mem., ¶¶ 193-214.

[1001] Cl. Mem., ¶ 196; Cl. Reply, ¶ 436.

[1002] Cl. Mem., ¶¶ 202-203; Cl. Reply, ¶ 436; Tr. Day 1, 105:15-22.

[1003] Cl. Mem., ¶¶ 202-203, 219-220; Cl. Reply, ¶ 436; *see also* CD-1.1, Cl. Op. Statement, Part 3, Slide 20 (citing CL-15, E. Paasivirta, "The Energy Charter Treaty and Investment Contracts: Towards Security of Contracts," Bilateral Investment Treaties in the Mid-1990s (United Nations), 1998, p. 350); *see also* Tr. Day 1, 105:23-106:1.

494. Thus, the Claimants argue, 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.[1004] The Claimants submit that by ratifying the ECT, Contracting States agree to: (i) provide such a framework to investors in the energy sector; and (ii) be held to account in the event that they fail to do so.[1005]

495. With reference to international arbitral jurisprudence,[1006] the Claimants contend that the core objectives of the ECT include:[1007]

a) the recognition of the role of entrepreneurs, "operating within a transparent and equitable legal framework";[1008]

b) 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;[1009] and

c) "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."[1010]

496. Relying on certain commentary, the Claimants argue that the ECT offers a "higher" level of protection than other investment treaties and that its investor protections are "extensive, rather than restrictive."[1011]

[1004] Cl. Reply, ¶ 436; Tr. Day 1, 106: 2-7.

[1005] Cl. Reply, ¶ 436.

[1006] CL-91/RL-62/RL-63, *Eiser*, ¶ 379; CL-95/RL-92, *Foresight*, ¶ 350; CL-94/RL-88, *Antin*, ¶¶ 520-525.

[1007] Cl. Reply, ¶¶ 437-438.

[1008] CL-1/RL-20, ECT, p. 213 (Preamble, 1991 Charter).

[1009] CL-1/RL-20, ECT, p. 218 (Title II(4), Promotion and Protection of Investments, 1991 Charter). The Claimants submit that 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" (Cl. Reply, n. 644, quoting CL-1/RL-20, ECT, pp. 44 and 53).

[1010] CL-1/RL-20, ECT, p. 14 (An Introduction to the Energy Charter Treaty).

[1011] Cl. Reply, ¶ 440 (citing CL-39, 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, November 2005, p. 23; CL-34, T. W. Wälde, "Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice" (2004), 1 Transnational Dispute Management 2, 2004, p. 32).

497. The Claimants submit that Spain's treatment of the Claimants, its specific breaches of the ECT, and the interpretation of the standards in the ECT, must all be viewed in relation to the above context, objective and purpose of the ECT.[1012]

498. Moreover, the Claimants submit that State regulation is significantly restricted under the ECT.[1013] The Claimants' view is that, while the ECT recognizes the legislative authority of the Contracting Parties in relation to matters of vital national interests, it also carefully circumscribes that authority in favor of the ECT's legal framework and the investment-related obligations contained therein.[1014]

499. The Claimants contend that the drafters of the ECT deliberately chose to restrict the right to regulate.[1015] The Claimants emphasize that they are not arguing that Spain cannot regulate. Instead, with reference to international jurisprudence, the Claimants submit that 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 ECT Article 10.[1016]

(2) Applicability of EU Law to the Merits

500. In response to the Respondent's argument that EU law is applicable to the merits,[1017] the Claimants argue that EU law, including with respect to State aid, is irrelevant to the present case.[1018] As discussed above in Section V.C(1)b, the Claimants' position is that this Tribunal is bound to apply the ECT and international law to the merits of the dispute, but not EU law.[1019] In particular, the Claimants contend that the 2017 EC State Aid Decision and EU law more generally are not binding on the Claimants, because Switzerland is not a Member State of the EU and, in any event, the ECT prevails over EU law and acts of the EU institutions.[1020] The Claimants refer *inter alia* to the

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[1012] Cl. Mem., ¶ 214.

[1013] Cl. Reply, ¶ 449.

[1014] Cl. Mem., ¶ 213; Cl. Reply, ¶¶ 449-452.

[1015] Cl. Mem., ¶ 209; Cl. Reply, ¶¶ 451-452 (contrasting with NAFTA. CL-11, North American Free Trade Agreement, Chapter 11, Part Five (NAFTA), 17 November 1993, Article 1114(1), p. 7).

[1016] Cl. Reply, ¶¶ 453-455 (citing CL-94, *Antin*, ¶¶ 530, 532-533; CL-122, *Watkins*, ¶ 543).

[1017] Resp. C-Mem., ¶¶ 395-396.

[1018] Cl. Reply, ¶ 352 (citing RL-76, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Arbitration (2015/063), Award, 15 February 2018 ("***Novenergia II***"), ¶ 465; CL-93, *Masdar*, ¶ 678; CL-95, *Foresight*; ¶ 381; CL-99, *9REN*, ¶ 166; CL-106, *Cube* Decision, ¶¶ 306-307).

[1019] Cl. Reply, ¶ 354.

[1020] Cl. Reply, ¶ 354.

Novenergia II decision to argue that the 2017 EC State Aid Decision is "entirely irrelevant" to a claim brought under the ECT.[1021]

B. THE RESPONDENT'S POSITION

(1) The ECT

501. The Respondent shares the Claimants' view that the protection standards of the ECT need to be analyzed in accordance with the terms of the ECT in their context, and in light of the object and purpose of the ECT.[1022] However, the Respondent's view is that the protection of investments must be understood within its historical context of the European Community's (now the EU's) goal to deregulate the energy market between Western Europe and the "Eastern Bloc" following the fall of the Berlin Wall.[1023]

502. As such, the Respondent contends that the main objective of the ECT is to achieve the introduction of a free market in order to carry out energy related activities, by granting foreign investors domestic or non-discriminatory treatment, no lower than the minimum protection standards admitted under international law.[1024] Consequently, States are in no way impeded to adopt reasonable and proportionate macroeconomic control measures to avoid market distortions.[1025] The Respondent refers to "the vast majority" of arbitral awards that have applied the ECT by performing a "balancing exercise."[1026]

503. In particular, Spain submits that the idea that an investor may receive subsidies that distort competition in the energy market that the ECT seeks to create is incompatible with both the ECT and EU law.[1027] In this context, the Respondent argues that the ECT is not "a big BIT" or "a super investment treaty." Instead, the ECT is a multilateral and mixed treaty that aims to create an electricity market across Europe following the EU model and must be applied accordingly.[1028]

[1021] Cl. Reply, ¶ 354 (citing RL-76, *Novenergia II*, ¶ 465.).

[1022] Resp. C-Mem., ¶ 966.

[1023] Resp. C-Mem., ¶ 969; Resp., Rej., ¶ 1191.

[1024] Resp. C-Mem., ¶¶ 966-986; Resp. Rej., ¶ 1184; Resp. PHB, ¶ 70.

[1025] Resp. PHB, ¶ 70.

[1026] Resp. PHB, ¶ 70 (citing RL-71, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("***Saluka***"), ¶¶ 305-309).

[1027] Resp. Rej., ¶ 1197.

[1028] Resp. Rej., ¶ 1200.

(2) Applicability of EU Law to the Merits

504. The Respondent submits that the standards of protection under the ECT must be interpreted in a manner consistent with EU law.[1029] Relying *inter alia* on the *Komstroy* Judgment, the Respondent argues that EU law is international law for the purposes of ECT Article 26(6) and, as such, must be applied by the Tribunal.[1030] In addition, the Respondent refers to Article 38 of the Statute of the International Court of Justice (the "**ICJ Statute**") to submit that the EU Treaties are international agreements and therefore a source of international law that this Tribunal necessarily must apply.[1031]

505. The Respondent submits that the applicability of EU law is even more evident in the context of this particular dispute, because it relates to public subsidies, which are within the exclusive competence of the EU.[1032] With reference to the 2017 EC State Aid Decision, the Respondent highlights that support schemes for renewable energy producers in the EU must comply with EU regulations on State aid to protect competition in the internal European market.[1033] In particular, the Respondent points to the EC's finding on the proportionality of the aid that Spain provided to its renewable energy sector, under the very measures that are challenged in this case. The EC found that the target rates of return for standard facilities which were used to calculate tariffs under the Disputed Measures "appear to be in line with the rates of return of renewable energy and high efficiency cogeneration projects recently approved by the Commission and does not lead to overcompensation."[1034]

506. The Respondent contends that EU law must be applied by the Tribunal to the merits of the case, and that EU law on State aid shapes an investor's expectations when it invests in a European country and intends to benefit from a European support scheme.[1035]

C. THE TRIBUNAL'S ANALYSIS

507. ECT Article 26(6), the Treaty's applicable law provision, provides that "[a] tribunal … shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of

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[1029] Resp. PHB, ¶ 71.

[1030] Resp. PHB, ¶ 71 (citing RL-166, *Komstroy* Judgment, ¶ 31).

[1031] Resp. Rej., ¶ 1181 (citing RL-140, Statute of the International Court of Justice, 18 April 1946).

[1032] Resp. Rej., ¶ 1182.

[1033] Resp. PHB, ¶ 72 (citing RL-3, 2017 EC State Aid Decision).

[1034] Resp. PHB, ¶ 75 (citing RL-3, 2017 EC State Aid Decision, ¶ 120).

[1035] Resp. PHB, ¶ 79 (citing RL-129, *BayWa*, ¶ 569 (g)).

international law."[1036] The first part of this provision is uncontroversial: the provisions of the ECT necessarily must be applied to decide the "issues in dispute."

508. In construing the ECT, the Tribunal is guided by the interpretative principles reflected in the VCLT. In particular, under VCLT Article 31, the provisions of the ECT are to be interpreted in accordance with the "ordinary meaning" of their terms, in the "context" in which they occur and in light of the treaty's "object and purpose."[1037] The relevant "context" for construing the provisions of a treaty can include the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help to illuminate its object and purpose. In accordance with VCLT Article 32, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion," but only "to confirm the meaning" resulting from the textual approach required by Article 31, or in the event the textual approach leaves a meaning "ambiguous or obscure" or would lead to a result that is "manifestly absurd or unreasonable."[1038]

509. The second part of ECT Article 26(6) – its reference to "applicable rules and principles of international law" – has proven more controversial, in particular with respect to the status of EU law in intra-EU ECT cases. Some tribunals have interpreted this phrase as incorporating EU law, on the straightforward basis that "EU law, being based on a treaty, forms part of international law" applicable as between EU Member States who are ECT Contracting Parties.[1039] Other tribunals have adopted a more nuanced interpretation of the particular phrase "rules and principles of international law," considering that it does not incorporate by reference all other treaties in force between relevant ECT Contracting Parties, but rather refers only to certain special bodies of international law which are applicable to all States, *i.e.*, *general* rules and principles of law. The latter approach may be seen in *Vattenfall* and other cases,[1040] and perhaps in greatest detail in the

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[1036] CL-1/RL-20, ECT, Article 26(6).

[1037] CL-5/RL-24, VCLT, Article 31(1).

[1038] CL-5/RL-24, VCLT, Article 32.

[1039] CL-83/RL-2, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("***Electrabel* Decision**"), ¶ 4.136. The CJEU adopted a similarly brief analysis of Article 26(6) in the *Komstroy* Judgment. *See* RL-166, *Komstroy* Judgment, ¶¶ 48-50 ("it should be noted that, in accordance with Article 26(6) ECT, the arbitral tribunal … is to rule on the issues in dispute in accordance with the ECT and with the applicable rules and principles of international law. As stated in paragraph 23 of this judgment, the ECT itself is an act of EU law. It follows that an arbitral tribunal such as that referred to in Article 26(6) ECT is required to interpret, and even apply, EU law.").

[1040] *See, e.g.*, CL-131, *Vattenfall*, ¶ 133 (concluding that "EU law does not constitute principles of international law which may be used to derive meaning from Article 26 ECT, since *it is not general law* applicable as such to the

Eskosol Intra-EU Decision.[1041] In *Eskosol*, the tribunal examined the categories of international law authoritatively listed in Article 38(1) of the ICJ Statute, and found that while the EU Treaties certainly qualify as "international conventions" under Article 38(1)(a), the particular concepts referenced in ECT Article 26(6) – *i.e.*, "rules and principles of international law" – refer to the *different* categories listed in Articles 38(1)(b) and (c) of the ICJ Statute, namely customary international law and "general principles of law recognized by civilized nations." Since the EU Treaties self-evidently do not qualify as either – they reflect a regional and not a worldwide system of law – the *Eskosol* tribunal concluded that they do not fall within the scope of ECT Article 26(6).[1042] The *Eskosol* tribunal added that this conclusion, based on the "ordinary meaning" of ECT Article 26(6)'s terms, was further reinforced by their "context," namely that the ECT contains another article (Article 16) for the specific purpose of regulating the ECT's "Relation to Other Agreements."[1043]

510. Be this as it may, it is not actually necessary in this case to take a position on this interesting debate. That is because, as noted in Section V.C(2) above, this is not actually an *intra*-EU case. To the contrary, EBL is a national of Switzerland, and the ICSID Convention and the ECT itself require that Tubo Sol (in its status as a claimant) be treated also as a Swiss investor, in consequence of EBL's controlling shareholding in Tubo Sol at all times relevant to this dispute. Switzerland is not a party to the EU Treaties. In these circumstances, even if *arguendo* the EU Treaties (and EU law stemming from such treaties) were to be accepted as part of the "rules and principles of international law" applicable as between EU investors and other EU Member States, that proposition would be irrelevant here. The EU Treaties cannot qualify as part of the "applicable" international law in place between Switzerland and Spain. As such, and applying the strict terms of ECT Article 26(6), EU law does not form part of the applicable law of this case.

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interpretation and application of … another treaty such as the ECT") (emphasis added); CL-91/RL-62/RL-63, *Eiser*, ¶¶ 197-198 (rejecting the argument that the EU treaties constitute "applicable rules and principles of international law" for purposes of ECT Article 26(6)).

[1041] CL-183/RL-132, *Eskosol* Intra-EU Decision, ¶¶ 114-121 (presided by the same arbitrator as this Tribunal, and joined by one member of the *Electrabel* tribunal, reconsidering the issue of whether the ECT's applicable law included EU law).

[1042] CL-183/RL-132, *Eskosol* Intra-EU Decision, ¶¶ 114-121.

[1043] CL-183/RL-132, *Eskosol* Intra-EU Decision, ¶ 122 (observing that "[i]f the effect of Article 26(6) were that other treaties between the relevant Contracting Parties were directly incorporated into the ECT as applicable law … then there would be *no* reason to have a specific article, Article 16, to regulate the impact of potentially overlapping treaties. By definition, there would be nothing to regulate, by the simple fact that other treaties already had been interpolated into the ECT by virtue of Article 26(6)" (emphasis in original)).

511. This does not mean, however, that mandatory principles of EU law have no bearing on this dispute. EU law clearly is binding *on Spain* as an EU Member State. In these circumstances, an ECT tribunal may consider it as a *matter of fact* that is potentially relevant to the merits, just as any ECT tribunal may consider the host State's domestic law as part of the factual matrix of claims against that State.[1044] Among other things, any foreign investor in an EU Member State (even investors hailing from outside the EU) would have to expect that State to respect mandatory EU laws and to seek to act consistently with those laws. Likewise, the rationality of any EU Member State's conduct must be assessed in the context of the EU laws that bind it, including the extent of regulatory discretion provided by those laws. The Tribunal returns to these issues further in the sections that follow.

VII. LIABILITY

512. ECT Article 10(1) provides:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.[1045]

513. The Claimants contend that the measures Spain adopted beginning in 2012 breached its obligations under ECT Article 10(1), in particular with respect to (i) failing to encourage or to create stable, equitable, favorable and transparent conditions for the Claimants' investments; (ii) failing to accord the Claimants' investments FET; and (iii) impairing, by unreasonable and discriminatory measures, the management, maintenance, use, enjoyment and disposal of the Claimants' investments.[1046]

514. The Respondent's position is that it has shown that it fulfilled its obligations under the ECT. In particular, the Respondent submits that it has granted FET to the Claimants' investment, including

[1044] *See generally* CL-183/RL-132, *Eskosol* Intra-EU Decision, ¶ 123.

[1045] CL-1/RL-20, ECT, Article 10(1).

[1046] Cl. Mem., ¶ 217.

in respect of the Claimants' objective and legitimate expectations; it has acted in a transparent manner; and it has respected proportionality and reasonableness standards when adopting the Disputed Measures.[1047]

515. These positions are summarized further below, in Sections VII.A (Claimants' position) and VII.B (Respondent's position). The Tribunal also summarizes, in Section VII.C, the EC's position with respect to ECT Article 10(1), particularly in the context of cases involving subsidy measures that are subject to State aid control in the EU legal order. The Tribunal's analysis of these issues follows in Section VII.D.

A. THE CLAIMANTS' POSITION

516. The Claimants understand ECT Article 10(1) to encompass several distinct obligations, which give rise to distinct claims.[1048] In particular, the Claimants contend that Spain has violated ECT Article 10(1) by:

a) failing to encourage or to create stable, equitable, favorable and transparent conditions for the Claimants' investment;

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

c) impairing, by unreasonable and discriminatory measures, the management, maintenance, use, enjoyment and disposal of the Claimants' investments.[1049]

517. It is the Claimants' position that ECT Article 10(1) provides a standard of investment protection additional and superior to the international minimum standard, and which, contrary to the Respondent's position, is not limited to national treatment.[1050]

518. In response to the Respondent's argument that the Tribunal should asses Spain's obligations under the ECT through the lens of Spanish law,[1051] the Claimants submit that Spanish law cannot be used

[1047] Resp. PHB, ¶ 68.

[1048] CD-1.1, Cl. Op. Statement, Part 3, Slide 2; CD-6, Cl. Closing Statement, Part 2, Slide 89.

[1049] Cl. Mem., ¶ 217.

[1050] Cl. Mem., ¶ 247 (citing CL-70, *Liman Caspian Oil B.V. and NCL Dutch Investment B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (excerpts only), 22 June 2010 ("***Liman***"), ¶ 263); Cl. Reply, ¶ 448.

[1051] Resp. C-Mem., ¶ 1006.

as a tool to override Spain's international obligations.[1052] The Claimants argue that even if Spanish law allowed Spain to change the FIT schemes, despite what the Claimants say were Spain's repeated statements that it would not do so for installations already operating under a given regime, Spain still can be held liable for a breach of ECT Article 10(1).[1053]

(1) Spain Failed to Provide a Stable and Predictable Legal Framework

519. The Claimants argue that ECT Article 10(1) imposes upon Spain the independent obligation to "encourage and create stable, equitable, favourable and transparent conditions" for investors.[1054] With reference to the specific wording of Article 10(1), the Claimants submit that the ECT must be viewed differently from other BITs that are not sector specific and often do not contain the express obligations included in the first sentence of ECT Article 10(1).[1055] Relying on legal commentary, the Claimants contend the ECT's objective of "a stable, transparent legal framework for foreign investments" was enshrined in the substantive protections of the ECT.[1056] Consequently, the Claimants argue that Spain was under an obligation to provide long-term stability for the Claimants' investment conditions.[1057] Separately, the Claimants also contend that the FET standard includes the obligation to provide a stable and predictable legal framework for investments.[1058]

520. The Claimants emphasize that it is not their position that this obligation in the ECT means that a host State must completely freeze its regulatory regime.[1059] However, they submit, by entering into the ECT Spain knowingly accepted limitations on its regulatory power, including its ability to fundamentally alter the regulatory framework applicable to the Claimants' investment.[1060]

[1052] Cl. Reply, ¶ 464 (citing CL-27, ILC Articles, 28 January 2002, Article 3; CL-170, Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, PCIJ Series A/B, No. 44, 4 February 1932, p. 24; CL-169, *Suez, Sociedad General de Aguas de Barcelona S.A and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, ¶ 65; CL-127, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶ 313).

[1053] Cl. Reply, ¶ 465 (citing CL-122, *Watkins*, ¶ 505).

[1054] Cl. Mem., ¶¶ 219-221; Cl. Reply, ¶ 477.

[1055] Cl. Mem., ¶ 220.

[1056] Cl. Mem., ¶ 221 (citing CL-89, J. W. Rowley QC, The Guide to Energy Arbitrations (Global Arbitration Review), 2015, p. 80; CL-88, R. Dolzer, "Fair and Equitable Treatment: Today's Contours," 12 Santa Clara Journal of International Law 7, 17 January 2014 ("**Dolzer FET Article**"), p. 23).

[1057] Cl. Mem., ¶ 221 (citing CL-91, *Eiser*, ¶ 378).

[1058] Cl. Reply, ¶ 477.

[1059] Cl. Mem., ¶ 222; Cl. Reply, ¶ 479.

[1060] Cl. Mem., ¶ 222 (citing CL-92, *Novenergia II*, ¶ 654); *see also* Cl. Reply, ¶ 479.

521. In response to the Respondent's argument that the ECT standard does not contain a "stability clause," the Claimants explain that they are not suggesting that ECT Article 10(1) constitutes a stability clause.[1061] Instead, the Claimants' case is that Article 10(1) creates an obligation for Spain to refrain from adopting measures that do not "encourage and create stable, equitable, favourable and transparent conditions for Investors," as required by Article 10(1).[1062]

522. The Claimants contend that stability is particularly important for renewable energy projects, a proposition which they say Spain itself confirmed, citing the CNE's comments on Article 44.3 of RD 661/2007 specifically,[1063] and ECOFYS' comments and the InvestInSpain publications on RD 661/2007 more generally.[1064] In particular, the Claimants point out that under RD 661/2007, Spain offered remuneration that would apply to all electricity produced, for the entire operational life of qualifying installations. The Claimants contend that Spain also committed under Article 44.3 of RD 661/2007 not to introduce detrimental changes to the remuneration for existing installations.[1065] The Claimants further point to the Ministry's press release accompanying the issuance of RD 661/2007, advising that "[f]uture adjustments to said tariffs will not affect installations which are already in operation. This guarantees legal certainty for the electricity producer and stability for the sector,"[1066] and to the InvestInSpain's and the CNE's references to regulatory stability and "no retroactive effect" in the context of RD 661/2007.[1067]

523. The Claimants submit that, on this basis, there can be no doubt that prior to the Claimants' investment, Spain had created a renewable energy regime that was intentionally designed to provide long-term stability to investors to induce investment.[1068] Moreover, the Claimants argue that the

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[1061] Cl. Reply, ¶ 482 (referring to Resp. C-Mem., ¶¶ 1091-1093).

[1062] Cl. Reply, ¶¶ 482-484 (citing CL-94, *Antin*, ¶ 533).

[1063] Cl. Mem., ¶ 223 (citing C-88, CNE Report on the Royal Decree Proposal Regulating and Modifying Certain Issues relating to the Special Regime, 14 September 2010, p. 24).

[1064] Cl. Mem., ¶¶ 224-226 (citing C-105, ECOFYS Report, 27 January 2014, p. 24; C-64, Ministry and InvestInSpain Presentation, p. 4; C-54, RD 661/2007 Ministry Announcement, p. 1; C-57, INTERES InvestInSpain, PowerPoint Presentation, "Opportunities in Renewable Energy in Spain," Graz, Republic of Austria, 15 November 2007 ("**InvestInSpain Presentation, 15 November 2007**"), p. 32; C-58, InvestInSpain Presentation, 16 November 2007, p. 32).

[1065] Cl. Reply, ¶ 480 (citing C-2, RD 436/2004, Article 40.3 and C-4, RD 661/2007, Article 44(3)); *see generally* Section III.A(3) above.

[1066] Cl. Mem., ¶ 226 (citing C-54, RD 661/2007 Ministry Announcement, p. 1).

[1067] Cl. Mem., ¶ 226 (emphasis omitted) (citing C-64, Ministry and InvestInSpain Presentation; C-57, InvestInSpain Presentation, 15 November 2007, p. 32; C-58, InvestInSpain Presentation, 16 November 2007, p. 32; C-62, First CNE Presentation, p. 25; C-74, CNE Presentation on Renewable Energies: The Spanish Case, Cartagena de Indias, Colombia, 9-13 February 2009, p. 67; C-73, Second CNE Presentation, p. 25; C-81, Third CNE Presentation, p. 29).

[1068] Cl. Mem., ¶ 227.

stability and predictability of the regulatory regime was the key reason why Spain was so successful in attracting the investments it needed to develop its renewable energy sector.[1069]

524. The Claimants submit that from 2012, Spain implemented a series of measures that completely changed the legal framework for existing CSP installations such as the Plant.[1070] These continual changes, the Claimants argue, have created "a regulatory rollercoaster ride" characterized by instability and uncertainty.[1071] In particular, the Claimants refer to the following measures:[1072]

a) In December 2012, Spain introduced Law 15/2012, imposing a 7% levy on electrical energy production (*see* Section III.F(1) above). As discussed in Section V.D(2), the Tribunal has found this particular claim to be outside its jurisdiction.

b) In February 2013, Spain introduced RDL 2/2013, modifying the annual inflation adjustment index for updating the FIT from that previously provided in RD 661/2007 (*see* Section III.F(2) above). The Claimants contend that this had a limited effect in practice but nonetheless made clear a broader intention by Spain to cut the FIT. They also say that RDL 2/2013 deprived the Plant of the Premium option offered under RD 661/2007, which they contend was a key part of their decision to invest in CSP technology.[1073]

c) In July 2013, Spain adopted RDL 9/2013, repealing the Special Regime and introducing the New Regime for remuneration of renewable energy providers (*see* Section III.F(3) above).[1074] However, the Claimants note, the New Regime was not fully defined or implemented until June 2014. The Claimants argue that this created 11 months of uncertainty with regard to the remuneration parameters which would apply to the Plant.[1075]

d) In December 2013, Spain introduced Law 24/2013, which replaced the 1997 Electricity Law, reiterated the main principles of RDL 9/2013, and (the Claimants say) put conventional and

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[1069] Cl. Reply, ¶ 480.

[1070] Cl. Mem., ¶ 230 (citing C-101, CNE Report 18/2013 on the Proposal of Royal Decree which Regulates the Production of Electricity from Renewable Energy Sources, Combined Heat and Power and Residues, 4 September 2013 ("**CNE Report 18/2013**"), pp. 15, 19).

[1071] Cl. Mem., ¶ 230; Cl. Reply, ¶ 481.

[1072] Cl. Mem., ¶¶ 231-238; Cl. Reply, ¶ 481.

[1073] Cl. Mem., ¶¶ 232-233 (citing C-71, EBL Circular VR 09/02, 14 January 2009, p. 8).

[1074] Cl. Mem., ¶ 234 (referring to the *Eiser* tribunal's characterization of this as "a new regime intended to significantly reduce [Spain's] financial support for concentrated solar power," CL-91, *Eiser*, ¶ 390; CL-95, *Foresight*, ¶ 390; CL-94, *Antin*, ¶ 568; CL-98, *NextEra*, ¶ 599).

[1075] Cl. Mem., ¶ 235; Cl. Reply, ¶ 481.

renewable energy generators on an equal footing (*see* Section III.F(4) above). The Claimants complain that Law 24/2013 established that the "reasonable return" parameters introduced by RDL 9/2013 would be calculated over the entire useful life of plants, with the result of penalizing them for past returns in excess of the new regulatory targets (characterized as a "clawback").[1076]

e) In June 2014, Spain introduced RD 413/2014, the first implementing regulation to define the new payment scheme applicable to renewable energy installations, and issued the June 2014 Order to set out particular compensation parameters (*see* Section III.F(5) above).[1077] The Claimants submit that it was only at this point that the Claimants were finally in a position to assess the impact on the Plant of the New Regime.[1078]

525. The Claimants argue that the constant regulatory changes to which the Plant was subject over the 18-month period from December 2012 to June 2014, together with the uncertainty that characterized the 11-month "limbo" period from July 2013 to June 2014, are by themselves sufficient to establish Spain's violation of its obligation to provide the Claimants' stable and transparent investment conditions.[1079]

526. With reference to a number of Spanish renewable energy awards, the Claimants submit that the New Regime represented a complete overhaul of the FIT scheme under the Special Regime,[1080] and that it was also a retroactive change that abolished the guaranteed FIT for existing installations.[1081]

527. The Claimants point to Spain's own documents at the time referring to the New Regime as an "unprecedented and complete change."[1082] As such, the Claimants argue that Spain cannot

[1076] Cl. Mem., ¶ 237; Cl. PHB, ¶¶ 49-50. The Claimants explained at the Hearing that because the impact of the "clawback" depends on the vintage of the installation, it is not the most significant source of damages in this case. Tr. Day 6, 64:15-65:12.

[1077] Cl. Mem., ¶ 238.

[1078] Cl. Mem., ¶ 238.

[1079] Cl. Mem., ¶ 240 (citing CL-91, *Eiser*, ¶ 387).

[1080] Cl. Reply, ¶ 488 (citing CL-98, *NextEra*, ¶ 599; CL-122, *Watkins*, ¶ 597; CL-106, *Cube* Decision, ¶¶ 425, 427-428; CL-91, *Eiser*, ¶¶ 387, 391; CL-92, *Novenergia II*, ¶¶ 559, 695: "[t]aking into account the Kingdom of Spain's statements and assurances prior to and in connection with the implementation of RD 661/2007, the legitimate expectations of the Claimant, and the changes introduced through RDL 9/2013, the Tribunal considers these challenged measures as radical and unexpected"; CL-95, *Foresight*,¶ 397).

[1081] Cl. Reply, ¶ 489 (citing CL-92, *Novenergia II*, ¶ 697).

[1082] Cl. PHB, ¶ 47 (citing C-101, CNE Report 18/2013, p. 8; R-65, Opinion 937/2013, p. 16; C-227, Transcript of Ms. Ribera's declarations on RDL 17/2019 in the press conference after the meeting held by the Spanish Council of Ministers, 22 November 2019); *see also* CD-1.1, Cl. Op. Statement, Part 3, Slides 3-4 (citing also C-29, 2013 Electricity Law, Preamble, PDF pp. 3-4)).

reasonably dispute that the application of the New Regime to qualifying ECT investors and their investments was incompatible with its obligation to provide a stable framework under ECT Article 10(1).[1083] The Claimants note that certain other ECT tribunals have found the New Regime not only to represent a drastic and unexpected withdrawal of the regulatory regime, but also to be retroactive in applying those changes to existing installations.[1084]

528. Moreover, the Claimants contend that the New Regime itself created uncertainty, lack of transparency and long-term instability with respect to the future.[1085] The Claimants point to Spain's discretion to re-define "reasonable return" and to change the remuneration regime every six years, even with respect to existing installations.[1086] In this regard, the Claimants refer to RDL 17/2019, introduced in November 2019, which (as discussed in Section III.J above) set the rate of return for the 2020-2025 regulatory period at 7.09%, a reduction from the 7.398% figure established in the June 2014 Order.[1087] The Claimants' position is that RDL 17/2019 is further evidence that the New Regime allows Spain to set returns arbitrarily, in breach of the stability commitment in Article 10(1).[1088]

529. Consequently, the Claimants submit that they have suffered because of Spain's failure to provide a stable, transparent, and predictable regulatory framework within the meaning of ECT Article 10(1).[1089] The Claimants argue that Spain's failure is all the more egregious given its prior emphasis on stability in materials offered to investors to induce their investment.[1090]

530. In response to the Respondent's argument that the Disputed Measures respect the stability and predictability of the legal framework because they continue to provide investors with a "reasonable return," the Claimants refer to the *Antin* award, noting that:

> [T]he issue at hand is not whether the New Regime provides a 'reasonable return', but rather how such 'reasonable return' is determined. To comply with the stability and predictability requirements under the ECT, the

[1083] Cl. Reply, ¶ 490.

[1084] Cl. Reply, ¶ 490 (citing CL-95, *Foresight*, ¶ 398).

[1085] Cl. Mem., ¶ 241.

[1086] Cl. Mem., ¶ 241 (citing First Brattle Regulatory Report, ¶ 219).

[1087] Cl. PHB, ¶¶ 102-103.

[1088] Cl. PHB, ¶ 103; *see also* Cl. Reply, ¶¶ 539-551.

[1089] Cl. Mem., ¶ 242 (citing CL-91, *Eiser*, ¶ 391; CL-92, *Novenergia II*, ¶ 695; CL-95, *Foresight*, ¶¶ 390, 398; CL-98, *NextEra*, ¶¶ 598-599). *See also* Cl. Mem., ¶ 260.

[1090] Cl. Mem., ¶ 243.

> methodology for determining the payment due to CSP installations must be based on identifiable criteria.[1091]

531. In particular, the Claimants refer to the *Antin* tribunal's finding that the methodology for determining the so-called reasonable return under the New Regime was not in compliance with the ECT's requirements of stability and predictability.[1092]

532. The Claimants reiterate that they are not suggesting that Spain was not entitled to pass legislation, or that doing so *ipso facto* would be a breach of its stability commitment. However, the Claimants contend that the stability commitments under RD 661/2007 mean that if Spain does choose to alter the applicable regime for existing installations, then its international obligations are engaged so as to require the payment of compensation.[1093]

(2) Spain Failed to Accord Fair and Equitable Treatment

a. Overview

533. The Claimants contend that the Disputed Measures failed to accord FET to the Claimants' investment in Spain.[1094]

534. With reference to the *Liman* tribunal's observations, the Claimants submit that the FET standard in the ECT goes beyond the minimum standard of treatment under international law.[1095] In the Claimants' view, the FET standard in the ECT has a specific legal meaning, which is discerned by the normal process of treaty interpretation, including with reference to the ordinary meaning of the treaty's terms, their context and the object and purpose of the treaty.[1096]

[1091] Cl. Reply, ¶ 486 (quoting CL-94, *Antin*, ¶ 562).

[1092] Cl. Reply, ¶¶ 486-487 (citing CL-94, *Antin*, ¶¶ 563-568).

[1093] Cl. Mem., ¶ 244 (citing C-53, CNE Report 3/2007, p. 22).

[1094] Cl. Mem., ¶ 246; Cl. Reply, Section III(4).

[1095] Cl. Mem., ¶ 247 (citing CL-70, *Liman*, ¶ 263); Cl. Reply, ¶ 448.

[1096] Cl. Mem., ¶¶ 248, 251-253 (confirming this interpretation approach, the Claimants cite: CL-88, Dolzer FET Article, p.12; CL-31, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 ("***Tecmed***"), ¶ 156; CL-35, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113; CL-42, *Saluka*, ¶¶ 286, 293; CL-43, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 360; CL-48, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 290; CL-67, *Joseph Charles Lemire v. Republic of Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ("***Lemire***"), ¶ 262; CL-68, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Cases No. ARB/05/18 and ARB 07/15, Award, 3 March 2010, ¶¶ 430-433).

535. Regarding the ordinary meaning of the words, the Claimants refer to the Oxford English Dictionary definitions as follows: "fair" meaning "just, unbiased, equitable, impartial, legitimate"; "equitable" meaning "[c]haracterized by equity or fairness"; and "equity" meaning "[f]airness; impartiality; even-handed dealing."[1097]

536. Regarding the context of the provision, the Claimants compare the FET standard with other substantive standards, such as national treatment or Most Favored Nation ("**MFN**"), which are relative, to submit that the FET standard is an absolute standard that provides a fixed reference point regardless of the treatment others receive.[1098] The Claimants reject the Respondent's argument that the FET standard is limited to the minimum standard of treatment and submit that the cases on which the Respondent relies, including *AES* and *Electrabel*, are inapposite.[1099]

537. The Claimants also reject the Respondent's claimed exceptions to the FET obligation with respect to "macroeconomic control measures" and "the public aid regime."[1100] It is the Claimants' position that the only exceptions are those set out in ECT Article 24, which are not applicable here.[1101]

538. The Claimants reiterate that they are not arguing that Spain cannot regulate without violating the FET standard.[1102] Instead, with reference to the *Antin* decision, the Claimants submit that the FET standard under ECT Article 10(1) "comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments," which "means that a regulatory regime specifically created to induce investments in

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[1097] Cl. Mem.,¶ 249 (citing CL-46, Shorter Oxford English Dictionary on Historical Principles, Volume 1 A-M (6th ed, Oxford University Press) 2007, p. 920; CL-87, B. Garner, Black's Law Dictionary (10th ed, Thomson Reuters), 2014, p. 715, which defines "fair" as "impartial; just; equitable; disinterested" or "free of bias or prejudice"; and CL-46, Shorter Oxford English Dictionary on Historical Principles, Volume 1 A-M (6th ed, Oxford University Press) 2007, p. 856; CL-87, B. Garner, Black's Law Dictionary (10th ed, Thomson Reuters), 2014, p. 654, which defines "equitable" as "just; consistent with principles of just and right" or "existing in equity," with "equity" being defined as "fairness; impartiality; even-handed dealing").

[1098] Cl. Mem., ¶ 250 (citing CL-30, *United Parcel Service of America, Inc. v. Government of Canada,* UNCITRAL, Award on Jurisdiction, 22 November 2002, ¶ 80, noting that "[t]hose obligations [MFN and national treatment] are relative. They depend simply and solely on the specifics of the treatment the Party accords to its own investors or investors of third States. Article 1105 [FET], by contrast, states a generally applicable minimum standard which, depending on the circumstances, may require more than the relative obligations of articles 1102 and 1103"); Cl. Reply, ¶¶ 446-447.

[1099] Cl. Reply, ¶ 444.

[1100] Cl. Reply, ¶ 450 (citing Resp. C-Mem., ¶¶ 983, 997); *see also* Cl. Reply, ¶¶ 457-462.

[1101] Cl. Reply, ¶¶ 450-451.

[1102] Cl. Reply, ¶ 453.

the energy sector cannot be radically altered – *i.e.*, stripped of its key features – as applied to existing investments in ways that affect investors who invested in reliance on those regimes."[1103]

539. The Claimants refer to the following non-cumulative criteria against which tribunals have typically evaluated a State's conduct in applying the FET standard:[1104]

a) whether the host State breached the investor's reasonable and legitimate expectations when the investment was made;

b) whether the State failed to provide a stable and predictable legal and business framework in relation to the investment;

c) whether the State's conduct was transparent;

d) whether the State acted in an arbitrary or unreasonable manner; and

e) whether the actions of the State were disproportionate.

540. The Claimants explain their view that while a host State's obligation to provide stability is a stand-alone obligation under the ECT (addressed separately in Section VII.A(1) above), the FET standard in the ECT also encompasses an obligation to provide a stable legal and business framework.[1105] In addition, the Claimants submit that it is not necessary to establish bad faith on Spain's part in order

[1103] Cl. Reply, ¶ 453 (citing CL-94, *Antin*, ¶ 532); *see also* ¶ 454 (citing CL-122, *Watkins*, ¶ 543).

[1104] Cl. Mem., ¶ 254 (citing CL-88, Dolzer FET Article, p. 14).

[1105] Cl. Mem., n. 374.

to establish a violation of the FET standard.[1106] Finally, the Claimants argue that a series of measures can collectively amount to a composite act in breach of the FET standard.[1107]

541. The Claimants submit that Spain has breached its obligations under the FET standard by:

a) adopting measures that frustrated the Claimants' legitimate expectations;[1108]

b) failing to provide a stable and predictable business and legal framework for the Claimants' investment;[1109]

c) implementing the New Regime in a non-transparent manner;[1110] and

d) adopting measures that are unreasonable and disproportionate.[1111]

b. The Claimants' Expectations Were Legitimate

542. The Claimants contend that a central feature of the FET standard is the principle that the State must not frustrate a foreign investor's reasonable and legitimate expectations on which the investor relied at the time it made its investment.[1112] The Claimants' view is that the State's conduct, which may

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[1106] Cl. Mem., ¶ 255 (citing CL-31, *Tecmed*, ¶ 153; CL-36, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 186, noting that the FET standard imposes objective requirements that do not depend on whether the host State has proceeded in good faith or not; CL-37, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 280, noting that the FET standard "is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question" and "such intention and bad faith can aggravate the situation but are not an essential element of the standard"; CL-45, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 ("***LG&E***"), ¶ 129, noting that "[t]he Tribunal is not convinced that bad faith or something comparable would ever be necessary to find a violation of fair and equitable treatment"; and CL-50, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 ("***Enron***"), ¶ 263, noting that "the principle of good faith is not an essential element of the standard of fair and equitable treatment and therefore violation of the standard would not require the existence of bad faith").

[1107] Cl. Mem., ¶¶ 256-259 (citing CL-58, *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 518; CL-72, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ("***El Paso***"), ¶¶ 515 *et seq*; CL-80, *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, ¶¶ 275-276, 300; CL-71, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V 079/2005, Final Award, 12 September 2010, ¶¶ 410, 599, 621; CL-81, *Quasar de Valores SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012 ("***Quasar de Valores***"), ¶ 158; CL-78, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 304).

[1108] Cl. Mem., ¶¶ 262 *et seq*; Cl. Reply, § III.4.3.

[1109] Cl. Mem., ¶¶ 284 *et seq*.

[1110] Cl. Mem., ¶¶ 292 *et seq*; Cl. Reply, § III.4.4.

[1111] Cl. Mem., ¶¶ 298 *et seq*; Cl. Reply, § III.4.5.

[1112] Cl. Mem., ¶ 262 (citing CL-42, *Saluka*, ¶ 302; CL-31, *Tecmed*, ¶ 154; CL-25, *CME*, ¶ 611).

contribute to the creation of a reasonable expectation and upon which an investor relies, may take the form of the legal framework applicable to the investment.[1113]

543. With reference to international arbitral jurisprudence, the Claimants argue that the legal framework on which the investor is entitled to rely consists of legislation and treaties, and assurances contained in decrees, licenses and similar executive assurances or undertakings.[1114] In particular, the Claimants refer to ECT tribunals that have found that the RD 661/2007 FIT regime, by itself, was sufficient to create the legitimate expectation that the regulatory framework applicable to renewable energy would not be fundamentally altered.[1115]

544. In response to the Respondent's argument that the Claimants' investments were made over a longer period and their expectations should be assessed during times extending until 2011, the Claimants' position is that they made their investment on 12 June 2009, when EBL entered into the Investment Agreement (to which Tubo Sol and others were parties) pledging to acquire 85% of Tubo Sol's shares (*see* Section III.C(1) above).[1116] Consequently, the Claimants submit that this is the date on which the legitimacy and reasonableness of their expectations should be assessed.[1117]

545. In response to the Respondent's argument that EBL erred by not obtaining sufficiently thorough legal advice on regulatory matters before making its investment, the Claimants submit that an investor does not have to have carried out due diligence for its legitimate expectations claim to prevail.[1118] In the Claimants' view, legitimate expectations are to be assessed objectively, and the presence or absence of due diligence to inform an investor's subjective understanding of the regulatory framework is not determinative.[1119] The Claimants submit that the only relevant enquiry is whether the investor's understanding was objectively reasonable.[1120]

[1113] Cl. Mem., ¶ 268 (citing CL-91, *Eiser*, ¶¶ 367, 382, 387; CL-92, *Novenergia II*, ¶ 654; CL-93, *Masdar*, ¶ 484; CL-94, *Antin*, ¶ 532; CL-95, *Foresight*, ¶¶ 352, 359, 365, 377, 378; CL-96, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 ("***RREEF***"), ¶¶ 390, 395).

[1114] Cl. Mem., ¶¶ 269-270 (citing to CL-50, *Enron*, ¶¶ 264-266; CL-45, *LG&E*, ¶¶ 130, 133; CL-72, *El Paso*, ¶¶ 513, 514, 517).

[1115] Cl. Mem., ¶ 270 (citing CL-91, *Eiser*, ¶¶ 363, 382, 387; CL-92, *Novenergia II*, ¶¶ 652, 662, 667, 681; CL-93, *Masdar*, ¶ 512; CL-94, *Antin*, ¶¶ 548, 552; CL-95, *Foresight*, ¶ 378; CL-99, *9REN*, ¶¶ 294-295).

[1116] Cl. Reply, ¶¶ 216-222.

[1117] Cl. Reply, ¶¶ 218, 222.

[1118] Cl. PHB, ¶¶ 40-41 (citing Tr. Day 6, 104:19-21).

[1119] Cl. PHB, ¶ 41.

[1120] Cl. PHB, ¶ 41.

546. In any event, the Claimants contend that they conducted adequate due diligence.[1121] In particular, the Claimants refer to the EBL Supervisory Board's approval of the investment being conditional on Tubo Sol's obtaining preliminary registration, which was understood to qualify it for a stable FIT under RD 661/2007;[1122] its engagement of Fichtner and B&B;[1123] and the consideration of the Cuatrecasas Report shared by Novatec (all discussed in Section III.C(1) above).[1124] In particular, the Claimants refer to Mr. B. Andrist's testimony at the Hearing confirming that Fichtner recommended that EBL explore an investment in Spain because of the "clear feed-in tariff decree which provides protection to investors."[1125]

547. The Claimants argue that RD 661/2007 was so clear that it did not require an extensive regulatory analysis,[1126] and that no red flag was raised by its advisors in respect of the stability of RD 661/2007.[1127] In this regard, the Claimants point to the *Novenergia II* tribunal's finding that RD 661/2007 was clear on its face and that investors did not have to undertake further due diligence in order to invest in reliance upon it.[1128] The Claimants also refer to their witnesses' testimony at the Hearing confirming that they placed reliance on the text of RD 661/2007.[1129]

548. The Claimants contend that their expectations were twofold: (i) regarding the nature, amount and duration of the FIT offered under RD 661/2007; and (ii) with respect to the stability of the RD 661/2007 economic regime.[1130]

549. First, the Claimants expected that once the Plant was registered in the RAIPRE and the Claimants' rights crystallized under RD 661/2007:[1131]

a) the Plant would sell electricity at a FIT for the amounts that were set out in RD 661/2007;

[1121] Cl. Mem, ¶¶ 92-99; Cl. Reply, ¶ 230.

[1122] Cl. Reply, ¶¶ 230, 250-252 (referring to EBL carefully considering the FIT before investing).

[1123] Cl. Reply, ¶ 230 (citing C-79, Minutes of Meeting of EBL's Supervisory Board, 14 May 2009, p. 3); *see also* Cl. Reply, ¶ 236 (referring to consulting with EBL's legal and technical advisors), ¶¶ 238-243 (referring to the B&B Report), and ¶¶ 244-246 (referring to the Fichtner Report); *see also* Cl. PHB, ¶¶ 42-46.

[1124] Cl. Reply, ¶¶ 247-249; Cl. PHB, ¶ 46.

[1125] Cl. PHB, ¶ 37 (citing Tr. Day 2, B. Andrist, 73:14-17).

[1126] Cl. Reply, ¶ 232.

[1127] Cl. Reply, ¶ 236 (citing CL-95, *Foresight*, ¶ 380).

[1128] Cl. Reply, ¶ 234 (citing CL-92, *Novenergia II*, ¶ 679).

[1129] Cl. PHB, ¶ 39 (citing Tr. Day 2, T. Andrist, 28:6-7; Tr. Day 2, B. Andrist, 73:14-17).

[1130] Cl. Mem., ¶ 272.

[1131] Cl. Reply, ¶¶ 400-402 (citing to CL-94, *Antin*, ¶ 552).

b) the FIT would apply for the entire operational life of the Plant; and

c) the FIT would be subject to inflation adjustments, as provided in RD 661/2007.[1132]

550. Second, the Claimants expected that any changes to the RD 661/2007 regime would only apply prospectively, *i.e.*, to new installations, while existing installations would remain unaffected.[1133]

551. The Claimants argue that the purpose of the RD 661/2007 was to attract investors to invest in renewable energy installations, which are otherwise unprofitable, so that Spain could reach its renewable energy targets.[1134] The Claimants contend that Spain had explicitly promised that the economic regime for qualifying Special Regime installations would remain stable under RD 661/2007, which, in the Claimants' view, includes a stabilization commitment in Article 44.3.[1135] The Claimants point to a number of arbitral decisions confirming the Claimants' understanding of Article 44.3,[1136] and submit that the tribunals in the cases on which the Respondent relies erred in their finding that RD 661/2007 did not contain a stabilization commitment in Article 44.3.[1137] The Claimants explain that this stability commitment was core to the Claimants' expectations and that, without the FIT, they never would have invested in the Spanish CSP sector.[1138]

552. In response to the Respondent's position that a royal decree such as RD 661/2007 was "unable" to include a stabilization commitment (or "grandfathering provision"), the Claimants submit that this

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[1132] Cl. Mem., ¶ 273 (noting that the FIT would either be a fixed Regulated Tariff or a Premium in addition to the market price).

[1133] Cl. Mem., ¶ 274.

[1134] Cl. Reply, ¶¶ 368-371 (citing CL-92, *Novenergia II*, ¶ 665; C-184, *Secretary of State for Energy and Climate Change v. Friends of the Earth and others*, Court of Appeal Judgement, CA, Civil Division, Lloyd, Moses, Richards, LJJ, ¶¶ 40-41, 51).

[1135] Cl. Mem., ¶ 275; Cl. Reply, ¶ 358 (citing C-53, CNE Report 3/2007, p. 24).

[1136] Cl. Reply, ¶¶ 359-361 (citing CL-91, *Eiser*, ¶ 364; CL-92, *Novenergia II*, ¶¶ 679, 681; CL-99, *9REN*, ¶¶ 257, 259, 265-273, 294-297; CL-123, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019 ("***OperaFund***"), ¶ 485; CL-126, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, 15 July 2019 ("***Cube* Award**"), ¶¶ 257-283, 309-310; CL-122, *Watkins*, ¶¶ 526, 550; CL-124, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, ("***SolEs Badajoz***"), ¶¶ 424 (b), 426; CL-94, *Antin*, ¶¶ 274, 553; CL-93, *Masdar*, ¶¶ 500, 503, 512, 521. *See also* CL-130, *PV Investors*, Concurring and Dissenting Opinion of Charles N. Brower; CL-163; *BayWa*, Dissenting Opinion of Horacio A. Grigera Naón ("***BayWa* Dissent**"), ¶¶ 11, 22 (the Claimants refer to CL-128, *BayWa* by mistake); CL-168, *Isolux*, Dissenting Opinion of Arbitrator Guido Santiago Tawil, ¶¶ 7, 10).

[1137] Cl. Reply, ¶¶ 403-412 (citing Resp. C-Mem., ¶¶ 1057, 1095; CL-96, *RREEF*; CL-193, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Quantum Principles, 30 December 2019 ("***RWE***"); CL-128, *BayWa*; CL-191, *Hydro*).

[1138] Cl. Mem., ¶ 276 (citing T. Andrist Statement, ¶ 39; B. Andrist Statement, ¶ 54); *see also* Cl. PHB, ¶ 26.

is inconsistent with the Respondent's claim that had it wanted to include such a provision, it would have introduced it in a norm with the rank of a law.[1139] The Claimants point out that as a matter of Spain's domestic law, both laws and regulations can be changed or repealed, and refer to the fact that the 1997 Electricity Law itself was modified 35 times during the 16 years it was in force.[1140] In the Claimants' view, the fact that norms can be lawfully changed does not change the fact that regulations can give rise to legitimate expectations, especially when they contain provisions like Article 40.3 of RD 436/2004 and Article 44.3 of RD 661/2007.[1141]

553. Thus, for the Claimants, the question is whether it was legitimate for the Claimants to rely on the continued application of the remuneration regime that Spain put in place under RD 661/2007.[1142]

554. In response to the Respondent's argument that the Claimants' expectations regarding the continued application of RD 661/2007 could not be objectively legitimate because Spain made no "specific commitment" to the Claimants in this regard, the Claimants submit that the Respondent's position is wrong.[1143] The Claimants contend that it makes no difference whether Spain's commitments were set out in a royal decree or in an individually negotiated contract with the Government.[1144] The Claimants point out that the Respondent accepts that the regulatory framework did contain at least one specific commitment (*i.e.*, to provide investors a reasonable return), even though the Respondent contests the additional specific commitment the Claimants say was contained in RD 661/2007, based on an identified tariff per kWh of electricity produced and for the operational life of the installation.[1145]

555. The Claimants reject the Respondent's position that the reasonable return construct in Spanish regulatory practice is inherently "dynamic," and the corresponding findings of the ECT tribunals

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[1139] Cl. PHB, ¶ 27.

[1140] Cl. PHB, ¶ 27.

[1141] Cl. PHB, ¶ 27.

[1142] Cl. PHB, ¶¶ 27-28 (citing Tr. Day 6, 130:9-11).

[1143] Cl. Reply, ¶ 372 (citing Resp. C-Mem., ¶¶ 569-576, 1053-1062); *see also* Cl. Reply, ¶¶ 376-391 (distinguishing *Charanne* and *Isolux* on which the Respondent relies to argue that a regulatory regime, without a specific commitment, cannot give rise to legitimate expectations); ¶¶ 392-396 (distinguishing CL-57, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ("***Plama***"); RL-33, *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 ("***AES* Award**"); and RL-64, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 ("***Blusun***")).

[1144] Cl. Reply, ¶ 373.

[1145] Cl. Reply, ¶ 373 (citing Resp. C-Mem., ¶ 609); *see also* Cl. Reply, ¶¶ 403-430 (distinguishing the cases on which Spain relies regarding its alleged commitment to provide reasonable return).

on which the Respondent relies.[1146] The Claimants' view is that extensive contemporaneous evidence shows that Spain offered investors a guaranteed FIT that was "secured by the State,"[1147] and not just a reasonable return.[1148] Further, the Claimants argue that RD 661/2007 provided specific commitments that no retrospective changes to the FIT would be made.[1149] The Claimants rely on contemporaneous statements from the CNE, the Ministry, the IDAE and InvestInSpain to support its position.[1150] In response to the Respondent's argument that "the Claimants rely on documents that they have not seen," the Claimants explain that these presentations confirm that their expectations were objectively reasonable because they coincide with Spain's own understanding at the time.[1151] Thus, the Claimants submit that the real inquiry for the Tribunal is the content of the commitment and not how it was made.[1152]

556. The Claimants refer to a number of ECT tribunals that have found that it was legitimate for investors to rely on continued application of the FIT,[1153] and point out that some of the ECT decisions on which the Respondent relies also found elements of the New Regime to be retroactive.[1154]

[1146] Cl. Reply, ¶¶ 413-415 (citing CL-96, *RREEF*, ¶ 567; CL-139, *RWE*, ¶¶ 740-741; CL-128, *BayWa*, ¶ 508; CL-191, *Hydro*, ¶ 695; CL-195; *PV Investors v. Kingdom of Spain*, UNCITRAL, PCA Case No. 2012-14, Final Award, 28 February 2020 ("***PV Investors***"), ¶ 617). While the Claimants disagree with the findings of these tribunals, they point out that all concluded that the radical nature of the changes Spain made to the regulatory regime under which the claimants invested amounted to a breach of ECT Article 10(1). Cl. Reply, ¶¶ 424-428.

[1147] Cl. Reply, ¶ 415 (citing Section III.1.2(a)(ii) and C-78, Presentation to Supervisory Board, 14 May 2009, p. 2).

[1148] Cl Reply, ¶ 415 (citing Cl. Mem, ¶¶ 74-76; Section III.2.5(b)).

[1149] Cl. Reply, ¶ 374 (citing C-4, RD 661/2007, Article 36).

[1150] Cl. Reply, ¶ 374 (citing C-81, Third CNE Presentation, p. 29; C-62, First CNE Presentation; C-185, Luis Jesús Sánchez de Tembleque, CNE Presentation, "Renewable Energies: The Spanish Case" (Cartagena de Indias), 9-13 February 2009; C-186, Luis Jesús Sánchez de Tembleque, CNE Presentation, "Renewable Energy Regulation" (Barcelona), February 2009; C-111, Ministry of Industry, Tourism and Commerce and InvestInSpain, "Spain for Renewable Energies," October 2011, p. 1; C-98, Ministry of Industry, Tourism and Commerce and IDAE, "Panorama - Renewables Made in Spain," 23 September 2012, p. 1); *see also* Cl. PHB, ¶ 41.

[1151] Cl. PHB, ¶ 41 (citing Tr. Day 6, 146:22-23; Tr. Day 6, 36:19-37:4).

[1152] Cl. Reply, ¶ 374.

[1153] Cl. Reply, ¶¶ 397-399 (citing CL-91, *Eiser*, ¶ 387; CL-92, *Novenergia II*, ¶ 681; CL-93, *Masdar*, ¶¶ 489-522; CL-94, *Antin*, ¶¶ 553-554; CL-95, *Foresight*, ¶ 365; CL-98, *NextEra*, ¶ 596; CL-99, *9REN*, ¶ 294; RL-98, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019 ("***InfraRed***"), ¶¶ 438-451; CL-126, *Cube* Award, ¶¶ 273, 354; CL-124, *SolEs Badajoz*, ¶¶ 423-424; CL-123, *OperaFund*, ¶ 485; CL-122, *Watkins*, ¶ 527.

[1154] Cl. Reply, ¶¶ 429-430 (citing CL-96, *RREEF*, ¶¶ 328-330, 474, 483, 591, 600(2); CL-139, *RWE*, ¶ 621; CL-128, *BayWa*, ¶¶ 495-496, 533; CL-195, *PV Investors*, ¶ 813; CL-191, *Hydro*, ¶¶ 693-695) (the Claimants cited CL-129 by mistake).

557. The Claimants submit that their expectations of the RD 661/2007 regime continuing to apply to the Plant were legitimate and reasonable given that:

a) the RD 661/2007 regime provided specific tariffs that would apply for the lifetime of the Plant;[1155]

b) RD 661/2007 committed not to subject existing installations to anticipated future tariff revisions, a commitment to stability that was made to attract investment;[1156]

c) the RD 661/2007 regime was part of a wider international and domestic policy to develop renewable energy power-generation infrastructure;[1157]

d) the regime was sufficiently attractive to encourage the necessary investments in renewable energy projects, such as the Plant; and without those support schemes, renewable energy producers would have to compete with conventional generators to sell power in the electricity market, in circumstances where market prices were not high enough to justify the large investments these projects initially require.[1158]

558. The Claimants submit that their expectations were further confirmed and enhanced by Spain's active campaign to promote investments in the Spanish renewable energy sector.[1159]

559. The Claimants reject the Respondent's argument that developments between June 2009 and July 2011 foreshadowed regulatory changes that would adversely impact existing renewable energy installations.[1160] They observe that neither of the Supreme Court's December 2009 judgments – Judgment App. 151/2007 of 3 December 2009 and Judgment App. 152/2007 of 9 December 2009 (discussed in Section III.B above) – provided an interpretation of the meaning and effect of the key provisions of RD 436/2004 or RD 661/2007.[1161] With respect to RDL 14/2010 (discussed in Section III.D above), the Claimants contend that the tariff revisions implemented by this law applied only

[1155] Cl. Mem., ¶ 277(a).
[1156] Cl. Mem., ¶ 277(b) (citing C-4, RD 661/2007, Article 44.3).
[1157] Cl. Mem., ¶ 277(c) (citing C-50, RDL 7/2006, Preamble).
[1158] Cl. Mem., ¶ 277(d) (citing First Brattle Regulatory Report, ¶ 41).
[1159] Cl. Mem., ¶ 278.
[1160] Cl. Reply, ¶ 223 (citing Resp. C-Mem., ¶¶ 748-749).
[1161] Cl. Reply, ¶ 224 (citing R-84, Judgment App. 151/2007; R-85, Judgment App. 152/2007).

to photovoltaic plants, and that the Government subsequently confirmed that future regulatory changes to the regime for such plants would not affect those already in operation.[1162]

(i) The Spanish Law Arguments Have no Relevance to Assessing the Claimants' Legitimate Expectations

560. The Claimants further reject the Respondent's arguments under Spanish law as having no relevance to the assessment of the Claimants' legitimate expectations.[1163] In particular, the Claimants refer to the Respondent's reliance on the PER 2005-2010 (discussed in Section III.A(2) above),[1164] and submit that, contrary to the Respondent's position, it does not evidence that FITs could be changed retroactively for existing installations.[1165] Further, the Claimants' position is that there is no link between the PER 2005-2010 and the RD 661/2007 FITs.[1166]

561. The Claimants further contend that the Respondent's "reasonable return" defense is a fallacy.[1167] In particular, they submit that even though Article 30(4) of the 1997 Electricity Law referred generally to the concept of "reasonable return," there was no indication before 2013 that this concept would be implemented by reference to returns on Spanish bond yields, much less that the result would be tariffs set by reference to a 7.398% pre-tax return.[1168] The Claimants say that Spain's own documents confirm that the link to bond yields was established only in the New Regime.[1169]

562. The Claimants argue that the evolution of the regulatory framework (discussed in Section III.A above) shows that the only variable they were required to take into account in projecting future returns was the FIT established under RD 661/2007:[1170]

[1162] Cl. Reply, ¶¶ 225-226 (citing R-24, Law 2/2011, Forty-fourth Final Disposition (One)).

[1163] Cl. Reply, Section III.2.5.

[1164] Cl. Reply, ¶¶ 284-290 (citing C-3, Summary PER 2005-2010).

[1165] Cl. Reply, ¶ 287 (citing Resp. C-Mem., ¶ 513).

[1166] Cl. Reply, ¶ 289 (citing C-171, Response to EC information request in matter SA.40348 2014/N, 22 April 2015, p. 6).

[1167] Cl. Reply, ¶¶ 291-313.

[1168] Cl. Reply, ¶ 292 (citing First Brattle Regulatory Report, ¶¶ 144-146).

[1169] Cl. Reply, ¶¶ 292-293 (citing R-65, Opinion 937/2013, p. 15; C-171, Response to EC information request in matter SA.40348 2014/N, 22 April 2015, p. 15. The Claimants also refer to a number of arbitral awards finding the same (CL-122, *Watkins*, ¶ 557(iv); CL-106, *Cube* Decision, ¶ 425; RL-76, *Novenergia II*, ¶ 673).

[1170] Cl. Reply, ¶ 295.

a) First, RD 2366/1994 established the Special Regime for renewable energy producers, justifying legitimate expectations that economic conditions would be maintained and that double-digit profitability would be considered to be "more reasonable."[1171]

b) Second, Article 30.4 of the 1997 Electricity Law provided the framework for setting the specific remuneration through regulation that would provide a "reasonable return."[1172] Specifically, the Claimants argue that 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 allowing investors to achieve a "reasonable return,"[1173] but once the remuneration was set, renewable energy producers could rely on its continuing, without need to second-guess whether it complied with the concept of "reasonable return."[1174]

c) Third, RD 661/2007 contemplated the possibility of a return higher than 7% for CSP projects, the Claimants say.[1175] They contend that the Respondent accepted that RD 661/2007 was not intended to "cap" the returns of any given investor, but rather was designed to achieve a target return.[1176] It is the Claimants' case that Spain was aware that, under its FIT regime, some projects would earn in excess of the target rate of return.[1177]

563. The Claimants also reject the Respondent's claim that the concept of reasonable return should have been understood to be a dynamic one, particularly with reference to the cost of money on the capital markets.[1178] The Claimants argue that (i) if the Respondent's position were correct, Spain should have increased the RD 661/2007 FIT when interest rates were at their historic high in 2009;[1179] (ii) there was no significant difference in the cost of money between 2007 and 2013 that would justify Spain's retroactive changes;[1180] (iii) the Respondent's own documents recognize that the

[1171] Cl. Reply, ¶ 296 (citing C-172, Memoria Económica for RD 2366/1994, Undated, p. 45; C-173, Council of State Report on RD 2366/1994, 10 November 1994, pp. 15-16).

[1172] Cl. Reply, ¶¶ 297-299.

[1173] Cl. Reply, ¶ 298.

[1174] Cl. Reply, ¶ 298.

[1175] Cl. Reply, ¶ 300 (citing First Brattle Regulatory Report, ¶¶ 181, 277).

[1176] Cl. Reply, ¶ 301 (citing Resp. C-Mem., ¶ 539; First Brattle Regulatory Report, Appendix 3, ¶¶ 247-248).

[1177] Cl. Reply, ¶ 301.

[1178] Cl. Reply, ¶¶ 303-309 (citing Resp. C-Mem., ¶¶ 720(c), 878, 440-441).

[1179] Cl. Reply, ¶ 305.

[1180] Cl. Reply, ¶ 306 (citing First Brattle Regulatory Report, ¶¶ 147-148; CL-97, *RREEF*, Partially Dissenting Opinion of Professor Robert Volterra ("***RREEF* Dissent**"), ¶¶ 34-35; CL-122, *Watkins*, ¶¶ 502-503).

RD 661/2007 FIT was meant to remain stable for the lifetime of the installations;[1181] and (iv) the Respondent's "dynamic" theory is inconsistent with international regulatory practice.[1182] The Claimants acknowledge that the New Regime does allow changes in remuneration to be made for existing investments based on changes in the cost of money in capital markets; however, this was not how the RD 661/2007 regime worked.[1183]

564. The Claimants contend that RD 661/2007 put in place a remuneration that increased FITs by 17% for CSP plants in order to attract investment.[1184] In particular, the Claimants refer to a number of documents that show that Spain's purpose was to improve the incentive scheme or, at the very least, this was the consequence of RD 661/2007.[1185]

(ii) The Supreme Court Judgments are not Relevant to the Claimants' Expectations

565. The Claimants reject any suggestion that the judgments of the Spanish Supreme Court (discussed in Section III.B above) should have led them to anticipate the possibility of regulatory changes such as the Disputed Measures, and that these judgments show that the Claimants' expectations regarding continuation of the RD 661/2007 regime were not legitimate.[1186] The Claimants argue that the *Charanne* decision on which the Respondent relies in this regard is inapposite, because none of the judgments considered in that case, which were in existence when the Claimants invested, support the notion that RD 661/2007 could be subject to wholesale changes.[1187] In any event, the Claimants also point out that the Respondent relies on a number of judgments that post-date the Claimants' investments, which they could not have taken into account.[1188]

[1181] Cl. Reply, ¶ 307.

[1182] Cl. Reply, ¶ 308 (citing CL-97, *RREEF* Dissent, ¶ 20; C-104, Commission Staff Working Document, "European Commission Guidance for the Design of Renewables Support Schemes," SWD(2013) 439 final, 5 November 2013, p. 5).

[1183] Cl. Reply, ¶ 309 (citing First Brattle Regulatory Report, ¶¶ 23, 173; C-101, CNE Report 18/2013, p. 4).

[1184] Cl. Reply, ¶ 313.

[1185] Cl. Reply, ¶¶ 310-313 (citing C-155, *Memoria Económica* for RD 661/2007, Section 3.2.1, p. 18; C-174, CNE opinion on the resolution adopted by the CNE Board of Directors on 14 February 2007, approving the report on the RD 661/2007, p. 8; C-54, RD 661/2007 Ministry Announcement, pp. 1-2; C-62, First CNE Presentation, pp. 25, 27).

[1186] Cl. Reply, ¶ 314 (citing Resp. C-Mem., ¶ 450).

[1187] Cl. Reply, ¶ 315 (citing Resp. C-Mem., ¶¶ 724-725).

[1188] Cl. Reply, ¶ 316 (citing Resp. C-Mem., Section IV.C and stating that consequently the Judgments of the Spanish Supreme Court and Constitutional Court contained in Exhibits R-4, Judgments of the Supreme Court, 2011-2012; R-5, Judgment, Third Chamber of the Supreme Court, 12 April 2012 (RCA. 40/2011); R-88, Judgment, Third Chamber of the Supreme Court, 12 April 2012 (App. 35/2011); R-89, Judgment, Third Chamber of the Supreme Court, 19 June 2012 (App. 62/2011); R-94, Judgment 63/2016, Supreme Court, 21 January 2016 (Administrative App. 627/2012)

566. With reference to the decisions issued before the Claimants' investment,[1189] the Claimants submit that these provide no interpretation of the meaning and effect of the key provisions in RD 436/2004 and RD 661/2007, as they did not concern investments that benefitted from the Special Regime.[1190] The only judgment the Claimants deem relevant is Judgment App. 151/2007 of 3 December 2009, which concerned a photovoltaic installation previously registered under RD 436/2004.[1191] However, they contend that the Supreme Court did not refer to Article 40.3 of RD 436/2004, and in fact found that RD 661/2007 had maintained (or improved) the investor's remuneration from its situation under RD 436/2004.[1192] Thus, the Claimants argue that this could not have put investors on notice that harmful changes were lawful.[1193] In any event, the Claimants point out that even this judgment post-dates the Claimants' investment and is therefore irrelevant.[1194]

567. It is for this reason, the Claimants submit, that their legal advisors did not flag any of the domestic court judgments on which the Respondent relies, and that no other adviser ever referred to the potential retroactive changes in the regulatory regime based on Spanish court judgments.[1195]

568. In this context, the Claimants contend that the *Stadtwerke* tribunal made an error in its assessment of the Supreme Court judgments, in particular in relation to Judgment App. 12/2005 of 25 October 2006. In the Claimants' view, that judgment did not concern Article 40.3 of RD 436/2004 or any changes to RD 436/2004, but rather related to an investment made under a previous regime that did not contain the stability commitment set out in Article 40.3.[1196]

(iii) RD 661/2007 Protected Against "Demand Risk"

569. In response to the Respondent's argument that the global financial crisis should have put the Claimants on notice regarding potential changes to the FIT scheme under the Special Regime, the Claimants submit that this is inconsistent with the circumstances that prevailed at the time when

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and R-176, Judgment 183/2014, Constitutional Court, 6 November 2014 (published on 4 December 2014) are irrelevant).

[1189] Cl. Reply, ¶ 317 (citing Judgments contained in Exhibits R-80, Judgment App. 73/2004; R-81, Judgment App. 12/2005; R-82, Judgment App. 11/2005; R-83, Judgment App. 13/2006; R-84, Judgment App. 151/2007; R-85, Judgment App. 152/2007).

[1190] Cl. Reply, ¶ 317.

[1191] Cl. Reply, ¶ 318 (citing R-84, Judgment App. 151/2007).

[1192] Cl. Reply, ¶¶ 318-319 (citing R-84, Judgment App. 151/2007, pp. 6-7).

[1193] Cl. Reply, ¶ 319.

[1194] Cl. Reply, ¶ 319.

[1195] Cl. Reply, ¶ 321.

[1196] Cl. Reply, ¶¶ 322-324 (citing CL-180, *Stadtwerke*, ¶ 277).

Spain approved the Royal Decrees implementing the Special Regime.[1197] The Claimants' point is that the Respondent cannot claim that the RD 661/2007 regime was implemented with a reasonable belief that electricity demand was incapable of fluctuation.[1198]

570. Moreover, because RD 661/2007 provided for priority of dispatch, the Claimants argue that one of the key inducements for investors was that they did not have to bear demand risk, which Spain fully allocated to itself.[1199] As a result, the Claimants contend that they could not have reasonably expected that a fall in demand and the resulting Tariff Deficit would entitle Spain to change and withdraw the Special Regime for existing installations.[1200]

(iv) EU State Aid Rules are not Relevant for Assessing Legitimate Expectations

571. With reference to the Respondent's and the EC's position that the RD 661/2007 FIT constituted notifiable State aid (as determined in the 2017 EC State Aid Decision discussed in Section III.H), and consequently that the Claimants could not legitimately expect the continued application of the RD 661/2007 FIT, the Claimants set out the following arguments.[1201]

572. First, the Claimants observe that the 2017 EC State Aid Decision post-dates the Claimants' investment, as it was issued more than nine years after the investment was made.[1202] In any event, the Claimants' view is that the Decision focuses only on the compatibility of the New Regime with EU law on State aid; it does not address the compatibility of the prior Special Regime or RD 661/2007 specifically.[1203]

573. Second, the Claimants submit that FITs were not considered State aid when the Claimants invested.[1204] This changed only in 2014, five years after the Claimants' made their investment, when the CJEU found that renewable energy FITs in Spain constituted State aid.[1205]

[1197] Cl. Reply, ¶¶ 325-326 (citing Resp. C-Mem., ¶¶ 593-594, 960, 1210).

[1198] Cl. Reply, ¶ 326.

[1199] Cl. Reply, ¶ 328.

[1200] Cl. Reply, ¶ 328.

[1201] Cl. Reply, ¶¶ 329-330.

[1202] Cl. Reply, ¶ 331 (citing CL-124, *SolEs Badajoz*, ¶ 442; CL-163, *BayWa* Dissent, ¶ 31).

[1203] Cl. Reply, ¶ 332 (citing RL-3, 2017 EC State Aid Decision, ¶ 156).

[1204] Cl. Reply, ¶ 333 (citing CL-164, *PreussenElektra v. Schleswag*, Case C-379/98, Judgment, CJEU, 13 March 2001, ¶¶ 59-61).

[1205] Cl. Reply, ¶¶ 334-335 (citing RL-54, Order of the Court of Justice of the European Union issued in the question referred C-275/13, Elcogás, 22 October 2014).

574. Third, the Claimants contend that both Spain and the EC failed to take action in relation to the Special Regime.[1206] The Claimants reject the suggestion that RD 661/2007 was unlawful.[1207] In any event, at the time the Claimants invested, Spain did not notify the RD 661/2007 FIT to the EC as potentially constituting unlawful State aid, and consequently the only information available to the Claimants was that the Special Regime had not been notified to the EC and therefore that Spain did not believe it to be State aid.[1208] The Claimants submit that the *BayWa* tribunal's decision was incorrect in finding that the Special Regime potentially constituted State aid that should have been notified to the EC, and by extension that the claimants in that case should have been aware of it.[1209] The Claimants' position is that their expectations should not be undermined by the failure of Spain and the EC to assess the Special Regime under State aid laws until after the fact.[1210]

575. Fourth, the Claimants argue that they were entitled to believe that the Special Regime complied with EU law because:[1211] (i) they were entitled to believe that Spain had acted legally when it implemented RD 661/2007;[1212] (ii) the FIT scheme under RD 661/2007 was put in place pursuant to EU law, as confirmed by its Preamble;[1213] (iii) the EC monitored the implementation of all FIT schemes under the Special Regime and raised no concerns;[1214] and (iv) at the time, neither the EU nor any of its Member States considered FITs to constitute State aid that needed to be notified.[1215]

576. In any event, the Claimants submit that EU law on State aid is irrelevant to the present case (*see* Section VI.A(2) above).[1216] In particular, the Claimants' position is that the Respondent's arguments regarding State aid and those submitted by the EC have no relevance to the Claimants' legitimate expectations.[1217]

[1206] Cl. Reply, ¶ 336.
[1207] Cl. Reply, ¶ 336.
[1208] Cl. Reply, ¶ 337 (citing CL-128, *BayWa*, ¶ 559 (the Claimants refer to CL-163, *BayWa* Dissent by mistake)).
[1209] Cl. Reply, ¶¶ 339-340 (citing CL-128, *BayWa*, ¶ 565 (the Claimants refer to CL-163, *BayWa* Dissent by mistake)).
[1210] Cl. Reply, ¶ 342.
[1211] Cl. Reply, ¶ 344.
[1212] Cl. Reply, ¶¶ 345-346.
[1213] Cl. Reply, ¶ 347.
[1214] Cl. Reply, ¶¶ 348-350.
[1215] Cl. Reply, ¶ 351.
[1216] Cl. Reply, ¶ 352.
[1217] Cl. Reply, ¶ 356.

c. The Disputed Measures Have Frustrated the Claimants' Legitimate Expectations

577. The Claimants contend that the Disputed Measures have frustrated the Claimants' legitimate expectations in breach of ECT Article 10(1).[1218]

578. The Claimants submit that the key disagreement between the Parties is whether the Claimants' expectations that the Plant would receive tariffs calculated pursuant to the RD 661/2007 scheme for all the electricity produced and for the installation's entire lifetime were reasonable.[1219] In their view, the Respondent's counter-argument that the New Regime offers a reasonable return is relevant only if the Tribunal were to find that the Claimants' legitimate expectations were limited to such a reasonable return.[1220]

579. The Claimants refer to the following measures as frustrating their expectations:

a) Law 15/2012 (discussed in Section III.F(1) above): the Claimants contend that the 7% levy introduced by this Law was in breach of the commitments contained in the regulations that implemented the Special Regime.[1221] As discussed in Section V.D(2), the Tribunal has found all claims regarding Law 15/2012 to be outside its jurisdiction.

b) RDL 2/2013 (discussed in Section III.F(2) above): the Claimants contend that while the impact of RDL 2/2013 was relatively minor, its modification of the inflation index demonstrated Spain's clear intent to strip away the rights it had granted under the Special Regime.[1222] The Claimants reject the Respondent's argument that RDL 2/2013 was in fact beneficial to the Claimants, and argue that this is misleading because during the time period in question, the New Regime had overridden RDL 2/2013.[1223]

c) RDL 9/2013 (discussed in Section III.F(3) above): the Claimants contend that the New Regime introduced by RDL 9/2013 put in place an unprecedented remuneration regime for renewable energy projects;[1224] they refer to various statements by Spain's organs

[1218] Cl. Reply, ¶ 491.
[1219] Cl. Reply, ¶ 491.
[1220] Cl. Reply, ¶ 492.
[1221] Cl. Mem., ¶ 280(a); Cl. Reply, ¶ 493 (citing C-26, Law 15/2012, Preamble).
[1222] Cl. Mem., ¶ 280(b); Cl. Reply, ¶¶ 494-498.
[1223] Cl. Reply, ¶ 496.
[1224] Cl. Reply, ¶¶ 499-501.

acknowledging the magnitude of the changes[1225] and the findings of other ECT tribunals that the changes introduced by the New Regime were significant.[1226]

d) Law 24/2013 (discussed in Section III.F(4) above): the Claimants argue that Law 24/2013, which established the new reasonable return set out in RDL 9/2013, had a "clawback" effect.[1227]

580. The Claimants submit that the succession of these measures frustrated their legitimate expectations and dismantled entirely the legal and business framework under which they had made their investment.[1228]

581. The Claimants reject the Respondent's position that the New Regime continues to provide a reasonable return on the basis that, in the Claimants' view, this was not what Spain committed to under RD 661/2007.[1229] In any event, the Claimants submit – as part of their "alternative" case on legitimate expectations[1230] – that the Respondent's argument that the New Regime offers a 7.398% rate of return is misleading as it does not mention that this is pre-tax, which means that actual post-tax returns under the New Regime are much lower.[1231] By contrast, the Claimants submit that the returns that were implicit under RD 661/2007 were at least in the range of 7.6% to 11% (or even higher).[1232] In reality, the Claimants submit that with the Disputed Measures in place, the IRR for the Plant, at the project level, would be 5.4% after taxes.[1233]

[1225] Cl. Reply, ¶¶ 501-502 (citing C-101, CNE Report 18/2013, pp. 4, 8; R-65, Opinion 937/2013, pp. 16-17).

[1226] Cl. Reply, ¶ 503 (citing CL-94, *Antin*, ¶ 568; CL-91, *Eiser*, ¶ 391).

[1227] Cl. Reply, ¶ 499; Cl. PHB, ¶¶ 49-50.

[1228] Cl. Mem., ¶¶ 280-283 (comparing to CL-85, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 ("***Micula***"), ¶¶ 131, 407, 433, 687).

[1229] Cl. Reply, ¶ 504 (referring to Resp. C-Mem., ¶¶ 840-850 and citing CL-92, *Novenergia II*, ¶ 674; CL-95, *Foresight*, ¶ 378).

[1230] In the event the Tribunal finds that the Claimants' legitimate expectations were limited to a "reasonable return," the Claimants contend that their expectations still were frustrated because the Plant's actual returns fell below the levels "offered by Spain at the time of the Claimants' investment," *i.e.*, "the reasonable return that was implicit in the FIT originally offered by the RD 661/2007 regime." *See* Cl. Reply, ¶¶ 507, 637, 724-727 (explaining that this is the basis for the Claimants' alternative damages claim, which assumes that the relevant return for CSP plants is 9.5%). *See also* CD-6, Cl. Closing Statement, Part 5, Slide 253; Cl. PHB, ¶ 205 (citing C-155, *Memoria Económica* for RD 661/2007, PDF p. 16). The Tribunal returns to this alternative case further in Section VII.D(4)b below.

[1231] Cl. Reply, ¶¶ 505-506.

[1232] Cl. Reply, ¶ 506 (citing C-53, CNE Report 3/2007, Annex III, p. 47; C-155, *Memoria Económica* for RD 661/2007, p. 18).

[1233] Cl. Reply, ¶ 506 (citing First Brattle Quantum Report, ¶ 276).

582. The Claimants further argue that even under the New Regime, the concept of "reasonable return" is subject to change or withdrawal. This was confirmed, they say, by Spain's approval of RDL 17/2019, which introduced a new factor for calculating the rate of reasonable return, the WACC for the renewable energy sector, and accordingly lowered the targeted return rate to 7.09% for the 2020-2025 regulatory period (*see* Section III.J above).[1234]

583. The Claimants also argue that the New Regime penalizes investors in the most productive plants. With reference to the *Foresight* tribunal's observation, the Claimants submit that 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.[1235] The Claimants contend that this fails to reward the investors who build efficient and high-producing plants, as the Claimants had expected under the RD 661/2007 regime.[1236]

584. The Claimants point out that they are particularly penalized under the New Regime, as the Plant is the only plant assigned in the June 2014 Order to its "standard" category, and yet Spain did not take into account the Plant's actual investment costs (*see* Section III.F(5) above).[1237]

585. The Claimants refer to a number of ECT tribunals that have found that the Disputed Measures violate investors' legitimate expectations,[1238] and submit that the ECT awards on which the Respondent relies are inapposite.[1239]

d. The Implementation of the New Regime was not Transparent

586. The Claimants also contend that the implementation of the New Regime was not transparent, in breach of the FET standard in the ECT.[1240]

[1234] Cl. Reply, ¶¶ 508-509.

[1235] Cl. Reply, ¶ 510 (citing CL-95, *Foresight*, ¶ 81).

[1236] Cl. Reply, ¶ 510.

[1237] Cl. Reply, ¶¶ 512-515.

[1238] Cl. Reply, ¶¶ 516-520 (citing CL-106, *Cube* Decision, ¶¶ 427-428; CL-123, *OperaFund*, ¶ 490; CL-124, *SolEs Badajoz*, ¶ 462; CL-122, *Watkins*, ¶¶ 483, 527-530; CL-93, *Masdar*, ¶ 522; CL-94, *Antin*, ¶ 532; CL-91, *Eiser*, ¶ 382.).

[1239] Cl. Reply, ¶¶ 521-523 (referring to Resp. C-Mem., ¶¶ 989-993, 1144-1145, 1172, citing RL-98, *Infrared*, ¶ 435; RL-40, *Charanne*; and RL-17, *Isolux*).

[1240] Cl. Mem., ¶ 292; Cl. Reply, ¶ 524.

587. According to the Claimants, the FET standard requires that the State's conduct toward investors and its legal environment be transparent (*i.e.*, free from ambiguity and uncertainty).[1241] The Claimants also point to the provision in ECT Article 20 entitled "Transparency,"[1242] and the first sentence of ECT Article 10(1), as binding Contracting Parties to provide transparent conditions for investors of another Contracting Party.[1243] The Claimants argue that, as is the case with stability, transparency is then linked to the FET standard on a plain reading of ECT Article 10(1).[1244]

588. The Claimants contend that Spain's use of its legal and regulatory framework to attract investment, and then alter the parameters for that investment, was not transparent.[1245] In particular, the Claimants say that the following measures "dismantled" the RD 661/2007 economic regime in a manner that was not transparent:

a) **The Use of RDLs**: the Claimants submit that the Government abused the function of Royal Decree Laws, which are to apply only in cases of "extraordinary and urgent need," to implement the New Regime.[1246] The Claimants' position is that there was no "need" to modify RD 661/2007 by way of an RDL (RDL 9/2013, discussed in Section III.F(3) above), particularly as it took over 11 months after the approval of the RDL to implement the details. The Claimants submit that the only reason why Spain used the RDL was to avoid the consultation process otherwise required for proceeding through a Royal Decree.[1247]

b) **Public Consultation**: the Claimants submit that whatever consultation process did take place occurred only after Spain had introduced RDL 9/2013, in the context of RD 413/2014 and the June 2014 Order (discussed in Section III.F(5) above).[1248] The Claimants contend that numerous complaints by renewable energy investors were ignored at that time because

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[1241] Cl. Mem., ¶¶ 292-294 (citing CL-31, *Tecmed*, ¶ 154; CL-83, *Electrabel* Decision, ¶ 7.79; CL-57, *Plama*, ¶ 178; CL-45, *LG&E*, ¶ 128; CL-67, *Lemire*, ¶ 284).

[1242] Cl. Mem., ¶ 295, n. 438 (noting "Article 20 of the ECT is contained in Part IV of the ECT. Although Part IV provisions are not subject to Article 26 investment arbitration on their own (as are those in Part III), they can be taken into account as legal context within which the obligations under Part III are to be applied and interpreted." CL-16, T. W. Wälde, "International Investment under the 1994 Energy Charter Treaty" in T. W. Wälde (ed.) The Energy Charter Treaty: An East-West Gateway for Investment and Trade (Kluwer Law International, 1996), pp. 284 and 285).

[1243] Cl. Mem., ¶ 295.

[1244] Cl. Mem., ¶ 295.

[1245] Cl. Mem., ¶ 296.

[1246] Cl. Mem., ¶ 297(a).

[1247] Cl. Mem., ¶ 297(a); Cl. Reply, ¶ 524.

[1248] Cl. Reply, ¶ 525.

the principles of the New Regime already had been established by RDL 9/2013.[1249] Similarly, the Claimants contend that Spain ignored the CNE's proposals as well.[1250]

c) **11-month Transition Period**: the Claimants contend that the period of uncertainty following RDL 9/2013, before issuance of RD 413/2014 and the June 2014 Order, left them in the dark regarding the applicable economic regime. This period also indicates, they say, that there was no urgent need to use an RDL to implement the New Regime.[1251]

d) **Calculation of Special Payment**: the Claimants contend that neither RD 413/2014 nor the June 2014 Order provide any transparent analysis explaining the underlying criteria or calculations behind the Special Payment. In particular, they say that no indication was provided as to how the standard costs of the standard installation were calculated for determining the reasonable rate of return, or for why the reports prepared by BCG and Roland Berger was disregarded in this process (*see* Section III.F(5) above).[1252]

e) **Right to Review**: the Claimants contend that the lack of visibility and predictability was aggravated by the fact that the Government retained the right to review in the future what it considers to be a reasonable return.[1253] The Claimants point in particular to the calculation of the Special Payment depending on Spain's estimation of pool prices, noting that Spain later confirmed that its estimates for the first three years of the New Regime were wrong,[1254] and the new methodology introduced by RDL 17/2019 for purposes of the 2020-2025 regulatory period (*see* Section III.J above).[1255]

589. Further, the Claimants find it troubling that after the CNE criticized the New Regime during the drafting process of RD 413/2014, Spain abolished the CNE and replaced it with the CNMC.[1256]

[1249] Cl. Reply, ¶ 525.

[1250] Cl. Reply, ¶¶ 526-527 (citing C-101, CNE Report 18/2013, and noting that the *Watkins* tribunal took this particularly into consideration, referring to CL-122, *Watkins*, ¶ 593).

[1251] Cl. Mem., ¶ 297(b); Cl. Reply, ¶¶ 528-529 (citing C-127, European Commission, "Macroeconomic Imbalances: Country Report – Spain 2015", European Economy Occasional Papers, Vol. 216, June 2015, p. 73).

[1252] Cl. Mem., ¶ 297(c); Cl. Reply, ¶¶ 531-535; Cl. PHB, ¶¶ 142-144 (regarding Spain not providing any contemporaneous explanation for why it rejected the input of BCG and Roland Berger); *see also* Cl. Reply, ¶¶ 536-538 (citing CL-94, *Antin*, ¶¶ 562-568; CL-122, *Watkins*, ¶ 503).

[1253] Cl. Mem., ¶ 297(d); Cl. Reply, ¶¶ 539-551.

[1254] Cl. Reply, ¶ 540 (citing Resp. C-Mem., ¶ 546).

[1255] Cl. Reply, ¶¶ 541-551.

[1256] Cl. Mem., ¶ 297(f) (citing C-112, *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros v. Administración del Estado*, Case No. C-424/15, Judgment, 19 October 2016, p. 11, ¶ 52).

e. The Disputed Measures are Unreasonable and Disproportionate

590. The Claimants also contend that the Disputed Measures are unreasonable and disproportionate in breach of the FET standard in the ECT.[1257]

591. Relying on international jurisprudence, the Claimants submit that for the Respondent to justify the measures at issue, it must identify a rational policy goal and then it must show that the measures taken were appropriately tailored to addressing that policy goal, with due regard for the consequences imposed on foreign investors.[1258]

592. The Claimants contend that it is apparent that the changes in Spain's policy, including the repeated changes to the applicable legal and regulatory framework, are unreasonable.[1259] In particular, the Claimants refer the dismantling of the legal framework as contrary to the Claimants' legitimate expectations. The Claimants submit that it was unreasonable to strip them of the key guarantees on which their investments were based.[1260]

593. The Claimants argue that addressing the Tariff Deficit was not a legitimate policy aim in the context of Spain's obligations under the ECT.[1261] The Claimants frame the Tariff Deficit as a "budgetary constraint," and submit that it cannot justify Spain's infringement of the Claimants' rights under the ECT.[1262] In any event, the Claimants argue that even if reducing the Tariff deficit was a rational policy aim, there is no reasonable nexus between withdrawing RD 661/2007 and addressing the Tariff Deficit.[1263]

594. Further, the Claimants contend that even if there was a rational policy aim underpinning the measures, these still may be unreasonable and disproportionate if less intrusive alternatives were available.[1264] The Claimants point to a number of alternatives they say Spain could have pursued –

[1257] Cl. Mem., ¶ 298; Cl. Reply, ¶ 552.

[1258] Cl. Mem., ¶¶ 298-299 (citing CL-57, *Plama*, ¶ 184; CL-42, *Saluka*, ¶ 460; CL-85, *Micula*, ¶ 525); Cl. Mem., ¶ 306 (citing CL-31, *Tecmed*, ¶ 122; CL-17, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Rep. 1997, Judgment, 25 September 1997, ¶ 85).

[1259] Cl. Mem., ¶ 300 (citing CL-54, *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 343, 346).

[1260] Cl. Mem., ¶ 301.

[1261] Cl. Reply, ¶¶ 552-557.

[1262] Cl. Reply, ¶ 557.

[1263] Cl. Mem., ¶¶ 302-305; Cl. Reply, ¶¶ 557-559 (citing CL-91, *Eiser*, ¶ 371; CL-94, *Antin*, ¶ 570).

[1264] Cl. Mem., ¶¶ 309-311; Cl. Reply, ¶¶ 560-563.

including a tax on the sale of petrol and gas, a tax on CO2 emissions, and FIT profiling – which the Claimants submit the CNE itself had identified in March 2012.[1265]

595. The Claimants also contend that the remuneration model under the New Regime was arbitrary because it did not use any rigorous basis for calculating the costs of standard installations and disregarded the BCG and Roland Berger Reports.[1266] The Claimants submit that this had a disproportionate impact on the Plant given that it is the only Linear Fresnel CSP plant in Spain.[1267]

(3) Spain has Impaired by Unreasonable or Discriminatory Measures, the Management, Maintenance, Use, Enjoyment and Disposal of the Claimants' Investments

596. The Claimants submit that ECT Article 10(1) prohibits Spain from impairing investments by "unreasonable or discriminatory measures."[1268] The Claimants' position is that a breach of this obligation results in a simultaneous breach of the FET standard because no action of the host State can be fair and equitable if it is unreasonable or discriminatory.[1269] Referring to the standard set by the *Saluka* tribunal, the Claimants contend that the standard of reasonableness requires that the "State's conduct bears a reasonable relationship to some rational policy."[1270]

597. The Claimants refer to their arguments in relation to the FET standard setting out why Spain's measures were unreasonable.[1271]

(4) Spain's Justifications of the Disputed Measures Have no Merit

598. Finally, the Claimants reject the Respondent's justifications for implementing the Disputed Measures, including with reference to the Tariff Deficit and the Respondent's invocation of a "margin of appreciation."[1272]

a. Tariff Deficit

599. The Claimants argue that the Respondent is relying on a "necessity defence" in relation to the Tariff Deficit and the related concern of a "reduction in demand" arising out of the global financial

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[1265] Cl. Mem., ¶ 309; Cl. Reply, ¶ 561 (citing C-97, CNE Report/2012, pp. 59, 76).
[1266] Cl. Reply, ¶ 564; Cl. PHB, ¶¶ 128, 130-131 (citing RL-33, *AES* Award, ¶ 10.3.9), 136-140.
[1267] Cl. Reply, ¶¶ 565-570.
[1268] Cl. Mem., ¶ 312.
[1269] Cl. Mem., ¶ 312.
[1270] Cl. Mem., ¶ 313 (citing CL-42, *Saluka*, ¶ 460).
[1271] Cl. Mem., ¶ 313.
[1272] Cl. Reply, Section III.5.

crisis.[1273] With reference to the scope of the necessity defense set out in Article 25 of the ILC Articles on State Responsibility, the Claimants submit that the Respondent does not meet the requirements because (i) abandoning the RD 661/2007 regime was not the only way to address the Tariff Deficit problem; and (ii) necessity may not be invoked if the State has contributed to the situation of necessity.[1274] It is the Claimants' position that a change of circumstances after RD 661/2007 does not relieve Spain of the commitments it made to the Claimants.[1275]

600. In response to the Respondent's argument that the macroeconomic circumstances resulting from the global financial crisis should have put the Claimants on notice regarding potential changes to the Special Regime,[1276] the Claimants submit that the Tariff Deficit existed before Spain introduced RD 661/2007 and indeed that it has existed since the 2000s.[1277] The Claimants' view is that Spain cannot claim that it made the commitments contained in RD 661/2007 with the reasonable belief that demand for electricity was incapable of fluctuation.[1278]

601. The Claimants also point to the fact that Spain continued to promote renewable energy investments as helping to alleviate the effects of the financial crisis.[1279] Further, the Claimants argue that Spain in fact made the choice to guarantee the fixed FIT in RD 661/2007 despite the Tariff Deficit and the global financial crisis.[1280] Thus, it is the Claimants' view that the Tariff Deficit in itself could not have put investors on notice that Spain in the future would retroactively reduce CSP tariffs.[1281]

602. The Claimants' position is that Spain is ultimately responsible for the Tariff Deficit[1282] because (i) it controls the electricity system's costs and revenues;[1283] and (ii) it failed to comply with its obligations in setting network access tolls, noting that increased tolls on users would have increased revenue to the system.[1284]

[1273] Cl. Reply, ¶ 572.

[1274] Cl. Reply, ¶ 573.

[1275] Cl. Reply, ¶ 580.

[1276] Resp. C-Mem., ¶ 1066.

[1277] Cl. Reply, ¶ 583 (citing First Brattle Regulatory Report, Figure 22, p. 81 and ¶¶ 152-153).

[1278] Cl. Reply, ¶ 585.

[1279] Cl. Reply, ¶ 586 (citing Second Brattle Regulatory Report, ¶ 97).

[1280] Cl. Reply, ¶ 587 (citing C-220, Council of Ministers' Agreement, p. 99851).

[1281] Cl. Reply, ¶¶ 588-590 (citing First Brattle Regulatory Report, ¶ 157. *See also* Second Brattle Regulatory Report, ¶¶ 44, 66, and n. 93; CL-94, *Antin*, ¶¶ 570-571).

[1282] Cl. Reply, ¶¶ 591-592.

[1283] Cl. Reply, ¶¶ 593-595.

[1284] Cl. Reply, ¶¶ 596-606.

b. Margin of Appreciation

603. The Claimants' view is that the ECT does not provide for a margin of appreciation analysis.[1285] The Claimants submit that the application of a margin of appreciation is appropriate in the European Court of Human Rights but inappropriate in this case, because it would lead to an interpretation of the text of the ECT that is more favorable to the State.[1286] Further, the Claimants argue that it is not permissible to dilute the protection afforded to investors by the State's FET obligation by applying a margin of appreciation.[1287] As a result, the Claimants contend that the margin of appreciation does not apply to the Claimants' claims.[1288] In any event, the Claimants conclude that the margin of appreciation is not broad enough to permit Spain's conduct.[1289]

B. THE RESPONDENT'S POSITION

604. The Respondent's position is that ECT Article 10 includes only one standard, not several autonomous obligations.[1290] Consequently, the Respondent does not accept the Claimants' position that Article 10(1) "provides an independent obligation to maintain a stable and transparent legal framework."[1291] Rather, in its view, the obligation to create stable conditions must be analyzed within the FET standard.[1292]

605. Nor does the Respondent accept the Claimants' view that the FET standard is an absolute standard that provides a fixed reference point regardless of the treatment others receive.[1293] With reference to international arbitral jurisprudence, the Respondent contends that the maximum objective aimed

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[1285] Cl. Reply, ¶¶ 607-610.

[1286] Cl. Reply, ¶¶ 611-612 (citing CL-171, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, ICJ Reports 2009, p. 237, ¶ 48).

[1287] Cl. Reply, ¶¶ 613-614 (citing CL-81, *Quasar de Valores*, ¶¶ 21-23; CL-172, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶¶ 465-466).

[1288] Cl. Reply, ¶¶ 616-619 (re: legitimate expectations); ¶¶ 620-624 (re: arbitrary and disproportionate measures); ¶ 625 (re: transparency).

[1289] Cl. Reply, ¶¶ 626-629.

[1290] RD-6, Resp. Closing Statement, Slide 95 (citing RL-14, *Plama*, ¶ 162).

[1291] Resp. C-Mem., ¶ 1087; Resp. Rej., ¶ 1231 (quoting Cl. Reply, ¶ 477).

[1292] Resp. C-Mem., ¶ 1087; Resp. Rej., ¶¶ 1231-1232.

[1293] Resp. C-Mem., ¶ 1009 (citing Cl. Mem., ¶ 250); Resp. Rej., ¶ 1186.

at by the ECT is to achieve national treatment of foreign investors, unless this is less favorable than the minimum standards of international law, in which case the latter will apply.[1294]

606. The Respondent's position is that in the absence of any specific commitment to stability, no investor can have the expectation that a regulatory framework will not be modified.[1295] It submits that regulatory authority as guarantor of the general interest is clearly a sovereign power, to which tribunals generally have recognized a considerable margin of deference.[1296] In particular, the Respondent refers to prior tribunals which have analyzed the same modifications of the Spanish renewable energy framework and have recognized such a margin of appreciation.[1297]

607. The Respondent submits that the Tribunal must take into account that in strategic sectors such as energy, States have some margin to adapt their regulations in good faith and reasonably, for the benefit of the general interest and within the limits of the law.[1298] It contends that it adopted the Disputed Measures for various reasonable causes:

a) the legal obligation to adjust the economic regime at all times to the principle of reasonable returns to investors, avoiding an over-remuneration that would be contrary to EU law;

b) the existence of a public interest in the sustainability of the SES, in a context of a serious international crisis and with a severe decrease in energy demand, which reduced the income

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[1294] Resp. C-Mem., ¶¶ 1010-1013 (citing RL-33, *AES* Award, ¶ 13.3.2; RL-35, *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the Ad Hoc Committee on the Application for Annulment, 29 June 2012 ("***AES* Annulment**"); RL-38, *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 ("***Electrabel* Award**"), ¶ 153); *see also* Resp. Rej., ¶ 1204.

[1295] Resp. Rej., ¶ 1213 (citing RL-14, *Plama*, ¶ 219; RL-33, *AES* Award, ¶ 9.3.25; RL-35, *AES* Annulment, ¶ 95; RL-38, *Electrabel* Award, ¶¶ 165-166); *see also* Resp. C-Mem., ¶ 1089 (citing RL-45, Schreuer, "Fair and Equitable Treatment in Arbitral Practice," 2005, p. 374).

[1296] Resp. Rej., ¶ 1215.

[1297] Resp. Rej., ¶¶ 1216-1218 (citing RL-95, *RREEF*, ¶¶ 244, 468; RL-143, *PV Investors*, ¶ 626; RL-40, *Charanne*, ¶¶ 493, 510); Resp. PHB, ¶ 118 (citing RL-131, *RWE*, ¶ 553: "The Tribunal … notes that a margin of appreciation has been accorded by various tribunals considering whether a State's regulatory measures can be regarded as necessary, and likewise so far as concerns the reasonableness or proportionality of a State's regulatory measures including in the ECT context. … A consideration of whether a State's response to one aspect of an economic crisis was disproportionate must, in the Tribunal's view, allow some reasonable margin of appreciation to the State, given that the Tribunal is at once in a better position (it has the benefit of hindsight and of experts suggesting different and arguably better ways of addressing the Tariff Deficit) and a worse position (its perspective is inevitably far narrower than that of a State addressing differing aspects of an economic crisis) to assess what was disproportionate, including in terms of balancing the differing public and private interests that may be in play. The Tribunal emphasizes, as was noted by the tribunal in *Saluka*, that the FET standard does not create an 'open-ended mandate to second-guess government decision-making'") (the Respondent refers to RL-122 by mistake).

[1298] Resp. Rej., ¶¶ 1219-1220.

of the SES and thus – together with an increase in the costs of renewable energy subsidies – led to a situation of significant economical unbalance; and

c) the impossibility of shifting the entire burden of the economic imbalance onto consumers.[1299]

608. The Respondent explains that this is also contextualized in a set of macroeconomic control measures that were adopted in compliance with international commitments, such as the Recommendations of the European Council of March 2012 and the Memorandum of Understanding signed with the European Union on 20 July 2012. In both documents, Spain undertakes to adopt macroeconomic measures to "address the electricity tariff deficit in a comprehensive way."[1300]

609. The Respondent points to the Guide to the Energy Charter Treaty, which, according to the Respondent, makes clear that the ECT does not prevent States from exercising their power of macroeconomic control:

> 8. Many government actions, for example macroeconomic control or the introduction of environmental and security legislation, can affect the benefits of investment but cannot be subject to absolute rules. In this case, the best defense for a foreign investor is the guarantee that he will be treated at least as well as domestic investors, as no government will want to destroy his own industry.[1301]

610. The Respondent submits that the Claimants' claim is not reasonable, attempting to use the ECT as an insurance policy against crisis situations so that the Claimants are more protected than Spanish national investors. This is not the objective of the ECT, the Respondent argues.[1302] In contrast, Spain's aim to protect the consumer is compatible with the objectives of the ECT.[1303]

[1299] Resp. Rej., ¶ 1222.

[1300] Resp. Rej., ¶ 1223 (citing R-11, Recommendation of the Council of 10 July 2012; RL-52, Memorandum of Understanding on Financial-Sector Policy Conditionality Subscribed with EU 20 July 2012: "VI. Public Finances, Macroeconomic Imbalances and Financial Sector Reform").

[1301] Resp. Rej., ¶ 1210 (quoting RL-19, "The Energy Charter Treaty and Related Documents," Spanish, p. 8).

[1302] Resp. Rej., ¶ 1227 (citing RL-17, *Isolux*, ¶ 823).

[1303] Resp. Rej., ¶ 1228.

(1) Spain has not Failed to Fulfil its Obligation to Create a Stable and Predictable Legal Framework

611. Relying on international jurisprudence, the Respondent argues that the obligation to create stable conditions must be analyzed within the FET standard recognized by the ECT, and not as a separate and autonomous standard.[1304]

612. The Respondent contends that stability obligations will only be breached under the FET standard where there is a "complete dismantling of the entire legal framework."[1305] Such dismantling has not taken place.[1306] In particular, the Respondent's position is that because (i) the Disputed Measures maintain the basic features of the renewable energy remuneration scheme; and (ii) there was no stabilization commitment in Article 44.3 of RD 661/2007, Spain complied with its obligation to create a stable and predictable legal framework, as set out further below.

a. The Disputed Measures Maintain the Essential Characteristics of the Renewable Energy Remuneration Scheme

613. The Respondent's position is that it has maintained the basic features of the renewable energy remuneration scheme as defined since the 1997 Electricity Law, before and after the introduction of the Disputed Measures.[1307] To that end, it explains that the Spanish support scheme for renewable energy has always guaranteed producers with a reasonable rate of return by reference to the cost of money in the capital markets.[1308] In particular, the Respondent highlights that in order to set such a return, the regulator has looked at the capital markets and calculated returns for an efficient standard installation that have always been around 7%, without external financing.[1309] In this regard, the Respondent refers to the planning documents leading to the introduction of RD 661/2007, including PER 2005-2010 (discussed in Section III.A(2) above), which provides as follows: "Return on Project Type: calculated on the basis of maintaining an Internal Rate of Return

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[1304] Resp. C-Mem., ¶ 1087 (citing RL-14, *Plama*, ¶ 173); Resp. Rej., ¶¶ 1232-1233, 1256-1261 (citing RL-2, *Electrabel* Decision, ¶ 7.73; and specifically in the context of ECT claims against Spain: RL-130, *Stadtwerke*, ¶ 195; RL-143, *PV Investors*, ¶ 567; RL-40, *Charanne*, ¶ 477; RL-105, *Isolux*, ¶¶ 764-766; RL-76, *Novenergia II*, ¶ 646; RL-63, *Eiser*, ¶¶ 381-382; RL-88, *Antin*, ¶¶ 529-530).

[1305] Resp. PHB, ¶ 110 (citing RL-64, *Blusun*, ¶¶ 371-372); *see also* RD-1, Resp. Op. Statement, Slide 197.

[1306] Resp. PHB, ¶ 110.

[1307] Resp. C-Mem., ¶ 1102; Resp. Rej., ¶ 1262; Resp. PHB, ¶ 111.

[1308] Resp. PHB, ¶ 111.

[1309] Resp. PHB, ¶ 111.

(IRR), measured in legal tender and for each standard project, around 7%, on equity (before any financing) and after taxes."[1310]

614. The Respondent invites the Tribunal to reflect on the essential features of the disputed support scheme.[1311] It submits that the basic features of a remuneration scheme are its key principles and the fundamental rights and obligations that it establishes.[1312] In this regard, the Respondent claims that the key features of its support scheme remained in place, before and after the Disputed Measures.[1313] In particular, the Respondent describes the Disputed Measures as:

a) maintaining subsidies to renewables as a cost of the SES linked to its sustainability;

b) maintaining the priority of access and dispatch;

c) maintaining the principle that renewable energy remuneration consists of a subsidy which, added to the market price, allows standard installations to achieve a reasonable return over their lifetime that is in line with the capital markets, with the precise return being dynamic and balanced with the revenue of the SES;

d) maintaining the methodology whereby the determination of the subsidies is fixed based on the evolution of demand and other basic economic data involving the costs of investment and operation of standard installations; and

e) resolving a situation of imbalance that jeopardized the economic sustainability of the SES, and doing so in a rational and proportionate manner.[1314]

615. In response to the Claimants' contention that the Disputed Measures applied retroactively, the Respondent points to Claimants' concession in closing arguments that the impact on the Plant of any alleged retroactivity would be minimal.[1315] It explains that the Plant entered into operation in the summer of 2012 and did so with terrible production,[1316] and accordingly that only these months

[1310] Resp. PHB, ¶ 111, n. 220 (citing R-63, PER 2005-2010, PDF p. 116).

[1311] Resp. PHB, ¶ 112.

[1312] Resp. PHB, ¶ 112.

[1313] Resp. C-Mem., ¶ 1100; Resp. PHB, ¶ 112 (citing RD-1, Resp. Op. Statement, Slide 200).

[1314] Resp. C-Mem., ¶ 1102; Resp. Rej., ¶ 1262; RD-1, Resp. Op. Statement, Slides 199-200.

[1315] Resp. PHB, ¶ 113 (citing Tr. Day 6, 65:19-24 ("So it is part of the features that have harmed our client, but it is not the feature that has harmed it most. And compared to other cases, indeed, that feature is less harmful than it was in other cases, and certainly less harmful than the – we say arbitrary – reduction in capex").

[1316] Resp. PHB, ¶ 113.

would be subject to any purported "clawback."[1317] Further, the Respondent highlights that the Claimants have not provided the Tribunal with any damages figure for their "clawback" claim.[1318]

616. In any event, the Respondent argues that the alleged retroactivity is in conformity with the ECT.[1319] It submits that under international law, for a regulation to be impermissibly retroactive, it must affect acquired rights.[1320] However, the Claimants never had an "acquired right" to any future remuneration, *sine die*, by means of a fixed and unchangeable FIT.[1321] Consequently, and with reference to the findings of the *Nations Energy* tribunal, the Respondent contends that the Disputed Measures are not retroactive under international law.[1322] It refers to a number of tribunals that have found the same.[1323]

617. Relying on the *RWE* tribunal's findings, the Respondent argues that "taking into account past remunerations may be retrospective, but it is certainly not retroactive."[1324] It also notes that the Disputed Measures expressly provided that producers would not be required to pay back any subsidies that they had received prior to July 2013.[1325]

618. Finally, the Respondent notes that the Disputed Measures are not considered retroactive under Spanish domestic law.[1326] In particular, it refers to the Spanish Constitutional Court and the Spanish Supreme Court ratifying the legality of the legislative amendments, on the basis that they do not

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[1317] Resp. PHB, ¶ 113.

[1318] Resp. PHB, ¶ 113.

[1319] Resp. C-Mem., ¶¶ 1103-1116; Resp. Rej., ¶ 1264; Resp. PHB, ¶ 114.

[1320] Resp. C-Mem., ¶¶ 1103-1105; Resp. Rej., ¶ 1111.

[1321] Resp. C-Mem., ¶ 1105; Resp. Rej., ¶ 1111.

[1322] Resp. C-Mem., ¶ 1106 (citing RL-34, *Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jamie Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010, ¶¶ 642, 644, 646); *see also* Resp. Rej., ¶¶ 1114-1120.

[1323] Resp. Rej., ¶¶ 1120, 1264-1267 (citing RL-130, *Stadtwerke*; RL-131, *RWE*, ¶ 617; RL-40, *Charanne*, ¶¶ 546, 548; RL-17, *Isolux*, ¶ 814).

[1324] Resp. PHB, ¶ 114 (citing RL-131, *RWE*, ¶ 617) (the Respondent refers to RL-122 by mistake); *see also* RD-1, Resp. Op. Statement, Slide 203.

[1325] Resp. PHB, ¶ 114 (citing R-26, 2013 Electricity Law, Third Final Disposition (4)); *see also* Resp. C-Mem., ¶ 1108.

[1326] Resp. C-Mem., ¶¶ 1113-1116; Resp. Rej., ¶ 1121.

affect acquired rights but apply only to the future.[1327] The Respondent considers this domestic case law relevant for purposes of this arbitration.[1328]

b. There was no Stabilization Commitment in Article 44.3 of RD 661/2007

619. Regarding the alleged stabilization commitment in Article 44.3 of RD 661/2007, the Respondent refers to the "vast majority" of arbitral tribunals that have found that no such commitment exists within the language of the provision.[1329] The Respondent notes that even some of the authorities on which the Claimants rely do not support their interpretation of Article 44.3,[1330] and a number of other awards have expressly rejected the existence of a stabilization commitment in Article 44.3.[1331]

620. The Respondent advances arguments regarding Article 44.3 based on the following:

a) a systemic interpretation of RD 661/2007, which in any case is subordinate to the 1997 Electricity Law;

b) a historical interpretation of Article 44.3 and, specifically, its relationship with Article 40.3 of RD 436/2004;

c) the case law of the Spanish Supreme Court, which has endorsed changes in the renewable energy sector since 2005; and

d) the European regulations on State aid, which prevents a commitment such as the one implied by the Claimants.[1332]

[1327] Resp. C-Mem., ¶¶ 1113-1116; Resp. Rej., ¶ 1121 (both citing R-95, 2015 Constitutional Court Judgment; R-96, Judgment, Constitutional Court, 18 February 2016 (Unconstitutional App. 5852/2013); R-97, Judgment, Constitutional Court, 18 February 2016 (Unconstitutional App. 6031/2013); R-94, Judgment 63/2016, Supreme Court, 21 January 2016 (Administrative App. 627/2012); R-85, Judgment App. 152/2007.

[1328] Resp. Rej., ¶ 1121.

[1329] Resp. Rej., ¶ 1235; Resp. PHB, ¶ 53.

[1330] Resp. C-Mem., ¶¶ 1094-1098; Resp. Rej., ¶ 1236 (citing RL-76, *Novenergia II*, ¶¶ 656, 688; RL-95, *RREEF*, ¶ 321; CL-98, *NextEra*, ¶ 584; RL-63, *Eiser*, ¶ 362; RL-88, *Antin*, ¶ 555). As for the *Masdar* award, the Respondent argues that the tribunal did not find a stabilization commitment in Article 44.3 of RD 661/2007, but rather analyzed specific communications addressed to the SPV holding the plants. Resp. C-Mem., ¶ 1098; Resp. Rej., ¶ 1236 (both citing RL-80, *Masdar*).

[1331] Resp. Rej., ¶¶ 1237-1252 (citing RL-130, *Stadtwerke*, ¶¶ 272-283; RL-129, *BayWa*, ¶¶ 465-466, 471; RL-131, *RWE*, ¶¶ 537-541; RL-143, *PV Investors*, ¶¶ 600-611; RL-145, *Hydro*, ¶¶ 618, 630); *see also* Resp. PHB, ¶ 54 (citing the same authorities as well as: RL-152, *Cavalum*, ¶ 547; RL-158, *FREIF*); RD-1, Resp. Op. Statement, Slide 198.

[1332] Resp. Rej., ¶ 1253; *see also* Resp. PHB, ¶ 54.

621. The Respondent further submits that no stabilization commitment can be found either in RDL 6/2009 predating the Claimants' investment (discussed in Section III.A(4) above).[1333] In fact, RDL 6/2009 contained a clear warning that the sustainability of the SES was at risk, with a growing tariff deficit in the context of a severe economic crisis, and that the regulator would take the necessary measures to address that difficult situation.[1334]

(2) Spain has not Infringed the Claimants' Legitimate and Objective Expectations

622. The Respondent submits that the Claimants could have had no legitimate expectation that the regulatory framework in Spain would remain unchanged and, as a result, the Disputed Measures did not infringe the Claimants' legitimate expectations in breach of the FET standard. The Respondent refers to a number of ECT tribunals that have ruled similarly with regard to the same Disputed Measures;[1335] rejects the Claimants' criticisms of those decisions;[1336] and distinguishes the contrary cases on which the Claimants rely.[1337] In particular, it highlights the similarities between the facts in this dispute and those considered by the *Stadtwerke* tribunal.[1338]

623. In the Respondent's view, absent a specific stability commitment, no investor can have a legitimate expectation that a regulatory framework will not be modified.[1339] It argues that legitimate expectations should (i) be assessed at the time of the investment,[1340] and consider the following circumstances: (ii) the regulatory framework; (iii) the investor's objective and reasonable

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[1333] Resp. C-Mem., ¶ 607; Resp. PHB, ¶ 55.

[1334] Resp. PHB, ¶ 55 (citing R-37, RDL 6/2009, Preamble: "the growing tariff deficit, ie the difference between that collected from the regulated tariffs set by the Government and that which the consumers pay for their regulated supply and from the access tariffs set by the liberalised market and the real costs associated with these tariffs is producing serious problems, which in the current context of international financial crisis is profoundly affecting the system. This puts at risk not only the financial situation of companies in the electricity sector but also the sustainability of that system. This maladjustment is unsustainable and has serious consequences by deteriorating the security and capacity of financing of investment needed for the supply of electricity at the levels and quality and security that Spanish society demands").

[1335] Resp. Rej., ¶¶ 1330-1352 (citing RL-130, *Stadtwerke*; RL-129, *BayWa*; RL-131, *RWE*; RL-143, *PV Investors*; RL-145, *Hydro*).

[1336] Resp. Rej., ¶¶ 1353-1364.

[1337] Resp. Rej., ¶¶ 1365-1366 (citing RL-128, *Cube* Award; RL-123, *OperaFund*; RL-127, *SolEs Badajoz*; RL-147, *Watkins*).

[1338] Resp. Rej., ¶¶ 1331-1334 (citing RL-130, *Stadtwerke*).

[1339] RD-1, Resp. Op. Statement, Slide 165 (citing RL-39, *Charanne*, ¶ 499; RL-64, *Blusun*, ¶¶ 319, 371, 372; RL-75, *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs. Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Award, 11 October 2017, ¶ 437; RL-95, *RREEF*, ¶ 262); *see also* Resp. PHB, ¶¶ 82-83 (citing CL-113, *Antaris*, ¶ 360(2), n. 536; RL-71, *Saluka*, ¶¶ 304-305).

[1340] RD-1, Resp. Op. Statement, Slide 166 (citing RL-33, *AES* Award, ¶ 9.3.8).

expectations; (iv) the conduct of the State; and (v) the subjective circumstances of the investor, including due diligence.[1341] The Respondent's comments on these factors are summarized below.

a. Time of the Investment

624. Regarding the time of the investment, the Respondent submits that legitimate expectations must be assessed by looking at the investment process in its entirety.[1342] Its position is that the entities with a direct interest in the outcome of this arbitration invested in stages between June 2009, the date of the Investment Agreement, and July 2011, when (as discussed in Section III.C(2)) EBL sold some of its shares in Tubo Sol to EWZ Deutschland, EKZ Renewables S.A and Berna Energía Natural España, S.L.U.[1343]

625. Thus, the Respondent submits that the question is what the Claimants' legitimate expectations were as of July 2011.[1344] It relies on EWZ's comments and Mr. T. Andrist's testimony to argue that as of 2011, the adoption of the Disputed Measures was not only evident, but almost imminent.[1345]

b. Regulatory Framework

626. The Respondent sets out the applicable regulatory framework at the time the Claimants made their investment as follows:[1346]

a) the 1997 Electricity Law: setting out the essential principles of reasonable rate of return and sustainability of the SES;

[1341] RD-1, Resp. Op. Statement, Slide 166 (citing RL-28, *Invesmart B.V. v. Czech Republic*, UNCITRAL Case, Award, 26 June 2009 ("***Invesmart***"), ¶¶ 250-258).

[1342] Resp. Rej., ¶ 1281; Resp. PHB, ¶ 84 (citing RL-33, *AES* Award, ¶¶ 9.3.9-9.3.18); RD-1, Resp. Op. Statement, Slides 167-171.

[1343] Resp. Rej., ¶¶ 1281-1282; Resp. PHB, ¶ 84 (citing RD-1, Resp. Op. Statement, Slides 167-168; C-110, EBL, Presentation, "Solar Thermal Electricity: Changes in Spanish Tariff System," 22 October 2015, Slide 7 and First Accuracy Economic Report, Figure 3). The Tribunal understands that when referring to "EWZ, EKZ and EWB" in the context of Resp. PHB, ¶ 84, the Respondent refers to the sales described at paragraph 191 above to EWZ (Deutschland), EKZ Renewables S.A, and Berna Energía Natural España, S.L.U.

[1344] Resp. PHB, ¶ 85.

[1345] Resp. PHB, ¶ 85 (citing R-234, Website bzbasel.ch: "Elektra Baselland is going full steam ahead in the Spanish sun" by Daniel Haller, bz Basellandschaftliche Zeitung, 8 July 2016; Tr. Day 2, T. Andrist, 30:4-31:8 ("Q. When did EBL first realise that there was a possibility or a risk that Spain would change this FIT? A. This is a good question. I think that this is – I think in 2010 there were rumours in the market about it … Yes, it was in place, but there were rumours in the market"). While Resp. PHB, ¶ 85 refers to "EKZ", the Tribunal understands that to be a typographical error, and that the intended reference was to EWZ.

[1346] RD-1, Resp. Op. Statement, Slide 173.

b) the PER 2000-2010 and PER 2005-2010: setting out the methodology for calculating remuneration based on standard facilities;

c) RD 2818/1998, RD 436/2004, RD 661/2007: enacting successive amendments to the economic regime, which were always applicable to existing facilities;

d) RDL 7/2006, RDL 6/2009: adopting urgent measures to guarantee the basic principles of reasonable profitability; and

e) 2010 Measures: consisting of further regulatory amendments.

627. In addition, the Respondent says that an investor's legitimate expectations must reflect the reality of the Spanish Supreme Court's decisions since 2005 (discussed in Section III.B above).[1347] Finally, the Respondent refers to EU law, in particular in relation to State aid, as informing the applicable regulatory context.[1348]

c. Objective and Reasonable Expectations

628. Regarding a prudent investor's objective expectations, the Respondent submits that the Claimants' expectation of an immutable tariff for 40 years was not objectively reasonable, because it was (i) contrary to Spanish law; and (ii) not shared by the relevant participants of the renewable energy sector.[1349]

629. The Respondent invokes international arbitral jurisprudence to the effect that, when making its investment, an investor should know and understand the regulatory framework, how it is applied and how it affects its investment.[1350] In particular, the Respondent refers to the *Charanne* tribunal's findings regarding the relevance of the Spanish Supreme Court's decisions in establishing an investor's legitimate expectations.[1351]

[1347] RD-1, Resp. Op. Statement, Slide 174 (referring to R-80, Judgment App. 73/2004; R-81, Judgment App. 12/2005; R-82, Judgment App. 11/2005; R-83, Judgment App. 13/2006; R-84, Judgment App. 151/2007; R-85, Judgment App. 152/2007; and citing RL-40, *Charanne*, ¶¶ 507-508; RL-17, *Isolux*, ¶¶ 793-794).

[1348] RD-1, Resp. Op. Statement, Slide 175 (citing RL-3, 2017 EC State Aid Decision; RL-129, *BayWa*, ¶ 569).

[1349] Resp. PHB, ¶ 86.

[1350] Resp. C-Mem., ¶¶ 1020-1026 (citing RL-38, *Electrabel* Award, ¶ 7.78; RL-74, *Parkerings-Compagnient AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 333; RL-71, *Saluka*, ¶ 304; RL-28, *Invesmart*, ¶ 250).

[1351] Resp. C-Mem., ¶¶ 1027-1029 (citing RL-40, *Charanne*, ¶¶ 495, 505-508).

630. The Respondent argues that in the Spanish legal system, regulations cannot contravene laws, but nothing prevents a new RD from amending a previous RD.[1352] It explains in this context that the applicable regulatory framework was not limited to RD 661/2007, but rather it was informed by the 1997 Electricity Law and further developed by various RDs and RDLs issued under that Law, to adapt to changing circumstances and to guarantee the sustainability of the SES.[1353] The Respondent notes that there were various regulatory changes even before the Claimants' investment, which were motivated either by correcting over-remuneration or by changes in the economic data that served as a basis for the premiums.[1354] It cites the decisions of a number of tribunals that have recognized these characteristics of the Spanish regulatory framework.[1355]

631. In this context, the Respondent notes that the Cuatrecasas Report made available to EBL before its investment (*see* Section III.C(1) above) expressly advised on the possibility of changes to the regulatory framework.[1356] The same point was reiterated in various decisions of the Spanish Supreme Court, which, in the Respondent's view, warned investors that they could not assume any right to an immutable tariff (*see* Section III.B above).[1357]

632. With reference to the EC Submission (discussed further in Section VII.C below), the Respondent submits that the Claimants also failed to take into account applicable EU legislation on State aid. In the Respondent's view, the Claimants could not have legitimately expected that Spain's aid regime for renewable energy would not be modified. It also observes that the EC itself opined in 2017 that for this reason, the Disputed Measures do not violate the FET standard under the ECT.[1358]

633. The Respondent also submits that all relevant market players were aware of the Government's regulatory power, the fact that the 1997 Electricity Law ensured a reasonable rate of return, and

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[1352] Resp. Rej., ¶ 1289(a); Resp. PHB, ¶ 87.

[1353] Resp. Rej., ¶ 1289(b).

[1354] Resp. Rej., ¶ 1289(g); *see also* ¶¶ 1295-1296 (referring to RD 2818/1998 being replaced by RD 436/2004 and commentary from the renewable energy sector on RD 436/2004 being replaced by RD 661/2007).

[1355] Resp. Rej., ¶¶ 1292-1294 (citing RL-40, *Charanne*, ¶¶ 504-508; RL-17, *Isolux*, ¶ 788; RL-130, *Stadtwerke*, ¶ 282; RL-143, *PV Investors*, ¶ 600; RL-129, *BayWa*, ¶ 323; RL-131, *RWE*, ¶ 537; RL-145, *Hydro*, ¶ 618).

[1356] Resp. PHB, ¶ 87 (citing C-168, Cuatrecasas Report).

[1357] Resp. C-Mem, ¶¶ 1030-1031; Resp. PHB, ¶ 87 (citing R-81, Judgment App. 12/2005, R-82, Judgment App. 11/2005, R-83, Judgment App. 13/2006; R-84, Judgment App. 151/2007).

[1358] Resp. C-Mem., ¶¶ 1048-1052; *see also* Resp. Rej., ¶¶ 1289(h)-1290 (citing RL-3, 2017 EC State Aid Decision, ¶ 155).

that Spain had always employed a benchmark rate of return of around 7% for an efficient facility.[1359]

634. In particular, the Respondent submits that the Claimants' alleged understanding of the content and scope of Article 44.3 of RD 661/2007 is untenable.[1360] It notes that APPA had earlier objected to RD 661/2007's own departure from the prior regime under RD 436/2004, despite Article 40.3 of RD 436/2004 having *equivalent* language to that which the Claimants now say (in Article 44.3 of RD 661/2007) contains a stabilization clause.[1361] The Respondent also rejects the Claimants' position that the final paragraph of Article 44.3 was included in RD 661/2007 as a result of the CNE Report.[1362] Instead, the Respondent suggests that both the CNE and APPA requested that RD 661/2007 not be applied at all to existing facilities, a request that was not accepted by the Government.[1363] As for the Claimants' invocation of various reports and marketing materials, the Respondent notes that none of these were addressed to the Claimants or even provided to them at the time of their investment.[1364]

635. The Respondent also highlights the views of EWZ at the time of EWZ (Deutschland)'s purchase of Tubo Sol shares from EBL in 2011, acknowledging that there was "a risk that these preferential tariffs will be reduced or abolished in the future." According to the Respondent, it is inconceivable that a minority shareholder would be aware of the risk of regulatory change while the majority shareholder was not.[1365]

[1359] Resp. PHB, ¶ 88.

[1360] Resp. Rej., ¶¶ 503-521; Resp. PHB, ¶ 89.

[1361] Resp. PHB, ¶¶ 89-91 (citing C-159, Second Draft of RD 661/2007 of the Ministry (new translation submitted with the Cl. PHB); R-273, Claims of APPA of 3 April 2007 against the Draft Royal Decree 661/2007, pp. 4, 7).

[1362] Resp. PHB, ¶ 92 (citing Cl. Reply, ¶ 191.)

[1363] Resp. PHB, ¶ 92 (citing C-53, CNE Report 3/2007, p. 23/119, stating that "[p]ursuant to Article 40 of Royal Decree 436/2004, of 12 March, the draft Royal Decree subject to analysis and report should not apply to facilities operating on 1 January 2008"; R-273, Claims of APPA of 3 April, 2007 against the Draft Royal Decree 661/2007, p. 4/7, stating that "any rational investor … must consider the risk that such remuneration could be lowered").

[1364] Resp. Rej., ¶ 1310.

[1365] Resp. PHB, ¶ 95 (citing R-230, Directive of the City Council to the Municipal Council, "Electricity Plant, Participation in Solar Thermal Power Plant Puerto Errado 2 in Spain, Approval of Property Loan," 23 March 2011; Tr. Day 2, T. Andrist, 35:12-16 ("How do you explain that EWZ considered this a specific risk after the EPC had been signed in 2009? A. Actually I don't know, why they … well, I don't know").

d. State Conduct

636. With respect to Spain's own conduct, the Respondent argues that general legislation, without a specific stabilization commitment to the investor, cannot create legitimate expectations that there will be no change in the law.[1366]

637. The Respondent rejects the Claimants' reliance on the text of Article 44.3 of RD 661/2007 as guaranteeing its immutability, pointing out (as discussed above) that the comparable language included in Article 40.3 of RD 436/2004 did not prevent it from being replaced by RD 661/2007.[1367] Similarly, the Respondent explains that registration in the RAIPRE does not imply any kind of commitment to maintain a given regulatory regime.[1368]

e. Subjective Expectations

638. Regarding the Claimants' subjective expectations, the Respondent argues that the Claimants did not even inquire from its legal advisors as to the existence of an alleged stabilization commitment.[1369] The Respondent refers to Mr. T. Andrist's testimony at the Hearing that the Claimants did not request a legal assessment of the possibility of changes in the Spanish legal regime,[1370] and to the Claimants' witnesses confirming that they were not familiar with the case law of the Spanish Supreme Court or the content of Spain's PER 2005-2010.[1371]

639. The Respondent rejects the Claimants' purported reliance on EBL's experience in Switzerland, on their own witnesses' personal interpretation of RD 661/2007, and on the fact that no advisor raised

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[1366] RD-1, Resp. Op. Statement, Slide 184 (citing CL-173, *Philip Morris Brands Sárl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Final Award, 8 July 2016, ("***Philip Morris***"), ¶ 426).

[1367] Resp. Rej., ¶¶ 1305-1308.

[1368] Resp. Rej., ¶ 1309.

[1369] Resp. PHB, ¶ 96.

[1370] Resp. PHB, ¶ 97 (citing Tr. Day 2, T. Andrist, 27:2-14, "My question is very specific: did you request from Bartolome & Briones, or from any other law firm, a legal assessment of the possibility of changes in the Spanish legal regime? A. If you ask it this specific, we have not, at the time when we discussed investment with Fichtner or with Bartolome & Briones, considered that such a change to the feed-in tariff would be possible and we have not asked for a specific legal opinion whether the feed-in tariff could be retroactively changed or totally dismantled and altogether changed for something totally different. No, we have not asked such a specific legal opinion").

[1371] Resp. PHB, ¶ 97 (citing Tr. Day 2, T. Andrist, 46:11-15, "Q. At the time of your investment, were you familiar, did anyone mention to you anything about the case law of the Supreme Court? A. No. Well, no, not in the way we discuss it nowadays"; Tr. Day 2, B. Andrist, 70:5-7, "The case law of the Supreme Court, are you familiar with it? A. No"; Tr. Day 2, T. Andrist, 46:16-24, "Q. At the time of your investment, did anyone mention to you the Renewable Energy Plan of the year 2005? A. I knew that such plan was in place, yes, yes. Q. Do you know that the plan included the technical assumptions upon which the royal decree – A. No. No. I have – no. Q. It's probably fair to say that you did not conduct a deep assessment of this plan, did you? A. Of – no, no, no").

a "red flag" to them about the possibility of regulatory changes. These are insufficient, in the Respondent's view, to form the basis of an objective expectation that the legal regime could not change.[1372] It argues that both the First and Second B&B Reports were inadequate on this matter and do not support the Claimants' position that they conducted legal due diligence.[1373] The Respondent also submits that the Fichtner Due Diligence Report cannot be considered a legal analysis, and, in any event, does not support the Claimants' expectation of an immutable tariff.[1374] Further, the Respondent highlights the Cuatrecasas Report's clear warning that "further changes of the current legal framework could occur in the future,"[1375] a report that was shared with EBL and its advisors prior to the investment (*see* Section III.C(1) above). In the Respondent's view, the Claimants did not undertake proper research at the time of making the investment, and had they done so, they never would have had the expectation they are claiming today.[1376]

640. The Respondent also points out that neither Mr. T. Andrist nor Mr. B. Andrist mention the various other documents on which the Claimants now rely, including the InvestInSpain Report, the CNE PowerPoints, or the CNE Reports; nor had they read the *Memoria Económica*.[1377] In fact, the Respondent submits that the Claimants' own contemporaneous documents do not support their alleged expectations.[1378]

641. The Respondent argues that the Claimants' position in this arbitration is in contradiction with their previous assessment of the Disputed Measures. It refers in particular to Tubo Sol's assessment of the Disputed Measures in 2014, indicating that they entailed less risk and the Plant would earn more for production up to 45 GWh than under the previous scheme.[1379] The Respondent also refers to the EBL Chairman's contemporaneous comments to the press, and EWZ and EKZ representatives'

[1372] Resp. PHB, ¶¶ 98-101.

[1373] Resp. C-Mem., ¶¶ 1035-1045; *see also* RD-1, Resp. Op. Statement, Slide 187.

[1374] Resp. C-Mem., ¶¶ 1046-1047; *see also* RD-1, Resp. Op. Statement, Slide 188.

[1375] RD-1, Resp. Op. Statement, Slide 189.

[1376] Resp. PHB, ¶ 101.

[1377] Resp. PHB, ¶ 102 (citing Tr. Day 2, T. Andrist, 46:8-10 ("I wanted to ask you: are you familiar with the memoria económica of Royal Decree 661/2007? A. No, no. I never read it").

[1378] RD-1, Resp. Op. Statement, Slides 191-195 (citing C-214, 2008 Land Lease Agreement, p. 20; C-16, Investment Agreement, Clause 3.1.1; C-90, Common Terms Agreement entered into between TBS PE2 as the Project Company and Commerzbank Aktiengesellschaft, Filiale Luxemburg as VAT Facility Agent and Security Agent, 10 February 2011, Article 21.25; C-118, Minutes of meeting of EBL's Supervisory Board, 3 December 2010 (re: country risk); R-230, Directive of the City Council to the Municipal Council, "Electricity Plant, Participation in Solar Thermal Power Plant Puerto Errado 2 in Spain, Approval of Property Loan," 23 March 2011 (re: risk of abolition of tariffs)).

[1379] Resp. PHB, ¶ 104 (citing C-108, Presentation to EBL's Supervisory Board on Puerto Errado 2, "Beyond Construction – Efficient Operation and Maintenance," August 2014 (new translation), Slide 9).

statements confirming their satisfaction with their investment in the Plant.[1380] Further, the Respondent highlights that in 2018, EBL re-invested in the Plant by acquiring IWB's 12% share,[1381] as discussed in Section III.I above. In the Respondent's view, the Claimants initiated this arbitration opportunistically only after the *Eiser* award was issued against Spain, and not because the Disputed Measures actually contravened any legitimate expectations that the Claimants actually held.[1382]

642. To summarize: the Respondent contends that the only legitimate expectation the Claimants could have held is that of a reasonable rate of return, which Spain has respected and maintained.[1383] As set out above, the Respondent's position is that the profitability offered by the Disputes Measures is reasonable,[1384] and that the current model continues to encourage production.[1385]

(3) Spain has Acted in a Transparent Manner

643. The Respondent submits that transparency is not an autonomous obligation and cannot be interpreted as a "perfection" standard.[1386] Relying on the test applied by the *AES* and *Electrabel* tribunals, the Respondent argues that the transparency standard under international law does not mean that the investor has to have access to all the information available to the host State when preparing regulatory changes, much less be consulted as a partner in the regulatory change process.[1387]

644. The Respondent contends that it acted at all times in a transparent and consistent manner:

a) **The Use of RDLs**: relying on the judgments of the Spanish Constitutional Court, the Respondent explains that the existence of a situation of extraordinary and urgent need existed

[1380] Resp. PHB, ¶ 105 (citing R-234, Website bzbasel.ch: "Elektra Baselland is going full steam ahead in the Spanish sun" by Daniel Haller, bz Basellandschaftliche Zeitung, 8 July 2016; RD-1, Resp. Op. Statement, Slides 226-234). The Tribunal understands that Resp. PHB, ¶ 105 intended to refer to the remarks by EWZ and EWB representatives at R-234 rather than those of "EWZ and EKZ".

[1381] Resp. PHB, ¶ 106 (citing C-113, 2018 Share and Loan Purchase Agreement; Tr. Day 2, T. Andrist, 47:18-49:22).

[1382] Resp. PHB, ¶ 107 (citing RD-1, Resp. Op. Statement, Slide 234).

[1383] Resp. Rej., ¶ 1312.

[1384] Resp. Rej., ¶¶ 1313-1319.

[1385] Resp. Rej., ¶¶ 1320-1327.

[1386] RD-1, Resp. Op. Statement, Slide 205 (citing RL-33, *AES* Award, ¶ 9.3.40).

[1387] Resp. C-Mem., ¶¶ 1119-1120 (citing RL-33, *AES* Award, ¶ 9.3.73); Resp. Rej., ¶¶ 1389-1390 (citing RL-33, *AES* Award, ¶ 9.3.40; RL-2, *Electrabel* Decision, ¶ 7.79).

and justified the issuance of RDL 9/2013, including the growing costs of the SES, the consequences of the economic crisis and the need to address the Tariff Deficit.[1388]

b) **Public Consultation**: the Respondent submits that public consultations did take place before RDL 9/2013 was enacted.[1389] In addition, it argues that the interested sectors participated, and their arguments were taken into account in the preparation of RD 413/2014.[1390] In particular, the Respondent refers to the arguments presented before and after RDL 9/2013 by Protermosolar, an association to which EBL belongs.[1391] The Respondent suggests that as a consequence of these submissions, some of the parameters applicable to the Plant improved.[1392]

c) **11-month Transition Period**: the Respondent's position is that because of the timing of RDL 9/2013 and the circulation of draft RD 413/2014 a few months after, it is not clear that the Claimants were "in the dark" for 11 months as they claim, with respect to the provisional application of the Disputed Measures.[1393] In any event, the Respondent argues that 11 months is not excessive when taking into account the complexity of the matter regulated.[1394] Its view is that any delay is, in fact, a consequence of the transparency and participation of the

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[1388] Resp. C-Mem., ¶¶ 1124-1125; Resp. Rej., ¶ 1391 (citing R-96, Judgment, Constitutional Court, 18 February 2016 (Unconstitutional App. 5852/2013), p. 13); *see also* RD-1, Resp. Op. Statement, Slide 206.

[1389] RD-1, Resp. Op. Statement, Slide 209 (citing R-104, Submissions of PROTERMOSOLAR to the Public Consultation of the CNE, 10 February 2012; R-72, CNE Report/2012).

[1390] Resp. C-Mem., ¶ 1126; Resp. Rej., ¶¶ 1393-1394 (citing R-310, CNMC Report, on the Proposal for a Royal Decree (RD 413/2014) for Regulating the Activity of Electricity Production from Renewable Energy Sources, Cogeneration and Biomass, 17 December 2013, stating that "[t]his Commission appreciates the consideration of the observations made by the former National Energy Commission, today the CNMC, which were made in Report 18/2013"; R-66, Decision 39/2014, Council of State, Administrative Enquiry Relating to the Draft Royal Decree that Regulates the Production of Electricity from Renewable Energy, Cogeneration and Waste Sources (Royal Decree 413/2014), 6 February 2014). According to the Respondent, this Report exposes the processing, with the participation of the entire sector and the restart of its processing as a result of the accepted proposals. *See also* RD-1, Resp. Op. Statement, Slide 209; Resp. PHB, ¶ 108.

[1391] Resp. Rej., ¶ 1394 (citing R-347, E-Mail Protermosolar, Request for Admission to Protermosolar, 30 April 2011; R-348, E- Mail Protermosolar, Change Membership to TuboSolPE2, 28 January 2016). *See also* RD-1, Resp. Op. Statement, Slide 209.

[1392] Resp. Rej., ¶ 1394 (citing R-371, Draft Order (IET/1045/2014) approving the remuneration parameters of standard facilities for certain electricity production facilities using renewable energy sources, cogeneration and waste, 2014).

[1393] Resp. C-Mem., ¶¶ 1127-1129; Resp. Rej., ¶ 1401; *see also* RD-1, Resp. Op. Statement, Slide 212 (citing RL-131, *RWE*, ¶¶ 866-868).

[1394] Resp. C-Mem., ¶ 1130 (citing RL-16, *Philip Morris Asia Limited v. The Commonwealth de Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 567); Resp. Rej., ¶ 1402; *see also* RD-1, Resp. Op. Statement, Slide 212 (citing RL-130, *Stadtwerke*, ¶ 313).

affected sectors. Further, the Respondent submits that even if the delay in implementing the new regime violated some transparency obligation, there was no harm to the Claimants.[1395]

d) **Calculation of Special Payment**: regarding the Claimants' allegations that Spain ignored the BCG and Roland Berger reports, the Respondent explains that IDAE hired both consultants only as technical support, and that not providing the Claimants with documents that were not taken into account by the regulator is not a breach of the ECT.[1396] Further, there was no final BCG Report;[1397] and the final Roland Berger Report was received after the approval of both RD 413/2014 and the June 2014 Order.[1398] In any event, the Respondent argues that it has not failed to explain the methodology and criteria on which the Disputed Measures are based.[1399] The Respondent's position is that the core methodology used to set subsidies based on the parameters of standard installations to obtain a reasonable return remains unchanged since the 1997 Electricity Law.[1400] The only difference is that the reasonable rate of return is now set out in an RDL.[1401]

e) **Right to Review**: the Respondent's view is that by setting regulatory periods of six years, investors know when the remuneration parameters will be reviewed and the criteria that will be taken into account, which is the opposite of uncertainty or lack of transparency.[1402] In fact, the Respondent submits that the remuneration in the second regulatory period has exceeded investors' expectations and therefore has been to the Claimants' benefit.[1403]

[1395] Resp. Rej., ¶ 1403 (citing RL-143, *PV Investors*, ¶ 632).

[1396] RD-1, Resp. Op. Statement, Slide 213.

[1397] Resp. Rej., ¶ 1406; RD-1, Resp. Op. Statement, Slide 213.

[1398] Resp. Rej., ¶ 1405; RD-1, Resp. Op. Statement, Slide 213.

[1399] Resp. C-Mem., ¶ 1131; Resp. Rej., ¶ 1408.

[1400] Resp. Rej., ¶ 1409; RD-1, Resp. Op. Statement, Slide 213.

[1401] Resp. Rej., ¶ 1409.

[1402] Resp. C-Mem., ¶ 1132-1333; Resp. Rej., ¶¶ 1411-1413 (citing R-237, Expansión Newspaper, "International Funds Support the Spanish Energy Sector," 3 October 2017); *see also* RD-1, Resp. Op. Statement, Slide 214 (citing RL-131, *RWE*, ¶ 662).

[1403] Resp. Rej., ¶ 1414 (citing RL-131, *RWE*, ¶ 662); RD-1, Resp. Op. Statement, Slide 215.

645. The Respondent rejects the Claimants' allegation that the CNE was dissolved as a result of its criticism of the New Regime, and argues that, in fact, the CNE's Report was taken into consideration during the rollout of RD 413/2014.[1404]

(4) The Measures Taken by Spain were Reasonable (not Arbitrary) and Proportionate

646. Relying on various jurisprudence, the Respondent contends that a measure is rational if it is connected to a reasonable public policy, and proportionate if it takes into consideration, when implemented, all of the interests involved.[1405]

647. The Respondent submits that the Disputed Measures are rational because they were aimed *inter alia* at tackling the Tariff Deficit, which is a legitimate public policy.[1406] It clarifies that Spain did not adopt the measures solely for the Tariff Deficit or any other reason in isolation.[1407] Instead, Spain has always carried out a global analysis of the economic, social and technical situation at the time of the measures.[1408] As such, the Respondent's position is that the measures were aimed at guaranteeing the sustainability of the SES and at obtaining a reasonable rate of return for renewable energy producers, in the context of the international financial crisis, over-remuneration of subsidized renewable energy producers, and the fact that consumers were facing significantly rising electricity bills.[1409]

648. Overall, the Respondent contends that the Claimants' position is based on a misrepresentation of the economic and social context in which the Disputed Measures were taken.[1410] It explains that contrary to the Claimants' submissions, it is not invoking a "necessity" defense under international law.[1411] Instead, the Respondent argues that the need to resolve the Tariff Deficit was a legitimate public policy and that subsidies to renewable energy producers paid under RD 661/2007

[1404] Resp. C-Mem., ¶ 1134; Resp. Rej., ¶¶ 1397-1398 (citing R-310, CNMC Report, on the Proposal for a Royal Decree (RD 413/2014) for Regulating the Activity of Electricity Production from Renewable Energy Sources, Cogeneration and Biomass, 17 December 2013).

[1405] RD-1, Resp. Op. Statement, Slide 218 (citing RL-71, *Saluka*, ¶ 309; CL-173, *Philip Morris*, ¶¶ 322, 424; RL-32, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 219; RL-2, *Electrabel* Decision, ¶¶ 179-180); Resp. PHB, ¶ 116.

[1406] RD-1, Resp. Op. Statement, Slide 219 (citing R-72, CNE Report/2012); Resp. PHB, ¶ 117.

[1407] Resp. Rej., ¶ 1417.

[1408] Resp. Rej., ¶ 1417.

[1409] Resp. Rej., ¶ 1418.

[1410] Resp. Rej., ¶ 1439.

[1411] Resp. Rej., ¶ 1440.

contributed to its exponential increase, putting pressure on the sustainability of the SES.[1412] The Respondent explains that the revenues of the SES, which pay for the renewable energy subsidies, depend on electricity demand, which declined during the economic crisis. Addressing the resulting gap by way of the Disputed Measures was a legitimate public policy to guarantee that renewable energy producers could still obtain a reasonable rate of return with the assistance of public subsidies, namely a return that is neither excessive nor insufficient, taking into account the costs reasonably incurred by efficient producers.[1413]

649. The Respondent submits that the Disputed Measures are proportionate because (i) they have affected not only renewable energy producers but also other segments of electricity production; and (ii) the reasonable rate of return fixed by Spain at 7.398% in the context of the aftermath of the international financial crisis was considered reasonable by the renewable energy producers themselves and has been considered proportionate by the EC.[1414]

650. The Respondent rejects as wrong in its premise the Claimants' argument that Spain had alternative ways of addressing the Tariff Deficit. Relying on the *Blusun* tribunal's findings, the Respondent submits that the public interest behind disputed measures and their legitimacy should be presumed, and that it is not for arbitral tribunals to examine whether the State concerned should have taken other measures.[1415] In any event, the Respondent recalls that the Claimants have not proven that the alternative measures would have been viable.[1416]

651. In response to the Claimants' argument that the remuneration model under the New Regime was arbitrary, the Respondent counters that its approach is rational,[1417] and that the calculations included in the June 2014 Order are reasonable.[1418] In particular, the Respondent argues that had it taken into account the Plant's actual costs without acknowledging any inefficiencies, such a policy would

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[1412] Resp. Rej., ¶¶ 1446-1462.

[1413] Resp. C-Mem., ¶¶ 1147-1151; Resp. Rej., ¶¶ 1463-1474.

[1414] Resp. C-Mem., ¶¶ 1152-1155 (citing R-158, APPA Draft Bill, Articles 23.3, 23.4; R-143, APPA-Greenpeace Press Release); Resp. PHB, ¶ 117 (citing RL-3, 2017 EC State Aid Decision, ¶ 120).

[1415] Resp. Rej., ¶ 1426.

[1416] Resp. Rej., ¶¶ 1429-1432.

[1417] Resp. Rej., ¶¶ 1433-1438.

[1418] RD-1, Resp. Op. Statement, Slide 223 (citing R-248, Report by the Technical Secretary-General of the Ministry of Industry, regarding the development of RD 413/2014, 9 January 2014 (the Respondent refers to R-72 by mistake); RL-111, Communication from the Commission on the Application of the European Union State aid Rules to Compensation Granted for the Provision of Services of General Economic Interest, 2012/C 8/02).

have been anything but rational.[1419] To the contrary, it was under no obligation to uncritically accept the proposals set out in the BCG and Roland Berger draft reports, which (according to its experts) did not contain any technical analysis of the Plant's costs.[1420] In any event, the Respondent contends that the remuneration model under the New Regime guarantees efficient operators a rate of return, which, at 7.398%, is reasonable.[1421]

C. THE EUROPEAN COMMISSION'S SUBMISSION

652. On 1 August 2019, the EC submitted the EC Submission authorized by the Tribunal's Procedural Order No. 2, addressing two issues: (i) the role and functioning of State aid control in the EU legal order; and (ii) why a change to a measure that was introduced in violation of EU law requiring prior notification and EC approval of State aid cannot violate the FET standard in the ECT.[1422]

(1) The Role and Functioning of State Aid Control in the EU Legal Order

653. The EC explains that under the EU Treaties (the TEU and the TFEU), EU Member States have transferred legislative, regulatory, and enforcement competences in a large number of fields to the EU and its institutions.[1423] Pursuant to Article 3(1) of the TFEU, the EU has exclusive competence to establish "the competition rules necessary for the functioning of the internal market."[1424] The rules on State aid are based on Articles 107 and 109 of the TFEU, which are part of the "Rules on Competition."[1425] The EC is responsible for the enforcement of EU competition law, including the investigation and control of any State aid that distorts competition in the internal market.[1426] The EC has exclusive competence and EU Member States have completely devolved their competence in the area of State aid.[1427]

[1419] Resp. Rej., ¶¶ 1434-1435; Resp. PHB, ¶ 123 (noting that the Claimants simply refer to the annual accounts, but have failed to prove that those figures correspond to an efficient company).

[1420] Resp. Rej., ¶ 1437 (citing Servert/Nieto CAPEX Report, Section 8.4); *see also* RD-1, Resp. Op. Statement, Slide 222.

[1421] Resp. Rej., ¶¶ 1475-1482; *see also* RD-1, Resp. Op. Statement, Slide 221 (citing R-120, APPA Info Journal No. 30, "The investment in renewables is very profitable for Spain," March 2010; RL-3, 2017 EC State Aid Decision, ¶¶ 120, 130).

[1422] EC Submission, ¶¶ 2-3.

[1423] EC Submission, ¶ 4.

[1424] EC Submission, ¶ 5.

[1425] EC Submission, ¶ 6.

[1426] EC Submission, ¶ 9.

[1427] EC Submission, ¶ 9.

654. The EC explains that pursuant to Article 107(1) of the TFEU, State aid, as a matter of principle, is forbidden under EU law.[1428] However, the EC enjoys wide discretion under Article 107(2) of the TFEU to declare various categories of State aid compatible with the internal market.[1429] The EC can limit its discretion by adopting binding guidelines for the assessment of aid measures.[1430] The EC observes that in the time period relevant for this dispute, State aid for the production of electricity from renewable energy sources fell within the scope of the Community Guidelines on State aid for environmental protection of 3 February 2001 and the Guidelines on State aid for environmental protection of 1 April 2008.[1431]

655. The EC adds that pursuant to Article 108(3) of the TFEU, Member States must inform the EC of any plans to grant new aid or to alter existing aid.[1432] Member States may not implement new State aid measures, before they have been approved by the EC (the "**stand-still obligation**").[1433] The EC and any national court has competence to find that a measure that was implemented in violation of the stand-still obligation is illegal or unlawful aid.[1434] However, pursuant to Article 107(2) of the TFEU, the EC may still declare unlawful aid (aid which was introduced in violation of the stand-still obligation) to be compatible with the internal market.[1435]

656. The EC observes that the consequence of the stand-still obligation is that unless the State aid has been formally recognized as lawful, it cannot, "in principle, entertain legal certainty and legitimate expectations," even when national authorities have actively encouraged "undertakings" to accept the aid in question.[1436]

657. Further, because exclusive competence over EU competition rules has been ceded by EU Member States to the EU, EU Member States cannot exercise their sovereign competence to assess for themselves the compatibility of State aid with EU law.[1437] For the same reason, EU State aid rules

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[1428] EC Submission, ¶ 10.

[1429] EC Submission, ¶ 11.

[1430] EC Submission, ¶ 12.

[1431] EC Submission, ¶ 13 (citing EC-4, The 2001 Community Guidelines on State aid for Environmental Protection, Official Journal of the European Union (OJ), Volume C 37, 3 February 2001, p. 3; and EC-5, Guidelines on State aid for Environmental Protection, OJ C 82, 1 April 2008, p. 1).

[1432] EC Submission, ¶ 14.

[1433] EC Submission, ¶ 14.

[1434] EC Submission, ¶ 15.

[1435] EC Submission, ¶ 16.

[1436] EC Submission, ¶ 17.

[1437] EC Submission, ¶¶ 18-19 (citing TFEU, Articles 2(1) and 108(3)).

have precedence even over national court judgments that otherwise would be treated as of *res judicata*.[1438]

658. Further, the EC explains that a decision by the EU institutions, including the EC, has the same effect in the EU legal system as the provisions of EU Treaties and Regulation, which precludes national courts from taking decisions that conflict with a decision of the EC.[1439]

(2) No Legitimate Expectations or a Violation of the FET Standard in the ECT

659. For the purposes of the EC Submission, the EC assumes that the claim in this arbitration arises out of Spain's energy reforms, enacted in the context of obligations flowing from the European Parliament's 2009 Renewables Directive.[1440]

660. The EC submits that the underlying claim is closely linked to proceedings in relation to State aid granted by Spain to investors in the renewable energy sector.[1441] The EC explains that those proceedings culminated in the 2017 EC State Aid Decision (summarized in Section III.H above), which found that:[1442]

> (i) any aid granted from 11 June 2014 to [the 2017 EC State Aid Decision] on 10 November 2017 had breached the stand-still obligation provided for in Article 108(3) TFEU and hence constituted unlawful State aid; and
>
> (ii) that the amended support scheme constituted unauthorized State aid within the meaning of Article 107(1) TFEU that is nonetheless compatible with the internal market.[1443]

661. The EC explains that it has "heard the same claims" as this Tribunal, in connection with investor submissions during the State aid proceedings which invoked EU law principles of legitimate expectations and the doctrine of FET under the ECT, and had "decided them under its powers of

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[1438] EC Submission, ¶ 20.

[1439] EC Submission, ¶¶ 22-25.

[1440] EC Submission, ¶ 27.

[1441] EC Submission, ¶ 28 (citing EC-22, 2017 EC State Aid Decision).

[1442] EC Submission, ¶ 28.

[1443] EC Submission, ¶ 29; *see also* ¶ 30 (citing EC-23, Order of the Court of Justice of the European Union issued in the question referred C-275/13, Elcogás, 22 October 2014; EC-24, Case C-262/12, *Association Vent De Colère and Others*, EU:C:2013:851).

EU State aid law."[1444] In this context, the EC recalls that EU law provides investors with complete protection of their investment, including protection of legitimate expectations.[1445]

662. Regarding legitimate expectations under EU law, the EC refers to EU case law, holding that, "save in exceptional circumstances, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in the Treaties."[1446] The EC refers to EU case law clarifying the three conditions for legitimate expectations to be well-founded:

> First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities.
>
> Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed.
>
> Third, the assurances given must comply with the applicable rules.[1447]

663. Consequently, the EC submits that "assurances given by national authorities about State aid matters are, by definition, incapable of creating any legitimate expectations."[1448]

664. Thus, because the original Spanish support scheme had not been authorized by the EC pursuant to Article 108(3) of the TFEU, "under EU law, any legitimate expectations of the Claimants were precluded."[1449] Further, the EC observes that to the extent the Claimants made their investment before the adoption of the EC's 2017 State Aid Decision, they cannot successfully argue that they had legitimate expectations arising from the non-authorization of the State aid by the EC.[1450]

665. The EC submits that the Claimants could have challenged the conclusions of the 2017 EU State Aid Decision before the General Court of the EU under Article 263(4) of the TFEU, but did not,

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[1444] EC Submission, ¶¶ 31-33.

[1445] EC Submission, ¶ 33.

[1446] EC Submission, ¶ 34 (citing EC-7, Case C-5/89, *Commission v. Germany*, ECLI:EU:C:1990:320, ¶ 14).

[1447] EC Submission, ¶ 35 (citing EC-27, Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08, *Regione Autonoma della Sardegna v. Commission,* ECLI:EU:T:2011:493, ¶ 273).

[1448] EC Submission, ¶ 36 (citing EC-27, Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08, *Regione Autonoma della Sardegna v Commission,* ECLI:EU:T:2011:493, ¶ 281).

[1449] EC Submission, ¶¶ 37-38 (quoting EC-22, 2017 EC State Aid Decision, ¶ 158).

[1450] EC Submission, ¶ 39.

with the result that the findings in that Decision "have become *res judicata* vis-à-vis the Claimants."[1451]

666. In the context of the FET standard in the ECT, the EC observes that legitimate expectations is "not a self-standing element" of the ECT, and instead "operates as an interpretative tool of the FET standard."[1452] The EC submits that "an investor can never have a legitimate expectation that general regulatory measures will not be changed," and sees this as an inherent risk of doing business, against which investment treaties are not intended to protect.[1453]

667. Rather, the EC argues that for legitimate expectations to arise, specific formal assurances and representations need to be made to the investor, on which the investor relied, and such formal assurances "cannot be *contra legem*."[1454] The EC also contends that in assessing an investor's claim to have harbored reasonable and legitimate expectations, it is relevant whether they carried out their responsibility to conduct due diligence prior to making the investment. In particular, "[d]iligent investors must be held to be acquainted with the regulatory framework under which the investment will operate, including substantive and procedural law and important decisions of the highest judicial authority on such framework."[1455]

668. The EC's view is that the correct standard of review for any FET claim should begin with an assessment of whether the investments concerned were made in accordance with the law at the time.[1456] In this case, the applicable legal framework includes EU law and in particular the system of State aid control: under EU law, "[a]ssurances given by national authorities about State aid matters are, by definition, incapable of creating any legitimate expectation – they are *contra legem* the system of EU State aid control."[1457] In other words, unless the EC had, upon due notification, declared a particular support regime to be compatible with EU law, an investor could not hold any legitimate expectations that a non-notified support system would not be changed.[1458]

[1451] EC Submission, ¶¶ 39-43.
[1452] EC Submission, ¶ 44.
[1453] EC Submission, ¶ 45.
[1454] EC Submission, ¶ 46.
[1455] EC Submission, ¶ 47.
[1456] EC Submission, ¶¶ 48-49 (citing EC-46, *Plama*).
[1457] EC Submission, ¶ 49.
[1458] EC Submission, ¶¶ 50-51 (citations omitted).

669. In this case, the EC observes that it did not grant any assurances that could have given rise to legitimate expectations about the immutability of the prior Spanish support regime. It submits that a "reasonably-diligent investor having undertaken the necessary and independent due diligence assessment prior to making its investment would have been aware" of this fact, particularly given that Article 108(3) of the TFEU, requiring prior notification of State aid, constitutes a mandatory provision of EU law.[1459] The EC observes that in the context of State aid rules, the investor's due diligence is particularly important, because expectations about outcomes, behaviors, or decisions, which would be contrary to the framework in which the investment is made, cannot be considered reasonable.[1460]

670. Consequently, the EC concluded in its 2017 EC State Aid Decision that any investments made prior to that Decision, purportedly on the basis of assumptions about the permanence of the non-notified support regime then in existence, were made contrary to applicable Spanish and EU law.[1461]

671. In any event, the EC observes that the ECT recognizes that Member States who are Contracting Parties to the ECT have devolved certain powers to the EU as a REIO Contracting Party.[1462] The EC's view therefore is that the Contracting Parties to the ECT, including Switzerland, were put on notice that the ECT's terms contemplated that an investor in an EU Member State would have to comply with both domestic and EU law, in order to acquire legitimate expectations and therefore protection under the ECT's FET standard.[1463]

(3) Conclusion

672. In conclusion, the EC observes that "[b]oth EU law and the ECT recognise that no legitimate expectations can arise in the case of the changes to the Spanish support scheme, nor that such expectations could bring about a right of claim under the FET provision of the ECT."[1464]

673. Further, the EC comments that these legal frameworks recognize that, prior to executing any award, Spain has to notify the award to the EC to assess whether the award itself constitutes State aid.[1465]

[1459] EC Submission, ¶¶ 52-53 (citing TFEU, Article 108(3)).

[1460] EC Submission, ¶ 53.

[1461] EC Submission, ¶ 54 (quoting EC-22, 2017 EC State Aid Decision, ¶ 164: "In an extra-EU situation, the fair and equitable treatment provision of the ECT is respected since no investor could have, as a matter of fact, a legitimate expectation stemming from illegal State aid").

[1462] EC Submission, ¶¶ 56-58 (citing ECT Article 1(3); EC-53, *Electrabel* Award, ¶¶ 6.70-6.93).

[1463] EC Submission, ¶ 59.

[1464] EC Submission, ¶ 61.

[1465] EC Submission, ¶ 62.

The EC's view is that the payment of any award would constitute notifiable State aid and be subject to a standstill obligation.[1466] The EC considers that it is in the interest of the international legal community to ensure clarity by avoiding interpretations of the ECT's protection standards that may create legal uncertainty, and avoiding a situation of potential conflict if the EC were to find that an arbitration award orders a State to pay aid that is illegal or incompatible with the internal market.[1467]

D. THE TRIBUNAL'S ANALYSIS

674. As is evident from the summary above, the Claimants challenge multiple measures (which they collectively label as the "New Regime") under multiple terms of ECT Article 10(1). Each ECT standard that the Claimants invoke is said to have been violated in several ways, and each regulatory measure by Spain is said to have violated several ECT standards. This framing of the case inherently leads to some repetition, whether an analysis is organized measure-by-measure or standard-by-standard. To minimize repetition, the Tribunal organizes its analysis as described below.

675. First, in Section VII.D(1), the Tribunal provides some preliminary remarks regarding the terms of ECT Article 10(1). This is not intended to address every aspect of those terms that the Parties debate, but only the basic parameters that the Tribunal considers necessary to apply. The Tribunal sees no need to resolve additional debates that may be of theoretical or academic interest but are not material to its determination of the claims. This is consistent with principles of prudence as well as procedural economy.[1468]

676. Following this introduction, the Tribunal discusses the Claimants' principal complaints organized by theme. This begins in Section VII.D(2) with the Claimants' core contention that the Plant was entitled to receive, for its operational life, the *benefits of the tariffs established by RD 661/2007*. The Claimants base this proposition both on ECT Article 10(1)'s reference to "stable" conditions, and on stability and legitimate expectations elements that the Claimants say are embedded in the notion of "fair and equitable treatment," as that phrase is used in ECT Article 10(1). With respect to legitimate expectations, the Claimants rely particularly on the text of Article 44.3 of RD

[1466] EC Submission, ¶ 63.

[1467] EC Submission, ¶ 64.

[1468] *See* CL-211/RL-157, *Eskosol* Award, ¶¶ 228-229 (suggesting that tribunals should exercise "prudence, in not reaching out to decide … points of law that are not strictly necessary to the resolution of the issues before it," particularly where such points involve "unsettled" issues that could require the rendering of "interpretations of arguably ambiguous treaty language" or that have "potential doctrinal consequences for future cases that should not be lightly ignored").

661/2007, which they characterize as an express grandfathering clause that assured investors the maintenance of the remuneration regime for all installations registered in the RAIPRE within the Tariff Window. These contentions are each examined in Section VII.D(2) below, together with the Respondent's primary counterarguments.

677. Next, in Section VII.D(3), the Tribunal discusses the Claimants' contention that even if Spain was permitted to move on from the RD 661/2007 regime, it was unreasonable and disproportionate for it to do in for the *stated reasons* and in the *general manner* that it did, as expressed in RDL 9/2013 and subsequently Law 24/2013. This section examines, *inter alia*, the Claimants' arguments about Spain's invocation of the Tariff Deficit as the rationale for replacing the RD 661/2007 regime, as well as its suggestion that Spain could have addressed the Tariff Deficit through alternative measures that would have imposed a lesser burden on their investments.

678. The following section, Section VII.D(4), turns to several more specific complaints about particular features of the New Regime and the way in which it was implemented with respect to the Plant. Subsection (a) of this section examines the Claimants' complaints about the "*dynamic*" *application* of the "reasonable return" construct, with target rates of return shifting over time. Subsection (b) addresses the particular methods used to calculate *target returns* and the levels thus calculated. As related to these target return levels, this discussion touches on the Claimants' stated "alternative case" on legitimate expectations, which is predicated on an alleged entitlement to returns of the levels Spain had referenced in its rollout of RD 661/2007. Next, subsection (c) addresses the Claimants' complaint of an alleged "*clawback*" effect, resulting from Law 24/2013's determination that the "reasonable return" introduced by RDL 9/2013 would be calculated throughout the regulatory life of each plant. Continuing on, subsection (d) examines the *use of "standard" rather than actual facilities* for tariff calculations, and subsection (e) turns to the Claimants' particular complaint about the manner in which "standard" plant costs were calculated in June 2014 for the *particular installation category* to which the unique PE2 facility was assigned. This is said to have been unreasonable both in process (because Spain did not take into account certain materials that Claimants say it should have done), and in outcome (because the resulting cost assumptions for the "standard" category were significantly below PE2's actual costs). The Claimants blame Spain's methodology in large part for the fact that PE2's returns under the New Regime have been below both the level the Claimants say they legitimately expected under RD 661/2007, and the level that Spain says the New Regime was intended to afford investors operating on an efficient basis.

679. Finally, in Section VII.D(5), the Tribunal addresses the Claimants' contentions that Spain violated "transparency" obligations embedded in ECT Article 10(1) in various ways. This includes the Claimants' complaints about the limited scope and timing of *consultations* in connection with the "New Regime," and about the *period of uncertainty* between the 2013 announcement of "New Regime" principles and the 2014 determination of specific parameters for remuneration of individual facilities, by virtue of RD 413/2014 and the June 2014 Order.

(1) Preliminary Remarks Regarding Applicable Standards

680. The Tribunal recalls its discussion in Section VI.C above of treaty interpretation principles under the VCLT. As noted there, in construing the ECT, the Tribunal is guided in particular by the principles reflected in VCLT Article 31, including that the provisions of the ECT should be interpreted in accordance with the "ordinary meaning" of their terms, in the "context" in which they occur and in light of the treaty's "object and purpose."[1469]

a. Object and Purpose

681. With respect to the ECT's object and purpose, the Tribunal agrees with other tribunals that have found this to reflect a balance between maintaining sovereign rights and promoting private investment.[1470] This conclusion follows from the analysis below.

682. First, ECT Article 2, which is entitled "Purpose of the Treaty," refers to the ECT as "establish[ing] a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."[1471] The "**Charter**" so referenced is the European Energy Charter, a political declaration that was signed at the conclusion of the Hague Conference on the European Energy Charter on 17 December 1991.[1472] The objectives of the Charter are expressed in its Title 1, as follows:

> The signatories are desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis.

[1469] CL-5/RL-24, VCLT, Article 31(1).

[1470] *See, e.g.,* CL-195/RL-143, *PV Investors*, ¶ 570; CL-191/RL-145, *Hydro*, ¶ 543; CL-139/RL-131, *RWE*, ¶¶ 438-439; CL-96/RL-95, *RREEF*, ¶ 239.

[1471] CL-1/RL-20, ECT, Article 2.

[1472] CL-1/RL-20, ECT, Article 1(1) (definition of "Charter").

> Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic co-operation, [the signatories] undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.[1473]

683. Thus, the express terms of the Charter – whose "objectives and principles" are expressly said to reflect the purpose of the ECT[1474] – reference both "the framework of State sovereignty and sovereign rights over energy resources," and the creation of a favorable climate for cross-border investment. Each objective must be seen within the context of the other, and neither objective can be said to dominate the other. For this reason, the Tribunal is unable to accept the Claimants' assertion of an inherent priority between the two in the ECT, in favor of investment-promotion objectives.[1475] That proposition would strip the ECT of the balance that its own terms suggest was intended, and would differentiate it without justification from most, if not all, other investment treaties. As the President of the Tribunal has previously observed:

> Every treaty creates a varied and nuanced balance between extending protections and limiting or conditioning those protections. It would be too facile to simply advert to the general notion of investor protection as a catch-all tool (or a proverbial finger-on-the-scale) to resolve all disputed issues regarding the extent, limits or conditions on protections.[1476]

b. The Relationship Among Sentences in Article 10(1)

684. With these principles in mind, the Tribunal turns next to the terms of ECT Article 10(1), in accordance with their ordinary meaning and the context in which they occur. As noted above, Article 10(1) provides as follows:

[1473] CL-1/RL-20, ECT, p. 214 (Concluding Document of the Hague Conference on the European Energy Charter, Title 1).

[1474] CL-1/RL-20, ECT, Article 2.

[1475] *See* Cl. Mem., ¶ 201 (contending that "the fundamental objective of the ECT is to facilitate transactions and investments in the energy sector by reducing political and regulatory risks"); *see similarly* Cl. Mem., n. 374 (contending that "the particular object and purpose of the ECT" require reading it to "impose[] a burden to provide stability that is more onerous than the FET obligation contained in a typical investment treaty").

[1476] CL-240, *Kappes,* ¶ 150; *see similarly* CL-195/RL-143, *PV Investors*, ¶ 570 (noting that "the protection of investments and the right to regulate operate in a balanced way under the ECT *as in all other investment treaties*") (emphasis added).

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.[1477]

685. The Claimants present three claims corresponding to the first three sentences of ECT Article 10(1):

> In particular, Spain has violated Article 10(1) of the ECT by:
>
> (a) failing to encourage or to create stable, equitable, favourable and transparent conditions for the Claimants' investments;
>
> (b) failing to accord the Claimants' investments fair and equitable treatment; and
>
> (c) impairing, by unreasonable and discriminatory measures, the management, maintenance, use, enjoyment and disposal of the Claimants' investments.[1478]

686. The Claimants do not invoke any *other* provisions of ECT Article 10(1), such as its statement that investments "shall also enjoy the most constant protection and security" (third sentence), that investments shall not be accorded treatment "less favourable than that required by international law, including treaty obligations" (fourth sentence), or that each Contracting Party "shall observe any obligations it has entered into with an Investor or an Investment" (fifth sentence). Nor do the Claimants invoke any ECT provisions *outside* of Article 10(1), such as the national treatment and most-favored nation treatment provisions of ECT Article 10(7) or the expropriation provisions of ECT Article 13. Accordingly, the Tribunal has no need in this Award to discuss the parameters, interpretation, or implications of those other provisions.

687. With respect to the provisions that the Claimants *do* invoke, the first is the statement in the first sentence of ECT Article 10(1) that ECT signatories "shall, in accordance with the provisions of

[1477] CL-1/RL-20, ECT, Article 10(1).

[1478] Request for Arbitration, ¶ 85; *see similarly* Cl. Mem., ¶ 217.

this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area."[1479] Before discussing the content of any of these terms, there is a threshold question about the *interaction* of this sentence as a whole with the rest of Article 10(1), and particularly with the immediately following sentence, which states that "[s]uch conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment." Some tribunals have interpreted the first sentence of ECT Article 10(1) as imposing obligations that are distinct from FET and are independently actionable. Others have concluded that ECT Article 10(1) must be read holistically, and that the terms of the first sentence do not extend protections beyond the extent to which the cited notions ("stable, equitable, favourable and transparent conditions") may be seen as already embedded, in some fashion, in the FET standard.

688. In the Tribunal's view, VCLT canons of interpretation require that the terms of any sentence in a treaty be read in the context of surrounding sentences. Each sentence must be given some meaning, rather than be rendered without *effet utile*, but its specific content may not be construed in isolation. Looking at the terms of ECT Article 10(1) as a whole, then, two observations stand out.

689. First, there is some overlap in the use of terms between the first sentence and the second. For example, the word "equitable" appears both in the first sentence (in the context of "encourag[ing] and creat[ing] … equitable … conditions") and in the second sentence (in the context of requiring "fair and equitable treatment"). Other overlaps are implicit rather than explicit, in the sense that notions of stability, favorability and transparency are often explored – along with the limits to such notions – in the context of FET obligations. To the extent of this overlap, a question fairly arises about the purpose of using two sentences rather than one to set out treaty obligations. Are the two sentences meant to apply to different circumstances, or alternatively are they meant to apply to the same circumstances, but to provide different protections?

690. Second, the first sentence addresses the "conditions for Investors … to make Investments," whereas the following sentences discuss the treatment to be afforded "Investments." (Thus, "Investments" are to be "accord[ed] at all times" fair and equitable treatment, are to "enjoy" protection against impairment by unreasonable or discriminatory measures, *etc.*) Again, a question arises about the purpose of distinguishing in terminology between "Investors" seeking "to make Investments," on the one hand, and the treatment of those "Investments," on the other.

[1479] CL-1/RL-20, ECT, Article 10(1).

691. In the Tribunal's view, this distinction is important, and it helps to explain what otherwise might appear to be an unnecessary repetition of terms or concepts between the first sentence of ECT Article 10(1) and the sentences that follow. As the *RWE* tribunal observed,[1480] the phrases "Make Investments" and "Making of Investments" are defined terms in the ECT, expressly stated to "mean[] establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity."[1481] These phrases are thus meant to address the conditions for establishment, acquisition, or expansion of "Investments." This definitional point is reinforced by a systematic analysis of the other subsections of ECT Article 10, which carefully distinguish between the "Making of Investments" and the treatment of "Investments" when made. For example, ECT Articles 10(2), 10(4), 10(5), 10(6) are all expressly directed at a Contracting Party's regulation of the "Making of Investments in its Area," whereas Article 10(7) addresses the "treatment" that each Contracting Party "shall accord to Investments in its Area," rather than the "Making" of such investments in the first place. In other words, the ECT signatories clearly devoted substantial attention to distinguishing between these concepts.

692. Bearing this in mind, then, the same care should be applied to interpretation of the first sentence of ECT Article 10(1), *vis-à-vis* the second sentence and those that follow. The first sentence's requirement that each Contracting Party "shall, in accordance with the provisions of this Treaty, encourage and create [various] conditions for *Investors … to make Investments in its Area*,"[1482] must be seen as regulating only the environment for the establishment, acquisition or expansion of investments.[1483] To the extent the terms in this sentence are independently actionable,[1484] it would be limited to the context of disputes arising from rules regulating the admission of investments into a host State or their establishment, acquisition or expansion. By contrast, the second sentence of

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[1480] *See* CL-139/RL-131, *RWE*, ¶ 425.

[1481] CL-1/RL-20, ECT, Article 1(8).

[1482] CL-1/RL-20, ECT, Article 10(1) (emphasis added).

[1483] *See* CL-139/RL-131, *RWE*, ¶ 426 (concluding that the first sentence of Article 10(1) "is concerned only with the conditions in which the Investment is made, as opposed to establishing any ongoing obligation of stability"); RL-64, *Blusun*, ¶ 319(2) (considering that the first sentence of Article 10(1) addresses "the initial making of the investment" as well as "subsequent extensions of the investment as well as changes of form").

[1484] *Contrast* CL-180/RL-130, *Stadtwerke*, ¶¶ 195-198 (considering that the first sentence of Article 10(1) "does not contain an independent obligation whose breach would be actionable by investors of the Contracting Parties," because it "is far too general to create enforceable definite rights"; rather, it is "a directive to the Contracting Parties as to the type of legislative regime they are to create in order to facilitate investment in the energy sector," whereas the subsequent sentences of Article 10(1) "refer to specific actions that a State may not take against protected investments. It is a State's violation of those obligations that results in liability to investors"), *with* RL-64, *Blusun*, ¶ 319(1) (considering that all the sentences of Article 10(1) "embody commitments towards investments," and "[n]one is merely preambular or hortatory"); CL-139/RL-131, *RWE*, ¶ 426 (agreeing with *Blusun* in that regard).

ECT Article 10(1), referring to "a commitment to accord at all times *to Investments* … fair and equitable treatment,"[1485] must be seen as reaching beyond the establishment phase to regulate also the ongoing treatment of investments once made.[1486] The conclusion that the fair and equitable treatment requirement applies to *both phases* – both the making of investments and the treatment of investments once made – is reinforced by two elements of the second sentence of ECT Article 10(1): (i) the linkage language employed after the first sentence, namely, that "[s]*uch conditions*" (*i.e.,* the "conditions for Investors … to make Investments") "*shall include* a commitment to accord … fair and equitable treatment," and (ii) the phrase "*at all times*," which ensures that once an "Investment" is established or acquired, FET shall be "accord[ed] at all times" to that investment.[1487]

693. It is therefore the notion of "fair and equitable treatment" which is central to any analysis of a State's compliance with ECT Article 10(1) in connection with an *existing* investment. This case concerns just that: an allegation by the Claimants that following EBL's acquisition of the shares of Tubo Sol, and Tubo Sol's construction of the Plant in Spain, the Respondent violated its obligations regarding the ongoing *treatment* of that Plant. The Claimants do not allege any State interference with the initial *making* of EBL's investment in Tubo Sol or Tubo Sol's investment in the Plant. Accordingly, the Tribunal sees no need to independently analyze the terms of the first sentence of ECT Article 10(1), addressing the creation of appropriate "conditions for Investors … to make Investments in its Area." To the extent that those terms ("stable, equitable, favourable and transparent") are relevant to the post-establishment treatment of investments, it is only insofar as – and only to the extent that – the same notions may be embedded in the concept of fair and equitable treatment.

c. "Stability" Obligations in the Context of Regulatory Change

694. In consequence of the analysis above, there is no autonomous standard of "stability" in the regulatory treatment of established investments that derives from the first sentence of ECT Article 10(1), separate from the way regulatory stability generally has been analyzed under the FET standard applicable through the second sentence of ECT Article 10(1). The Tribunal agrees with many other ECT tribunals that have considered "stability" arguments in the broader context of the

[1485] CL-1/RL-20, ECT, Article 10(1) (emphasis added).

[1486] *See* CL-139/RL-131, *RWE*, ¶ 428 ("[i]t is this second sentence that is concerned with ongoing protection of the Investment once it has been made (as is the case with the remaining sentences of Article 10(1))").

[1487] CL-1/RL-20, ECT, Article 10(1) (emphasis added).

FET standard, while rejecting the notion that investors have a standalone entitlement to a "stable" regulatory framework throughout the life of their investments, on account of the word "stable" appearing in the first sentence of ECT Article 10(1).[1488]

695. The Claimants contend that in any event, there is "little practical difference" for this case whether the concept of stability is deemed to be an autonomous obligation under the first sentence of ECT Article 10(1) (as they suggest), or alternatively is understood to be relevant only to the extent that concept is embedded in the FET obligation reflected in the second sentence (as the Tribunal has now found).[1489] In either event, the Claimants state that they do not contend the ECT requires States to freeze their regulatory regimes, absent a clear commitment that they would do so.[1490] This acknowledgment is consistent with the general understanding of FET obligations. It is widely agreed that in the absence of specific commitments, representations or assurances to investors that should be separately analyzed under the rubric of *legitimate expectations*, there is no prohibition on regulatory change as such. As the *AES* tribunal phrased the point, "[a] legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts."[1491] Rather, the latitude of States to institute regulatory changes should be assessed under the main criteria of "fair and equitable treatment," which involve (in addition to the notion of legitimate expectations) considerations of *reasonableness*, *proportionality* and *non-discrimination*; these principles collectively act as checks on the circumstances of regulatory change, rather than as restrictions on change *per se*. A discussion of these general elements follows below.

d. Elements of the Fair and Equitable Treatment Analysis

696. As the *Eskosol* tribunal observed, the FET standard has been interpreted as involving "several different elements, which may take on differing degrees of importance in different disputes,

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[1488] *See* CL-139/RL-131, *RWE*, ¶ 429 ("Reading the two sentences together, the Tribunal considers that there is an obligation on the host State to ensure ongoing regulatory stability, but only to the extent that this forms part of the commitment to accord FET established in the second of the two sentences and, by that second sentence, embedded into the first"); CL-195/RL-143, *PV Investors*, ¶ 567 ("The Tribunal does not consider that stability is a stand-alone or absolute requirement under the ECT; rather, it views it as a requirement that is intertwined with and closely linked to FET.").

[1489] *See* Cl. Mem., ¶ 288.

[1490] *See* Cl. PHB, ¶ 5 ("Claimants have never argued that Spain could not change its regulations. Rather, the Claimants' claim is based on the clear promise by Spain (in Article 44.3 [of RD 661/2007]) that it would not change its regulations.") (emphasis in original).

[1491] RL-33, *AES* Award, ¶ 9.3.29.

depending on the facts and the nature of the wrongs alleged."[1492] To some extent, tribunals have recognized that the FET standard involves an inherent "balancing exercise,"[1493] which takes into consideration both (i) the *legitimacy of the expectations* on which an investor is said to have relied, and (ii) the *nature and circumstances of the State measures* taken pursuant to its general right to regulate. With respect to the former, and as discussed further below, "the presence of a specific promise or representation made by the host State and relied upon by the investor may be important to determine the legitimacy of the investor's expectation in respect of the stability of the regulatory framework."[1494] With respect to the latter, as the *Electrabel* tribunal explained, an important part of the "balancing or weighing exercise" under the FET standard involves an evaluation of whether "there is an appropriate correlation between the policy sought by the State and the measure" and whether "the effects of the intended measure remain proportionate in regard to the affected rights and interests."[1495] The FET standard also incorporates protections against discrimination, a point which is made express in ECT Article 10(3).[1496]

697. Through the collective analysis of these various elements, the FET standard achieves an appropriate balance of interests. The FET standard "preserves the regulatory authority of the host State to make and change its laws and regulations to adapt to changing needs, including fiscal needs, subject to respect for specific commitments made."[1497] Otherwise stated:

> While the investor is promised protection against unfair changes, it is well-established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that

[1492] CL-211/RL-157, *Eskosol* Award, ¶ 381.

[1493] *See, e.g.,* RL-38, *Electrabel* Award, ¶ 165 (explaining that "the application of the ECT's FET standard allows for a balancing exercise by the host State in appropriate circumstances. The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance."); CL-42/RL-71, *Saluka*, ¶ 306 ("[t]he determination of a [FET] breach … requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other"); CL-195/RL-143, *PV Investors*, ¶ 582 (explaining that in such cases, FET is approached as a "balancing act that takes into account the investors' legitimate or reasonable expectations and the host State's right to regulate," which are in turn "linked to the requirement of proportionality of the measures").

[1494] CL-195/RL-143, *PV Investors*, ¶ 578.

[1495] RL-38, *Electrabel* Award, ¶ 180.

[1496] CL-1/RL-20, ECT, Article 10(3) (defining the word "Treatment" for purposes of Article 10 as meaning "treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable").

[1497] CL-191/RL-145, *Hydro*, ¶ 588.

> subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment.[1498]

698. The Tribunal addresses further below each of these important elements of the FET analysis.

(i) Legitimate Expectations

699. The concept of "legitimate expectations" is not mentioned in the ECT. The Tribunal accordingly shares the view (adopted by other tribunals) that this is not an independent standard of treatment mandated by ECT Article 10(1), but rather is an element that is useful for analyzing the content of the FET standard and the circumstances in which it might be breached. As the *Eurus* tribunal described it:

> [L]egitimate expectations are essentially *consideranda*. The term itself does not appear in the ECT, or for that matter in BITs, and there is no rule that legitimate expectations are to be observed, analogous to the *pacta sunt servanda* rule in the law of treaties. Rather, they are relevant factors to be taken into account in the interpretation and application of treaty standards such as Article 10(1) of the ECT, first and second sentences.[1499]

700. In construing the concept of legitimate expectations, the first point to note is the importance of the word "legitimate," employed as a qualifier to the broader notion of "expectations." The qualifier makes clear that "expectations" as such – the subjective anticipations of a particular investor – do not attract legal protection against State action. This is regardless of how rational an investor's expectations may be as a business matter, in the sense of predicting the likelihood or unlikelihood of future events. The nature of investment decisions is that they are predicated on an investor's weighing of potential risks and benefits over a period of time, and the fact that a given investor may incorporate into its risk-benefit analysis certain subjective expectations about future State conduct does not impose obligations on the State to honor those expectations.[1500]

[1498] CL-83/RL-2, *Electrabel* Decision, ¶ 7.77.

[1499] RL-159, *Eurus*, ¶ 317.

[1500] *See* RL-152, *Cavalum*, ¶ 418 ("It is in the nature of businesses to take decisions or risks on the basis of the facts known to them, their appreciation of the unknown, and their reasonable predictions about the future. Not every such decision is legally protected."); CL-191/RL-145, *Hydro*, ¶ 580 (same); *see also* CL-96/RL-95, *RREEF*, ¶ 262 ("Just because an investor may have an expectation of immutability of the conditions of an investment does not necessarily mean that such an expectation is objectively legitimate in any given circumstance.").

701. Nor is the notion of "legitimacy" tethered only to a "reasonable person" standard. It is true that expectations must be objectively reasonable in order to qualify for FET protection,[1501] but that is a necessary rather than a sufficient component of the analysis. The fact that a reasonable investor would place odds on a future event occurring (or not occurring) does not bind the State never to upset such expectations. As the *Cavalum* tribunal explained, the concept of legitimate expectations "is not synonymous with a reasonable business judgement. … [A] reasonable market expectation as to some state of affairs, justified or not, is not a basis for shifting risks to the public sector, i.e., the state budget."[1502]

702. Rather, the notion of "legitimacy" in the context of expectations is tied inextricably to the *source* of the expectations. They must derive from some form of *clear and specific State conduct* that, by virtue of its emanating authority,[1503] entitles reasonable investors to believe the State is offering a *commitment* for the future. As the *Cavalum* and *Hydro* tribunals explained, "[i]n this context, legitimate expectation means a legally protected expectation."[1504] In the absence of specific commitments by State authorities, "[c]ircumstances change and … the risk of change is for entrepreneurs to assess and assume."[1505] It has thus been said that the FET standard "preserves the regulatory authority of the host state to make and change its laws and regulations to adapt to changing needs, including fiscal needs, subject to respect for *specific commitments* made."[1506]

703. Before turning to the source and type of specific commitments that may give rise to legitimate expectations, a word about timing is important. It is axiomatic that because the underlying principle is about "a form of reliance interest," it "must relate to facts or circumstances in existence at the time the investment is made."[1507] In most cases that will be easy to determine, although the analysis may become more complex if there are significant developments between an investor's decision to invest and its implementation of that decision,[1508] or if different tranches of investment were made

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[1501] *See, e.g.,* CL-195/RL-143, *PV Investors*, ¶ 573 ("the standard of protection of legitimate expectations is an objective and not a subjective one").

[1502] RL-152, *Cavalum*, ¶¶ 418, 422; CL-191/RL-145, *Hydro*, ¶ 580 (same).

[1503] CL-211/RL-157, *Eskosol* Award, ¶ 452 ("it is axiomatic that legitimate expectations must be based on some form of State conduct").

[1504] RL-152, *Cavalum*, ¶ 418; CL-191/RL-145, *Hydro*, ¶ 580.

[1505] RL-152, *Cavalum*, ¶ 422.

[1506] RL-152, *Cavalum*, ¶ 429 (emphasis added).

[1507] RL-159, *Eurus*, ¶ 324; *see generally* CL-195/RL-143, *PV Investors*, ¶ 575 (describing it as "commonly accepted that the investors' expectations must be assessed at the time of making the investment").

[1508] *See generally* RL-152, *Cavalum*, ¶ 451 (noting that "the critical date is the date of actual investment *or* irrevocable commitment to invest," but not developing any distinction between the two options on the facts of the case) (emphasis added).

at different times.[1509] This case involves both such issues.[1510] A further twist may arise where (as in this case) a claim is being presented by a local company in its own name, pursuant to treaty and ICSID Convention rules that provide standing for such claims to be asserted under the deemed nationality of the company's controlling shareholder.[1511] In those cases a question may arise whether the local company's legitimate expectations likewise should be assessed as of the date of the controlling shareholder's investment in it, or alternatively as of the date of the local company's own investment in the underlying project. In this case there was no significant gap in time between the two, and the Parties did not identify the point as relevant to their positions.

704. Whatever the critical date may be for assessing the investor's legitimate expectations, a question frequently arises about the extent and relevance of an investor's "due diligence" prior to making its investment. In the Tribunal's view, due diligence is *not a procedural precondition* for an investor to assert a legitimate expectation; a hypothetical investor who performs only limited investigation is still entitled to the same treatment as another investor who performed extensive investigation, in the sense that *both* are entitled to the benefit of whatever State commitments are determined to have been made based on an objective analysis. Stated otherwise, the State's actions must be judged against the standard of what an objective investor would legitimately expect, in consequences of State assurances and representations; the State does not get a "free pass" simply because a given investor opted not to undertake a deeper analysis to explore the meaning and implications of the State's words. But at the same time, an investor cannot escape the objective implications of whatever information would have been revealed to it through appropriate due diligence.[1512] That knowledge is imputed to it, for better or for worse. As the *Electrabel* tribunal observed generally in connection with the FET standard, "[f]airness and consistency must be assessed against the

[1509] *See generally* CL-139/RL-131, *RWE*, ¶ 505 (concluding that "[i]n light of the many uncertainties in the regulatory situation [in Spain] as of November 2011," a second tranche investment in December late 2011 could not have been made "on the basis that the Special Regime [from 2007] would not be undergoing some major changes").

[1510] As discussed in Sections III.C and III.I above, EBL committed to Novatec on 12 June 2009 that it would purchase 85% of Tubo Sol's shares, and then executed on that commitment with a share purchase on 29 December 2009. EBL later sold 34% of Tubo Sol shares in several tranches between March 2010 and July 2011, and then in late December 2018 it repurchased 12% of the shares. The late 2018 acquisition was made after all of the events the Claimants challenge as the Initial Disputed Measures. The Tribunal returns to these timing issues in Section VII.D(2) below, where it applies the concept of "legitimate expectations" to the facts of the case.

[1511] CL-1/RL-20, ECT, Article 26(7); ICSID Convention, Article 25(2)(b).

[1512] *See similarly* CL-139/RL-131, *RWE*, ¶¶ 513-514 (explaining that "[i]t does not *automatically follow* [from the claimants' lack of due diligence on regulatory risk] that the Claimants' could not reasonably … rely on stability in the Special Regime. However, the Tribunal must bring into account any statements, reports or legal decisions that would have been considered in a due diligence exercise") (emphasis added).

background of information that the investor knew *and should reasonably have known* at the time of the investment and of the conduct of the host State."[1513]

705. This means, among other things, that investors are presumed to have knowledge of the laws and regulatory framework of the States in which they invest, as well as "important decisions from the highest authority regarding the regulatory framework for investment," at least to the extent such knowledge would be available to them with the exercise of reasonable due diligence.[1514] This is not because local law forms part of the governing law of an ECT dispute (as discussed in Section VI.C above, it does not). But host State laws are part of the *factual* context for any investment, and necessarily will be relevant to assessing the legitimate expectations of any investor.[1515]

706. As for the *type of State conduct* that can give rise to legitimate expectations on the part of an investor, there is little dispute that direct representations, assurances or commitments made to a specific investor so qualify, provided that the investor relies on such commitments to make investments protected by a treaty.[1516] At least some tribunals would consider representations and assurances to qualify if they were made to a "defined category of recipients," for the evident purpose of inducing investment by a member of that group, rather than to a specific investor.[1517] In this case, however, the Claimants do not rely on either such category. They disclaim having received any direct assurances from State officials or having read, prior to their investment, any investment promotion materials said to have been prepared by State authorities.[1518]

707. The real question in this case is thus whether the *content of laws* in a State can itself give rise to legitimate expectations of legal stability. This is the subject of some debate in investment arbitration

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[1513] CL-83/RL-2, *Electrabel* Decision, ¶ 7.78 (emphasis added).

[1514] RL-158, *FREIF*, ¶ 553 (quoting RL-17/RL-105, *Isolux*, ¶ 794); RL-152, *Cavalum*, ¶ 446 (quoting RL-17/RL-105, *Isolux*, ¶ 794). As the *Cavalum* tribunal further explained, "[b]usiness people will not necessarily be expected to know about such judicial decisions, but their lawyers … can properly be held to a standard of knowledge in respect of such decisions." RL-152, *Cavalum*, ¶ 531.

[1515] *See* CL-195/RL-143, *PV Investors*, ¶ 603; CL-139/RL-131, *RWE*, ¶ 525.

[1516] *See, e.g.,* CL-211/RL-157, *Eskosol* Award, ¶ 425 (citing CL-72, *El Paso*, ¶¶ 375-376, 403, holding that "the FET standard can be breached if there is a violation of a specific commitment," in the sense of one "directly made to the investor," for example in a letter of intent or "through a specific promise in a person-to-person business meeting").

[1517] *See, e.g.,* CL-211/RL-157, *Eskosol* Award, ¶ 432; CL-72, *El Paso*, ¶¶ 375, 377 (distinguishing between commitments that were "specific as to their addressee and those specific regarding their object and purpose," and reasoning with respect to the latter that "a commitment can be considered specific if its precise object was to give a real guarantee of stability to the investor. Usually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course. However, a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.").

[1518] *See, e.g.,* Cl. Reply, ¶ 212; Tr. Day 6, 36:19-37:4; Cl. PHB, ¶¶ 23(g), 41.

jurisprudence.[1519] The Claimants assert not only that a legal framework *can* create legitimate expectations,[1520] but also that it *actually did so* in this instance. The Claimants' case for legitimate expectations is based squarely on the proposition that EBL relied on the language of RD 661/2007 for their expectation that the Plant would receive stable FITs for its operational life, and that this expectation was central to their decision to invest in the shares of Tubo Sol.[1521]

708. The Tribunal turns later to the specific content of RD 661/2007, which in these circumstances must be assessed with great care. As a general matter, however, it agrees with the *PV Investors* tribunal that "expectations which are purported to be founded on general legislation have been treated with caution" in recent jurisprudence.[1522] That is because most laws and regulations simply announce the particular terms that will apply, now or as expected in the future, *under their own auspices*; they do not comment on the mutability or immutability of those terms under *future (replacement)* laws and regulations.[1523] A general legal instrument is unlikely to convey a commitment that it will never be changed, no matter the circumstances.[1524] In circumstances where such commitments are alleged to have been conveyed, tribunals have insisted that there be extremely clear statements made "about the *immutability* of the legal regime, and not just its expected contents" for so long as the regime remains in place.[1525]

[1519] *See* CL-211/RL-157, *Eskosol* Award, ¶ 439 (noting the "healthy debate in the jurisprudence regarding this particular question"); CL-93/RL-80, *Masdar*, ¶¶ 490-491, 504, 511, 520-521 (discussing "two schools of thought" on this issue, but ultimately not deciding the question of legitimate expectations based on general laws, because in that case there were also specific commitments made directly to the investor).

[1520] Cl. Mem., ¶ 268.

[1521] *See, e.g.*, Cl. PHB, ¶ 39 (citing Tr. Day 2, T. Andrist, 28:6-7, for an explanation that he read an English translation of RD 661/2007 which was "clear," and Tr. Day 2, B. Andrist, 73:14-17, for testimony that Fichtner had confirmed Spain had a "clear feed-in tariff decree which provides protection to investors").

[1522] CL-195/RL-143, *PV Investors*, ¶ 576; *see also* CL-139/RL-131, *RWE*, ¶ 457 (stating that "caution would need to be applied with respect to any analysis that treated domestic legal acts that are quite different in nature – i.e. (i) specific commitments made by the host State to an individual investor and (ii) regulations of general nature – as if they generated the same consequences as a matter of international law").

[1523] *See* CL-139/RL-131, *RWE*, ¶ 461 (noting that "a representation in the form of domestic law cannot correctly be elided with a specific promise or contractual commitment: a law remains a norm of general application (greater or lesser), and only applies whilst it remains in force").

[1524] *See* RL-152, *Cavalum*, ¶¶ 438-439 (noting that "[u]sually" general texts will not give rise to justifiable expectations about the freezing of future legislation, "as there is no guarantee that they will not be modified in due course. … Consequently, general legislation, without more, typically does not give rise to legitimate expectations of stability of that legislation."); CL-191/RL-145, *Hydro*, ¶¶ 586, 593-594 ("general laws are not promises, and the risk of change is for entrepreneurs to assess and assume. … Usually general texts cannot contain … commitments" to freeze legislation, "as there is no guarantee that they will not be modified in due course").

[1525] CL-211/RL-157, *Eskosol* Award, ¶ 434 (emphasis in original).

709. Of course, a lesser alternative to a promise of immutability may be a promise that any future legal change will not be applied to a given investor or a defined category of investors. That type of "grandfathering" commitment is still unusual, but it is not unheard of, and in principle a grandfathering pledge could be a basis for legitimate expectations.[1526] Nonetheless, such a pledge still would have to be clearly expressed, in order to create a basis for a protected expectation that particular beneficiaries will be shielded from the effects of an otherwise *bona fide* regulatory change. That requirement of clear expression stems from the fact that such a provision, in essence, is still a waiver (at least for those beneficiaries) of the State's sovereign right to regulate:

> … [A]n international obligation imposing on the State to waive or decline to exercise its regulatory power *cannot be presumed*, given 'the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.' The regulatory power is essential to the achievement of the goals of the State, so to renounce to exercise it is an extraordinary act that *must emerge from an unequivocal commitment*; more so when it faces a serious crisis.… Such a commitment would touch on core competences of the State, to which it is inconceivable the State would implicitly renounce.[1527]

710. In the absence of a clear commitment either not to regulate further or to shield particular beneficiaries against the effects of future regulatory change, the residual rule remains that investors "generally must assume that both politics and good faith legislation in the public interest might have to evolve to meet new challenges and unforeseen developments."[1528] This does not mean that investors are without international protection, however, because State discretion still remains subject to the fundamental guardrails of reasonableness, proportionality and non-discrimination that are addressed separately in the section that follows.

(ii) Reasonableness, Proportionality and Non-Discrimination

711. As discussed above, the presence or absence of "legitimate expectations" is by no means the end of an FET inquiry. That is because, even where there has been no form of State representation, assurance or commitment in a form that would engender protected expectations in a reasonably informed investor, the FET obligation still involves important checks on State conduct through its

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[1526] *See generally* RL-124, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Dissenting Opinion of Philippe Sands, 13 August 2019 ("***OperaFund* Dissent**"), ¶ 17 (noting that "[t]he proposition that an investor's expectation could be based on a specific guarantee in legislation is not of itself problematic"; the issue is what a particular legal provision actually "says and does not say") (citing cases).

[1527] CL-96/RL-95, *RREEF*, ¶ 244 (citations omitted; emphasis added).

[1528] CL-211/RL-157, *Eskosol* Award, ¶ 433.

requirements of reasonableness, proportionality and non-discrimination.[1529] These primary guardrails against improper State conduct are discussed briefly below.

712. First, the FET standard's requirement that State conduct be "reasonable" is generally understood in the context of rationality, otherwise known as a prohibition on arbitrariness. In general, this criteria examines whether State conduct "bears a reasonable relationship to some rational policy."[1530] The *AES* tribunal noted that this requires that "two elements … be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy."[1531] As for the first element, "[a] rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter."[1532] Under an FET clause, a foreign investor "can expect that the rules will not be changed without justification of an economic, social or other nature."[1533] The opposite of rationality is arbitrariness, meaning something that is "not founded in reason or fact but on caprice, prejudice or personal preference."[1534] But as the *AES* tribunal noted, there is a further second element to the test:

> [A] rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an *appropriate correlation* between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.[1535]

Putting these elements together, the *El Paso* tribunal observed that "there are always several methods for dealing" with challenging circumstances in a country. The requirement of reasonableness and non-arbitrariness examines not "whether the measures taken were or were not

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[1529] *See, e.g.,* CL-191/RL-145, *Hydro*, ¶ 568; *see also* CL-122, *Watkins*, Prof. Hélène Ruiz Fabri's Dissenting Opinion, 9 January 2020, ¶ 9 (absent specific commitments and in the context of general regulations, "the functioning of the FET standard requires balancing the regulatory margin of the State with the legal security of investors, the assessment of such a balance being based on a proportionality control").

[1530] CL-42/RL-71, *Saluka*, ¶ 460.

[1531] RL-33, *AES* Award, ¶ 10.3.7.

[1532] RL-33, *AES* Award, ¶ 10.3.8; *see also* CL-211/RL-157, *Eskosol* Award, ¶¶ 385, 400.

[1533] CL-72, *El Paso*, ¶ 372.

[1534] CL-57/RL-14, *Plama*, ¶ 184; *see also* CL-211/RL-157, *Eskosol* Award, ¶ 385.

[1535] RL-33, *AES* Award, ¶ 10.3.9 (emphasis added); *see also* CL-211/RL-157, *Eskosol* Award, ¶¶ 385, 401; CL-195/RL-143, *PV Investors*, ¶ 626.

the best," but simply whether they were "based on a reasoned scheme" that was itself reasonably connected to "the aim pursued."[1536]

713. Second, the FET standard requires that State action be proportionate, in the sense that it not impose burdens on foreign investment that go "far beyond what [is] reasonably necessary to achieve good faith public interest goals."[1537] As to this analysis, the Tribunal agrees with the *Eskosol* tribunal that, "as applied to general sector-wide measures taken in the public interest, with no targeting of a particular investor," the evaluation of proportionality must be based on their "overall features and impacts, and not through the narrow lens of [their] impact on a particular investor."[1538] In other words, a State is not required to canvass the particular circumstances of every single investor in a sector, in concluding that a measure of general applicability is proportionate in its balance of harms. Proportionality is a more general "weighing mechanism that seeks a fair balance between competing interests and/or principles affected by the regulation, taking into account all relevant circumstances."[1539] In this context, however, one of the relevant factors is that investors may have committed capital in consideration of a prior regulatory regime. As the *Blusun* tribunal explained, even in the absence of such specific commitments that such a regime will remain in place, modifications to a regime "should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime."[1540]

714. Finally, although of limited relevance to the pleadings in this case,[1541] the FET standard also requires that State conduct not be discriminatory. The ECT provides its own definition of this

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[1536] CL-72, *El Paso*, ¶¶ 320-322, 325; *see also* CL-211/RL-157, *Eskosol* Award, ¶ 385.

[1537] CL-211/RL-157, *Eskosol* Award, ¶ 410.

[1538] CL-211/RL-157, *Eskosol* Award, ¶ 413. On the origins of the proportionality requirement, *see generally* RL-38, *Electrabel* Award, ¶ 179 ("The relevance of the proportionality of the measure has been increasingly addressed by investment tribunals and other international tribunals, including the ECtHR. The test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved").

[1539] CL-96/RL-95, *RREEF*, ¶ 465; CL-191/RL-145, *Hydro*, ¶ 574; RL-159, *Eurus*, ¶ 360.

[1540] RL-64, *Blusun*, ¶ 319(5). *See similarly* CL-139/RL-131, *RWE*, ¶ 462 (explaining that a proportionality assessment entails "considerations both as to what is necessary and as to the financial burden that is being shifted to those investors who have committed substantial resources on the basis of the earlier regime," as well as assessing whether the State "took into account impacts to such investors in its decision-making process").

[1541] Although the Claimants' Memorial includes the phrase "discriminatory measures" in its summary of Spain's alleged violation of ECT Article 10(1), Cl. Mem., ¶ 217, it does not detail any allegations of discrimination. The Claimants' Reply alleged discrimination primarily in connection with complaints about the TVPEE, which the Tribunal has already found to be outside its jurisdiction (*see* Section V.D(2) above). *See, e.g.,* Cl. Reply, ¶¶ 91, 113,

requirement through ECT Article 10(3), which provides that for purposes of ECT Article 10 as a whole – and thus the ECT Article 10(1) requirement of fair and equitable treatment – the word "Treatment" is defined as "treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable."[1542] In applying any such standard the Tribunal agrees with the *Electrabel* tribunal's analysis that "a mere showing of differential treatment is not sufficient to establish unlawful discrimination." Instead, "[f]or discriminatory treatment, comparators must be materially similar; and there must then be no reasonable justification for differential treatment."[1543] The *Saluka* tribunal's analysis is also helpful in this regard:

> In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[1544]

(iii) Transparency

715. A final component of FET that must be addressed in this summary, given the Claimants' allegations in this case, is the issue of "transparency." The Claimants define this broadly as "free from ambiguity and uncertainty," relying in part on the *Tecmed* tribunal's notion that States should act "totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[1545] The Tribunal is unable to accept this definition, for the same reason that the *Eskosol* tribunal could not:

> These are sweeping propositions, and the Tribunal is unable to accept them in such broad terms, which would provide no room for good faith regulatory flexibility or recalibration even where a State strives to be

131-133. Beyond this, the only allegation of discrimination in the Reply is a single statement that the alleged "clawback" effect of the New Regime "in effect discriminates between old and new plants," by "offer[ing] lower remuneration to plants that were built earlier." Cl. Reply, ¶ 731. The Claimants did not reference discrimination at all in their opening or closing presentations at the Hearing or in their Post-Hearing Briefs. In these circumstances, it is not clear if a "discrimination" claim is even pursued, except in regard to the TVPEE.

[1542] CL-1/RL-20, ECT, Article 10(3).

[1543] RL-38, *Electrabel* Award, ¶ 175.

[1544] CL-42/RL-71, *Saluka*, ¶ 307.

[1545] Cl. Mem., ¶ 292 (quoting CL-31, *Tecmed*, ¶ 154).

> forthcoming about its reasons for change, both through public dialogue and through clarity in its laws.[1546]

716. Rather, like the *Eskosol* tribunal, this Tribunal sees the issue of transparency along the same lines as the *Electrabel* tribunal did. That tribunal found an obligation under the ECT that States seek "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."[1547] In applying this standard, the inquiry again is not specific to the circumstances of any *particular* investor, but rather must be addressed "at the more general level, including whether the State acted secretively to conceal its plans or announced those plans openly and with reasonable explanation and detail."[1548] An assessment of the State's conduct in this regard necessarily must take into account the surrounding circumstances, which include, *inter alia*, its obligations under domestic law, the degree of urgency involved, and the extent to which prior public statements may have alerted interested stakeholders to the potential for further State action. The Tribunal also agrees with the *Stadtwerke* tribunal that the focus is less on isolated slip-ups and more on patterns of conduct, in the sense of whether the evidence reveals a "continuing pattern of non-transparent actions by a government over time."[1549]

e. Non-Impairment Obligations

717. The final legal standard that the Claimants invoke is the proviso in the third sentence of ECT Article 10(1) that "no Contracting Party shall in any way impair by unreasonable or discriminatory measures the[] management, maintenance, use, enjoyment or disposal" of qualifying investments. The Tribunal notes the brevity of the Parties' briefing on this standard,[1550] as well as their mutual cross-reference for its content to other ECT standards that the Tribunal already has addressed. In particular, the Claimants contended in their Memorial that "a breach of this obligation results in a simultaneous breach of the FET standard," and that their briefing "in relation to the FET standard sets out in detail why Spain's measures are unreasonable; those facts will not be repeated here."[1551] The Claimants did not mention "impairment" in their Reply or Post-Hearing Brief, and the only

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[1546] CL-211/RL-157, *Eskosol* Award, ¶ 416.

[1547] CL-211/RL-157, *Eskosol* Award, ¶ 416 (quoting CL-83/RL-2, *Electrabel* Decision, ¶ 7.79).

[1548] CL-211/RL-157, *Eskosol* Award, ¶ 418.

[1549] CL-180/RL-130, *Stadtwerke*, ¶ 311.

[1550] *See* Cl. Mem., ¶¶ 312-313.

[1551] Cl. Mem., ¶¶ 312-313.

mention in their opening and closing presentations at the Hearing was to note that they had asserted an "impairment" claim, for which the Claimants stated, "[t]here's huge overlap with our claim that the disputed measures were arbitrary and disproportionate, so I will not detain you on that."[1552] The Respondent's Counter-Memorial noted the overlap in the Claimants' approach to briefing FET and non-impairment, and did not offer any distinguishing features for consideration.[1553] The Respondent did not discuss "impairment" further in its Rejoinder, and the only mention in its presentations at the Hearing was to quote the Claimants' own statement in their opening about their "impairment" claim having a "huge overlap" with their FET claim.[1554] While the Respondent did return to the "impairment" claim in its Post-Hearing Brief, its arguments there were consistent with the points the Respondent already had presented about rationality and proportionality in the context of the FET standard.[1555]

718. Given the lack of any distinguishing briefing by either Party, the Tribunal agrees that this claim should be addressed under the same rubrics of reasonableness and non-discrimination as considered for the FET claim. This is consistent with the way other tribunals have proceeded in similar circumstances.[1556]

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719. With this summary of the relevant ECT standards provided, the Tribunal begins its analysis below of the various aspects in which the Claimants allege wrongdoing on the part of Spain.

[1552] Tr. Day 1, 103:17-20.

[1553] Resp. C-Mem., ¶ 1135.

[1554] RD-6, Resp. Closing Statement, Slide 95.

[1555] Resp. PHB, ¶¶ 116-125.

[1556] *See, e.g.*, CL-211/RL-157, *Eskosol* Award, ¶¶ 487-488; CL-191/RL-145, *Hydro*, ¶ 567 ("The obligation not to impair investments by unreasonable or discriminatory measures appears as a free-standing obligation, but there is no doubt that the FET standard contains the same obligation"); CL-128/RL-129, *BayWa*, ¶ 532 ("If this were a free-standing obligation, it would overlap considerably if not completely with the obligations contained in the first two sentences of Article 10.1. On this basis, it would not lead to a different result than they do. In the Tribunal's view, unreasonable or discriminatory measures in the general sense are examples of measures that may breach the FET standard as contained in Article 10.1, first and second sentence."); CL-180/RL-130, *Stadtwerke*, ¶ 364 ("The Tribunal considers that while the above reference to 'unreasonable or discriminatory measures' creates a free-standing obligation, it is merely the obverse of the requirement of reasonableness embedded in the concept of FET. This being so, the earlier analysis by this Tribunal of whether the Respondent's measures are to be considered as reasonable within the FET standard equally applies to determining whether Spain enacted unreasonable measures as prohibited by the third sentence of Article 10(1) of the ECT. For reasons of judicial economy, there is no need to repeat the Tribunal's considerations here").

(2) The Alleged Entitlement to Continued Benefits of RD 661/2007 Tariffs

720. The Claimants' first and principal complaint is that Spain deprived the Plant of the specific benefits of RD 661/2007, to which they say the Plant was entitled for its full operational life. According to Claimants, the ECT entitled them to "the stability of the RD 661/2007 economic regime," and protected their expectations "regarding the nature, amount and duration of the FIT offered under RD 661/2007."[1557] Specifically, the Claimants' primary case on legitimate expectations is that once the Plant was finally registered in the RAIPRE, it became entitled to sell electricity at either a fixed Regulated Tariff or a Premium over the market price, each of which would be fixed at "the amounts that were set out in RD 661/2007 … for the entire operational life of the Plant," subject only to inflation adjustments.[1558] The Claimants say they expected that any future changes to RD 661/2007 would apply only to new installations, so that the Plant "would remain unaffected."[1559] Stated otherwise, the Claimants claim that they held "legitimate expectations that no changes to the regulatory regime applying to existing CSP plants would be made."[1560]

721. To the extent these contentions are based on the Claimants' reading of the first sentence of ECT Article 10(1) – its provision that Contracting States "shall … encourage and create stable … conditions for Investors … to make Investments in its Area" – the Tribunal already has determined, in Section VII.D(1)c above, that this provides no stand-alone rights regarding the ongoing treatment of investments, which is governed instead by the following sentences of ECT Article 10(1), including specifically the FET provision. With respect to the FET provision, the Tribunal already has explained, in Section VII.D(1)d above, that *absent specific commitments* to an investor or a defined class of investors, the provision does not entitle investors to legitimately expect a freeze in the regulatory regime applicable to their investments, but only that changes to that regime will be reasonable, proportionate and non-discriminatory. The Claimants' arguments about the reasonableness and proportionality of Spain's regulatory changes are addressed subsequently in this Award. For present purposes, thus, the key issue on the Claimants' primary case is *whether the Claimants received specific commitments*, either that RD 661/2007 would not be changed or that any future changes would not be applied to plants that already were registered in the RAIPRE.

[1557] Cl. Mem., ¶ 272.
[1558] Cl. Mem., ¶ 273.
[1559] Cl. Mem., ¶ 274.
[1560] Cl. Mem., ¶ 125.

722. In examining this claim, it is important to recall the ways in which this ECT case differs from certain others involving Spain's renewable energy sector. First, this is *not a case* where an investor asserts that it relied on any direct representations or assurances made to it by government officials. By contrast, such direct statements were persuasive to tribunals in a number of other ECT cases. For example, in *InfraRed*, the tribunal found that neither RD 661/2007 and its associated press release, nor RAIPRE registration, could be construed as specific commitments regarding the effects of future regulatory change[1561] – but a July 2010 agreement with the solar thermal sector, together with November 2010 letters of waiver by which certain CSP plants formally deferred their start of operations and associated December 2010 resolutions by Spain responding to those waivers, "*did* give rise to a legitimate expectation that CSP plants registered on the Pre-allocation Register would be shielded from subsequent regulatory changes to three specific elements of the Original Regulatory Framework."[1562] Likewise, in *NextEra*, the tribunal rejected a claim that "the mere fact of Regulatory Framework I was a sufficient basis for the expectation that Claimants would be guaranteed the terms of Regulatory Framework I," because "[t]he Framework was based on legislation and legislation can be changed," a fact of which investors "should have been aware." The tribunal likewise rejected expectation claims predicated on RAIPRE registration.[1563] However, the tribunal found that certain "assurances given to [NextEra] by the Spanish authorities," directly in writing and in meetings, changed that analysis, and gave rise to a legitimate expectation that the regulatory regime "would not be changed in a way that would undermine the security and viability of their investment."[1564]

723. This is not such a case; the Claimants do not invoke any statement made directly to them by Spanish authorities. Nor is this a case where an investor claims it relied on statements in investment promotion materials prepared by officials and allegedly aimed at influencing a narrow category of recipients. Tribunals have been divided on the impact of such presentations, with some considering them to be a form of assurance,[1565] and others not.[1566] Here, the Tribunal need not opine on that

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[1561] RL-98, *InfraRed*, ¶¶ 406-408.

[1562] RL-98, *InfraRed*, ¶ 410 (emphasis in original).

[1563] CL-98, *NextEra*, ¶¶ 584-585.

[1564] CL-98, *NextEra*, ¶¶ 587-596.

[1565] *See, e.g.,* CL-92/RL-76, *Novenergia II*, ¶¶ 668-669, 681 (finding that "the Claimant ha[d] convincingly established that its initial expectations were legitimate since there was nothing to contradict the guaranteed FIT in RD 661/2007 and the surrounding statements made by the Kingdom of Spain in e.g. 'The Sun Can Be All Yours' [an IDAE prospectus]").

[1566] *See, e.g.,* CL-195/RL-143, *PV Investors*, ¶ 615 (finding the documents "too general as to engender legitimate expectations that the framework could not be modified," while also making clear that tariff incentives "are policy tools

question, since the Claimants admit that they did not consider these materials prior to their investment. The Claimants candidly admit that they invoke those materials only to show how *the authors* perceived RD 661/2007 at the time, not to claim any reliance on their own part at the time of their investment decision.[1567] The factual matrix in that respect is similar to the *RWE* case, where the tribunal found that "there is no suggestion that the Claimants attended and relied upon any such presentations, and the Tribunal does not see how they could have generated any expectations."[1568]

724. In this case, the Claimants have been clear that their expectations regarding the Plant's lifetime entitlement to RD 661/2007 tariffs was based solely on the contents of the regulation itself,[1569] together with the fact that the Plant achieved final RAIPRE registration within the Tariff Window. Given the Claimants' central reliance on the terms of RD 661/2007, it is important to examine that regulation carefully, both on its own and in the context of the broader legal framework with which a reasonable investor is presumed to be familiar. In examining these matters, the Tribunal also recalls its observation in Section VII.D(1)d that, in the context of general legal instruments, a clear expression would be needed to create any protected expectation that particular beneficiaries will be shielded from later, otherwise *bona fide*, regulatory change.

a. The Text of RD 661/2007 and the Relevance of the RAIPRE Registration

725. The initial question, therefore, is whether the text of RD 661/2007 created a legitimate expectation that plants achieving final RAIPRE registration within the Tariff Window would be entitled to its tariff levels for life, and shielded from any further changes to the tariff regime that might be enacted for new installations.

726. As discussed in Sections III.A(2) and III.A(3), RD 661/2007 replaced RD 436/2004, which had previously been introduced to "unify the legislation developing and implementing the [1997 Electricity Law] with respect to electricity production under the special regime." RD 436/2004 had stated that it offered Special Regime operators "a durable, objective and transparent framework."[1570] Nonetheless, the PER 2005-2010 approved in 2005 anticipated a further revision

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… sufficient to grant investors 'reasonable profitability'," and in any event being issued by "entities [that] were not empowered to enact rules or regulations on energy issues in Spain").

[1567] *See, e.g.,* Cl. Reply, ¶ 212; Tr. Day 6, 36:19-37:4; Cl. PHB, ¶¶ 23(g), 41.

[1568] CL-139/RL-131, *RWE*, ¶ 542.

[1569] Tr. Day 2, T. Andrist, 28:6-7; Tr. Day 2, B. Andrist, 73:14-17; *see also* Cl. Reply, ¶ 232 (arguing that the text of "RD 661/2007 was so clear that it did not require an extensive regulatory analysis").

[1570] C-2/R-48, RD 436/2004, Preamble.

of the Special Regime framework.[1571] The Preamble of RD 661/2007 explained that it had "become necessary" for several reasons to modify that framework.[1572]

727. The Preamble of RD 661/2007 stated, *inter alia*, that the regulation further "develops the principles set forth in [the 1997 Electricity Law]," namely by "guarantee[ing] the owners of special regime installations a reasonable return for their investments, and the consumers of electricity an assignment of the costs attributable to the electricity system which is also reasonable …."[1573] It described a mechanism of calculating both the Regulated Tariff and the Premium over market prices, stating that these would be calculated on the basis of "categories, groups and sub-groups" into which the different facilities would be classified.[1574] Specifically, as explained in Article 25 of RD 661/2007, the Regulated Tariff "shall be determined as a function of the Category, Group, or Sub-Group to which the facility belongs," and as well as the installed power,[1575] with the CNE again authorized to define the relevant "technologies and standard facilities" to be used in setting tariff levels.[1576]

728. The Preamble of RD 661/2007 stated that a scheduled review of compensation was anticipated to take place at the end of 2010.[1577] That scheduled review was detailed further in Article 44.3, which provided that once reports were available on the extent to which the PER 2005-2010 goals had been achieved and new goals were established in the next Renewable Energy Plan for 2011-2020, all of the tariffs in RD 661/2007 "will be reviewed," to take into account (*inter alia*) developments in technology cost and electricity demand, and to "guarantee[] reasonable returns with reference to the cost of money on capital markets." Further "adjustment[s]" would be carried out every four years after 2010.[1578]

729. Article 44.3 stated, however, that *these* anticipated four-year revisions (namely, the ones "referred to *in this section*" or "indicated *in this paragraph*," depending on translation) would "*not affect*" existing facilities, namely ones which had obtained start-up permissions by a stated deadline.[1579]

[1571] C-3/BRR-69, Summary PER 2005-2010, pp. 47-48.

[1572] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 73).

[1573] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 74).

[1574] C-4/R-49, RD 661/2007, Preamble (referring to the English translation of C-4, pp. 74-75, 77).

[1575] C-4/R-49, RD 661/2007, Article 25 (quoting from the English translation of C-4, p. 102).

[1576] C-4/R-49, RD 661/2007, Article 44.4 (quoting from the English translation of C-4, p. 118).

[1577] C-4/R-49, RD 661/2007, Preamble (referring to the English translation of C-4, pp. 74-75, 77).

[1578] C-4/R-49, RD 661/2007, Article 44.3 (quoting from the English translation of C-4, pp. 117-118).

[1579] *Compare* C-4, RD 661/2007, Article 44.3, p. 118, *with* R-49, RD 661/2007, Article 44.3, p. 118 (emphasis added).

This is the specific provision that the Claimants invoke as entitling them to the continued application of RD 661/2007 tariffs, even if the regulation as a whole were replaced (for new facilities) by a subsequent regulation.[1580]

730. In the Tribunal's view, however, the Claimants read into this provision more than it actually provides. In either translation, as italicized in the paragraph above, the statement is limited to adjustment cycles that were presently anticipated to take place *within the rubric* of RD 661/2007 itself. Article 44.3 no doubt states a present intention that existing installations would not be subject to future cycles of tariff review so long as the regulation remained in effect. But that is far different from exempting those installations from the impact of entirely *new* sector-wide regulations, should RD 661/2007 itself be replaced by a subsequent regime. Nothing in Article 44.3, or in RD 661/2007 more generally, purports either to promise the immutability of the regulation itself or to create a vested right that existing installations would be shielded for their lifetime from all future regulatory developments pertaining to the structure, calculation or amount of renewable energy tariffs. No such promises were expressed.

731. The Tribunal acknowledges the Claimants' argument that the last sentence of RD 661/2007 was added in the second draft of the regulation, after the CNE had expressed certain concerns about an earlier draft.[1581] However, the Respondent is correct that the CNE's preference was that RD 661/2007 not be applied at all to existing facilities,[1582] a request that was not granted in the final decree. The fact remains that RD 661/2007 *did* impact existing facilities, just as prior Royal Decrees had done, and it did not state, in any fashion, that it was the last Royal Decree that might ever do so. The language added in the second draft was far narrower, simply providing that the tariff revisions anticipated within RD 661/2007 – *i.e.*, so long as that regulation remained in effect – would apply to new facilities only.

732. This close reading of Article 44.3 is particularly important in light of the very similar language contained in Article 40.3 of the prior RD 436/2004. As discussed in Section III.A(2), RD 436/2004 itself had provided a set of tariffs for Special Regime installations, and provided for scheduled revisions to be made in 2006 and every four years thereafter.[1583] However, Article 40.3 provided that the "tariffs, premiums, incentives and supplements resulting from any of the revisions *provided*

[1580] *See, e.g.,* Cl. Mem., ¶ 275; Cl. Reply, ¶ 358 (describing Article 44.3 as including a stabilization commitment).

[1581] Cl. PHB, ¶ 29.

[1582] Resp. PHB, ¶ 92; *see also* RD-6, Resp. Closing Statement, Slide 72.

[1583] C-2/R-48, RD 436/2004, Article 40.1.

for in this section" – *i.e.*, the regularly scheduled revisions foreseen by RD 436/2004 – would apply solely to new plants and not existing ones.[1584] Nonetheless, this language did not prevent RD 436/2004 from being replaced *in toto* by RD 661/2007, nor did it shield existing installations from the impact of RD 661/2007.

733. In short, as a matter of pure textual analysis, the Tribunal (like others before it) finds no representation or assurance in Article 44.3 that future regulation would not replace RD 661/2007, or that existing installations effectively would be "grandfathered" under its terms so as to continue to enjoy its tariff levels for life.[1585] Certainly, nothing in the language of RD 661/2007 announced such a dramatic sea change from RD 436/2004, which had contained analogous language (exempting existing installations from scheduled tariff revisions) that in no way prevented RD 436/2004's wholesale replacement by RD 661/2007 itself.[1586]

734. The fact that PE2 was registered in the RAIPRE within the Tariff Window adds little to the legitimate expectations analysis. As discussed in Section III.A(2) above, Spain had established various registry systems long before RD 661/2007 came into effect, including some which recorded all facilities, in both the Ordinary and the Special Regime. Moreover, prior Royal Decrees – including, for example, RD 2818/1998 (which first created the RAIPRE specific to the Special Regime) and RD 436/2004 – had linked registration to participation under *their* applicable tariff

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[1584] C-2/R-48, RD 436/2004, Article 40.3 (emphasis added).

[1585] *See* CL-195/RL-143, *PV Investors*, ¶ 600 ("The Tribunal is unable to discern in [Article 44.3] a stabilization commitment that would guarantee the Claimants an immutable tariff for the operational lifetime of their plants."); CL-139/RL-131, *RWE*, ¶ 538 (expressing "considerable doubts … [that] Article 44.3 can correctly be interpreted as a form of representation … that, come what may, the RD 661/2007 remuneration regime would remain substantially in place so far as they were concerned"); CL-180/RL-130, *Stadtwerke,* ¶ 283 (finding that "the second paragraph of Article 44(3) … could only be reasonably interpreted as limited to the adjustment procedure set out in the first paragraph of Article 44(3) …. If [that] adjustment procedure … itself were to be amended or repealed, then the non-retroactive application provision in the second paragraph … would cease to have any effect"); *see also* RL-124, *OperaFund* Dissent, ¶ 19 (noting that "Article 44(3) provides some degree of stability," in the sense that "so long as Article 44(3) and RD 661/2007 applied, the Claimants were entitled to receive the economic rights provided … in accordance with that legislation," but "[t]hat, however, is not the end of the matter," since RD 661/2007 does not state that it "could not be changed, or that it would not be changed, or that pre-existing rights would be grandfathered if [it] was repealed and replaced").

[1586] *See similarly* CL-195/RL-143, *PV Investors*, ¶ 602 (noting that "a clause analogous to Article 44.3, i.e. Art. 40.3, … had not barred the Government from introducing still other changes through the very instrument (RD 661/2007) under which the Claimants decided to invest and on which they base their Primary Claim."); CL-139/RL-131, *RWE*, ¶ 538 (considering that Article 44.3 "was a provision in a regulation of general application that, just as had been the case with RD 436/2004, was susceptible to change by the State – notwithstanding, in the case of RD 436/2004, the stability that was to some extent established by its Article 40.3"); CL-180/RL-130, *Stadtwerke,* ¶ 277 ("[t]he text of Article 44(3) of RD 661/2007 is almost identical to the previous Article 40(3) of RD 436/2004," which "could not have produced legal stabilization because it was repealed and replaced by RD 661/2007").

schemes.[1587] This obviously did not prevent RD 2818/1998 from being repealed by RD 436/2004, nor did it prevent RD 436/2004 in turn from being replaced by RD 661/2007. Finally, as for RD 661/2007's specific reference to RAIPRE registration, Article 17 of RD 661/2007 (like the Royal Decrees before it) required registration in order for installations to participate "in the economic regime set out by this Royal Decree,"[1588] but this provision contained no assurances about the impact of future Royal Decrees. In short, the Tribunal agrees with the many other tribunals who have considered RAIPRE registration as merely administrative in effect, and not as a source of representations and assurances that registered installations would be shielded from future regulatory change.[1589]

735. Finally, and in any event, the Tribunal is unable to accept that a reasonable investor would be able to stop at a mere textual reading of RD 661/2007, to conclude that it afforded existing installations a striking and exceptional exemption from the impact of all future sector-wide regulation. A reasonable investor would need to consider such a proposition within the broader context of the Spanish legal system, including its history of frequent regulatory changes and the prior pronouncements of its highest courts on issues of both regulatory discretion and legal certainty. The Tribunal turns next to these issues below.

b. The Context of RD 661/2007: Spain's Framework for Electricity Regulation

736. The contention that RD 661/2007 assured investors of the perpetual application of its terms to installations that had begun operations, regardless of any future developments, is even more unfounded in the broader context. A legitimate expectations analysis does not permit a single regulation to be read "in isolation."[1590] That regulation must be read, instead, in the context of the applicable legal framework and history, which includes the decisions of a State's highest courts –

[1587] *See* C-1/R-46, RD 2818/1998, Article 15(1); C-2/R-48, RD 436/2004, Article 15(1).

[1588] *See* C-4/R-49, RD 661/2007, Article 17(c) (quoting from the English translation of C-4, p. 95).

[1589] *See, e.g.,* RL-159, *Eurus*, ¶ 264 (describing RAIPRE registration as "essentially administrative in effect; it qualified applicants to receive FITs but did not entail a binding promise that these would be maintained unchanged"); RL-152, *Cavalum*, ¶ 550 (rejecting notion that RAIPRE registration "amounted to a specific commitment, or created vested rights, because it was simply an administrative requirement, without creating any rights under Spanish law, and it could not be endowed with any greater rights under international law"); CL-180/RL-130, *Stadtwerke,* ¶ 306 (RD 661/2007's provisions "make the right to receive the remuneration set out in RD 661/2007 contingent upon the registration of the facility; they do not purport to create additional rights to a stabilized regime for remuneration"); CL-139/RL-131, *RWE*, ¶ 544 ("the Tribunal sees RAIPRE registration as the completion of the administrative requirements for qualification under the given Special Regime, not as an independent commitment to a given investor"); RL-98, *InfraRed*, ¶ 408 (the requirement to register was "meant to restrict the conditions governing access to remuneration under the Special Regime, not to guarantee immutable economic rights to all CSP plants or a steady flow of remuneration over their operational lifespan").

[1590] CL-195/RL-143, *PV Investors*, ¶ 588.

about which (as discussed in Section VII.D(1)d above) a reasonably diligent investor is presumed to know.

737. In this case, the applicable legal framework begins with the hierarchy of laws. As discussed in Section III.A(1), laws enacted by the Parliament have primary authority in the Spanish legal system, second only to the Constitution. RDLs have the next highest rank, but are reserved for situations of extraordinary and urgent need. RDs are subordinate to laws and RDLs, and are intended as mechanisms to implement those; they can only regulate within the framework established by those hierarchically superior norms. It is understood, however, that a given RD may not supply the *only* way to implement a given law, and as a general matter the Spanish system provides authority for there to be iterative RDs, evolving as needs require, to ensure the proper implementation of the underlying objectives and commands of the overarching law. Moreover, the executive cannot, in an RD, bind the Parliament not to amend or repeal a law, including the very law that provides the authority for the executive to have enacted that RD in the first place.

738. As applied to the SES, the superior law was the 1997 Electricity Law, until the legislature replaced that law sixteen years later with Law 24/2013. The 1997 Electricity Law was implemented over its 16-year history through a succession of different RDLs and RDs, as its own terms anticipated and provided: Article 30.4 of the 1997 Electricity Law provided that remuneration for Special Regime operators would be "under statutory terms set out in regulations" to follow.[1591] Both Parties have translated this phrase in Article 30.4 using the plural form ("*regulations*"), which conveys a common understanding that the implementation of the 1997 Electricity Law might, over time, require successive regulation. The Spanish original conveys this understanding somewhat differently, using the phrase "*en los términos que reglamentariamente se establezcan*"[1592] (essentially, "in the terms established by regulation"). While the phrasing differs slightly, the import is the same: it confirms the legislature's expectation that the 1997 Electricity Law would be subject to a process of on-going regulation.[1593]

[1591] C-10/R-27, 1997 Electricity Law, Article 30.4.

[1592] C-10, 1997 Electricity Law, Article 30.4 (Spanish).

[1593] *See similarly* RL-158, *FREIF*, ¶¶ 552-553 ("a reasonable, diligent investor … should have understood the hierarchy of the Spanish regulatory framework. … Royal Decrees can be enacted by the Government and be replaced with other Royal Decrees as a regulatory tool while remaining in the parameters of Law 54/1997."); RL-159, *Eurus*, ¶ 331 (the 1997 Electricity Law "stated a coherent general principle" about reasonable return, which "is inconsistent with the thesis that particular Royal Decrees … stabilized the regime. The 1997 Law was to be implemented by regulations which would likely to change and did change, and not in any uniform direction favouring the recipients.").

739. By the time that EBL invested in Tubo Sol in 2009, there already had been numerous different regulations seeking to implement the 1997 Electricity Law, and each successive regulation to some degree revised or supplanted the prior one. RD 661/2007 was hardly the first in the series, and it therefore should have been foreseeable to a reasonable investor that it might not be the last. That is particularly the case given that each successive regulation, including RD 661/2007 itself, had justified its terms on the basis of developing knowledge and circumstances, and a need to calibrate (and recalibrate) renewable energy remuneration to remain consistent with the overarching goals of the 1997 Electricity Law.[1594] As the *PV Investors* tribunal observed, "the regulatory framework was subject to continuous changes aimed at adapting it to the constantly evolving technological and economic circumstances. This propensity for change should have been clear to any reasonable operator investing in this sector."[1595]

740. There certainly was nothing in the *text* of RD 661/2007 to indicate that it was an exception to the prior evolution of RDs, in service of implementing the broader goals of the 1997 Electricity Law. To the contrary, Article 17 of RD 661/2007, which is the provision that conferred the right to be remunerated according to the terms of the Decree, commenced with the following text: "Without prejudice to the provisions of Article 30.2 of Law 54/1997 …."[1596] As the *Stadtwerke* tribunal noted, this "[w]ithout prejudice" language confirmed that Article 30 of the 1997 Electricity Law was controlling, which suggests that the remuneration terms of RD 661/2007 could remain in effect only so long as the Ministry viewed them as still appropriate to achieve the broader objectives of the 1997 Electricity Law.[1597] Meanwhile, as discussed in Section VII.D(2)a above, there was no contrary statement in RD 661/2007 declaring that, regardless of circumstances, RD 661/2007 would be the last and final regulation that could apply to existing installations.

[1594] *See* Sections III.A(2) and III.A(3) above (quoting Preambles of RD 2818/1997, RD 436/2004, and RD 661/2007); *see also* CL-180/RL-130, *Stadtwerke*, ¶ 281(3), (5) ("an investor who had engaged in an appropriate due diligence of the Spanish regulatory framework for electricity production from renewable sources would have been aware … [that] [s]everal regulations preceded RD 661/2007 and their promulgation, amendment and/or repeal was justified by the Ministry as necessary to give effect to changing market conditions for the calculation of the premium; … In the Preamble to RD 661/2007, the Ministry justified the promulgation of the Royal Decree as necessary in order to take into account changing market conditions and to preserve the principle of a reasonable rate of return set out in the 1997 Electricity Law.").

[1595] CL-195/RL-143, *PV Investors*, ¶ 602. *See similarly* RL-124, *OperaFund* Dissent, ¶ 20 ("A reasonable and diligent investor would have been aware that the legal regime had recently changed, that earlier Royal Decrees had been changed: RD 661/2007 replaced RD 436/2004, which itself replaced RD 2818/1998. One might have thought that the regularity with which Royal Decrees were adopted and then replaced might cause a reasonable and diligent investor to take some steps to inform itself as to the risk of future changes" (emphasis in original)).

[1596] C-4/R-49, RD 661/2007, Article 17(c) (quoting from the English translation of C-4, p. 95).

[1597] CL-180/RL-130, *Stadtwerke*, ¶ 282(3).

741. Moreover, the Spanish Supreme Court had rejected numerous challenges to successive regulation of the electricity sector, each time explaining that under the Spanish legal system, including applicable EU law on principles of legal certainty, investors had no right to assume that the regulatory framework would not change. Each time, the Supreme Court emphasized that the principles of the applicable law (the 1997 Electricity Law) were paramount, but the executive had authority to recalibrate its implementing mechanisms as lessons were learned from past regulation and circumstances developed. Thus, well before EBL committed to purchase Tubo Sol shares from Novatec in June 2009, the Spanish Supreme Court had rejected challenges first to RD 436/2004 and then to various RDs that amended RD 436/2004, based on allegedly impermissible changes to the remuneration terms established by the prior RD 2818/1998.

742. Specifically, in at least five successive judgments between 2005 and 2007, described in more detail in Section III.B above, the Supreme Court had announced the following principles:

- 5 July 2005: Article 30 of the 1997 Electricity Law leaves the determination of premiums for Special Regime facilities "in the hands of the Government," which provides it with "a margin of freedom within the parameters established in this provision … there is nothing to prevent another regulation of the same hierarchical level from modifying" a prior one.[1598]

- 15 December 2005: "There is no legal obstacle to the Government, in the exercise of its regulatory powers and the broad authority it has in such a heavily regulated field as that of electricity, modifying a specific remuneration system providing [sic] it remains within the framework laid down by the [1997 Electricity Law]."[1599]

- 25 October 2006: "[T]he owners of electric power production facilities under the special regime have no 'unmodifiable right' to the fact that the financial scheme that regulates the receipt of premiums will remain unaltered…. The remuneration scheme … does not guarantee … the indefinite permanence of the formulas used to set the premiums."[1600]

- 20 March 2007: "[T]he grounds used in [the Supreme Court's ruling of 25 October 2006] are also applicable on this occasion to dismiss the appeal as well," notwithstanding the appellants'

[1598] R-80, Judgment App. 73/2004, pp. 9-10 (quoting a prior Judgment of 5 July 2005).

[1599] R-80, Judgment App. 73/2004, p. 11.

[1600] R-81, Judgment App. 12/2005, p. 3.

complaint that RD 2351/2004 had reduced by 22.6% the premiums they otherwise would have received under RD 436/2004.[1601]

- 9 October 2007: The Supreme Court "has maintained, effectively, the same jurisprudence … that we now reiterate, that the subsidy [for renewable energy operators is] … recorded under discretionary powers of Public Administration," which allow the government to "act with full discretionary power" based on "circumstances … of an economic or environmental character." Moreover, "the principle of regulatory hierarchy" allows a RD to be "modified or quashed" by another RD, and "nothing impedes the … regulatory authority to change previous dispositions of equal hierarchical levels to adapt these to the circumstances that political or economic circumstances demand at different times."[1602]

743. The Claimants contend that these numerous Supreme Court judgments were not relevant to their legitimate expectations, because the judgments did not interpret the "key provisions" of RD 436/2004 or RD 661/2007.[1603] But the fact remains that the Supreme Court consistently rejected challenges to RDs that decreased the remuneration operators otherwise would have received under prior regulations. In doing so, the Supreme Court repeatedly emphasized the broader principles in Spanish law that confirmed the Government's authority and discretion to adapt regulations over time to new circumstances, and it rejected contrary arguments invoking "legal certainty" and "legitimate expectations." Several of the Supreme Court pronouncements were issued the same year as RD 661/2007. A diligent investor should have appreciated, in this context, that there was at least some risk that RD 661/2007 also could be modified or supplanted – prompting at the very minimum a deeper inquiry into regulatory risk than the Claimants' simple assumption that RD 661/2007 uniquely guaranteed existing plants fixed FITs for decades to come.

744. Because the 2005-2007 Supreme Court judgments should have put a diligent investor on such notice,[1604] there is no imperative for the Tribunal to decide whether the Claimants should be deemed

[1601] R-82, Judgment App. 11/2005, pp. 2-3 (quoting extensively from R-81, Judgment App. 12/2005).

[1602] R-83, Judgment App. 13/2006, p. 4.

[1603] Cl. Reply, ¶ 317.

[1604] *See similarly* RL-152, *Cavalum*, ¶ 515 (concluding that, while the 2005-2007 Supreme Court decisions do not deal with RD 661/2007, "they reveal a consistent jurisprudence from which the following propositions can be derived: the Spanish Government may modify a specific remuneration system provided that it remains within the framework of Law 54/1997; electricity producers do not have an inalienable right to an unchanged economic regime … or that the formulae for fixing the premiums will stay unchanged; and one of the regulatory risks which they undertake is that premiums or incentives may be varied within the limitations of Law 54/1997").

also to have been on constructive notice, before EBL's initial investment,[1605] of the Supreme Court's two subsequent decisions in December 2009. (As discussed in Section III.B, those decisions dismissed appeals against RD 661/2007 that were predicated on its allegedly impermissible override of RD 436/2004; the Supreme Court reiterated its jurisprudence from 2005-2007, and in one of the decisions specifically rejected the appellants' contention that Article 40.3 of RD 436/2004 conveyed a stabilization commitment.[1606]) The Tribunal acknowledges the debate between the Parties about whether the critical date for assessing the Claimants' legitimate expectations falls before or after these December 2009 judgments. That depends on whether the critical date is deemed to be 12 June 2009, when EBL entered into the Investment Agreement with Novatec, or 29 December 2009, when EBL closed on that transaction through the SPA.

745. The answer to that question might depend, as a matter of principle, on whether one views the "legitimate expectations" doctrine as focused primarily on the *act of investing* (which is what ultimately qualifies an investor for treaty protection), or alternatively on an investor's *decision-making process* (which might conclude prior to its actual making of an investment). The choice between these approaches might matter in rare cases where the lag between decision and action is significant, and where intervening events arguably changed the landscape of what treatment an investor legitimately could expect from the host State. Here, however, the Tribunal finds no such dramatic change in the Supreme Court jurisprudence. The December 2009 decisions simply applied to the *latest* regulatory change (RD 661/2007's abrogation of RD 436/2004) the same longstanding reasoning that the Supreme Court had been enunciating consistently for some time with respect to prior regulatory changes.

746. Moreover, even before the Supreme Court issued its ruling on the permissibility of RD 661/2007's replacement of RD 436/2004, the fact remained that the Government had seen fit to implement such wholesale replacement in just over three years. At the very least, that should have put investors on notice that the Government did not consider anything in the text of RD 436/2004 (including its Article 40.3) to limit its discretion to enact new tariff rules with respect to existing installations.

[1605] There is no question that EBL was on constructive notice of these 2009 Supreme Court judgments by 2018, when it decided to acquire a further 12% interest in Tubo Sol. Moreover, this additional share purchase postdated the Initial Disputed Measures, and therefore cannot – by any stretch of imagination – be said to have been in continued reliance on "stability" commitments that Spain allegedly made prior to those measures. Accordingly, as to the portion of EBL's investment represented by these 12% shares, there could be no basis for an FET claim predicated on a violation of legitimate expectations, although in principle there still could be other grounds for a claim based on distinct elements of FET (*e.g.*, alleged unreasonable or disproportionate conduct).

[1606] R-84, Judgment App. 151/2007, pp. 1-2, 6; R-85, Judgment App. 152/2007, pp. 2-3, 5-7.

This notice of the Government's evident willingness to replace one regulation with another should have prompted investors at minimum to take further advice on the issue of regulatory risk. And as discussed below, the record confirms that knowledgeable observers in Spain, when asked the relevant questions, contemporaneously understood that – like RD 436/2004 before it – RD 661/2007 did not remove regulatory discretion in the renewable energy area, and accordingly did not immunize investors in that area from continuing regulatory risk.

c. The Contemporary Understanding about Retained Regulatory Discretion

747. The broader legal context of RD 661/2007, discussed in the subsections above, was neither obscure nor unknowable at the time EBL invested (or agreed to invest) in Tubo Sol. The record in this case demonstrates contemporaneous recognition by others that the SES involved a degree of regulatory risk even after the issuance of RD 661/2007. This contemporaneous recognition is useful to dispel any suggestion that Spain's arguments now about knowable regulatory risk are based on hindsight, and that investors in 2009 could not have expected existing installations to face potential changes to the applicable tariff regime.

748. First, it should be recalled that the lease of land for the planned PE2 facility was signed in May 2008, well after RD 661/2007 took effect. This lease permitted TBSM, the Novatec subsidiary which two years earlier had registered PE2 as a plant to be developed under the Special Regime, to terminate its obligations at any time if the Special Regime was "modified to decrease the profitability of the exploitation … in relation to the parameters currently in force."[1607] Among other things, the lease specified that termination rights would apply in the event of modifications to the "legal conditions governing … the operation, subsidy, premiums, rates, incentives and, in general any other regulated aspect" that could reduce PE2's profitability below what was predicted under the "parameters currently in force" (*i.e.*, RD 661/2007).[1608] This provision effectively operated to allocate risk, as between the lessor and lessee of the land, of the Government's issuing further regulations that might reduce FIT levels or otherwise alter the remuneration regime. The fact that the provision was included in the 2008 Land Lease Agreement is itself evidence that regulatory change was foreseeable as a possibility notwithstanding the terms of RD 661/2007, whatever odds each side to the transaction might privately assign to this eventuality.

[1607] C-214, 2008 Land Lease Agreement, Article 6 (quoting from the translation in Resp. Rej., ¶ 784).

[1608] C-214, 2008 Land Lease Agreement, Article 6 (quoting from the translation in Resp. Rej., ¶ 784).

749. One month after that transaction (in June 2008), the leading Spanish firm Cuatrecasas provided Novatec with the Cuatrecasas Report, which was a memorandum on the regulatory structure applicable to the solar thermal structure. As discussed in Section III.C above, the Cuatrecasas Report advised Novatec that "[t]here have been up to today's date four different legal frameworks governing the Special Regime of electricity production in Spain" – RD 2366/1994, RD 2818/1998, RD 436/2004 and RD 661/2007 – and that each successive one had "abrogat[ed], respectively, previous dispositions," albeit with certain transition periods for existing installations. Cuatrecasas expressly cautioned that "this past experience demonstrates that further changes of the current legal framework could occur in the future …"[1609] Evidently, Cuatrecasas did not see anything in RD 661/2007 that altered this conclusion, including Article 44.3 on which the Claimants place so heavy a reliance.

750. The Claimants admit that Novatec shared the Cuatrecasas Report with EBL in November 2008.[1610] The same month, EBL's Supervisory Board noted the "[p]roblem of … legal certainty" in Spain.[1611] EBL in turn shared the Cuatrecasas Report with its experts, Fichtner and B&B.[1612] Nonetheless, it appears that EBL chose not to take any legal advice of its own on the issue of regulatory stability. As discussed in Section III.C above, EBL asked its Spanish legal advisor B&B to advise it on only certain *other* questions, which are summarized in the two reports B&B issued in January and April 2009.[1613] EBL's witness Mr. T. Andrist specifically confirmed that EBL did not request B&B to provide any legal assessment of the possibility of further changes to the regulatory regime.[1614] As for Fichtner, its work was technical and financial in nature: it was asked to model potential returns that EBL might expect on the basis of certain assumptions, *e.g.,* about costs and production, and apparently also assumed for this exercise the permanence of the RD 661/2007 FITs. But Fichtner expressly stated that its report "does not cover evaluations of a legal nature."[1615] It thus appears that

[1609] C-168, Cuatrecasas Report, pp. 1, 14.

[1610] Cl. Reply, ¶ 248.

[1611] C-68, Minutes of Meeting of EBL's Supervisory Board, 26 November 2008, p. 2.

[1612] Cl. Reply, ¶ 248; *see also* CD-6, Cl. Closing Statement, Part 2, Slide 59 ("the Claimants' experts reviewed the Cuatrecasas report").

[1613] C-69, First B&B Report, pp. 3, 4, 22, 28; C-77, Second B&B Report, pp. 6-10.

[1614] Tr. Day 2, T. Andrist, 27:2-14.

[1615] C-72, Fichtner Due Diligence Report, p. 1-1 (PDF p. 6).

neither of EBL's outside experts were asked to consider the regulatory risks that Cuatrecasas had specifically flagged to Novatec, and that Novatec had duly shared with EBL.[1616]

751. Nonetheless, EBL and Novatec expressly included, in their June 2009 Investment Agreement, a clause that specifically addressed their respective obligations in the event Spain changed the RD 661/2007 regime in the coming months. Clause 3.1 required TBSM and Tubo Sol to take "all reasonable steps" to obtain preliminary RAIPRE registration, which was a condition precedent for the closing of the transaction. Their obligation to take such steps was dependent, however, on the condition of "no variation being made to the terms of Royal Decree 661/2007 or Royal Decree [Law] 6/2009 or any other variation being made to the regime provided by either of those decrees."[1617]

752. The Claimants have explained that the only regulatory risk they subjectively foresaw at the time was that Spain might change its regime before the Plant achieved preliminary RAIPRE registration, because they viewed such registration as key to locking in the lifetime benefits of RD 661/2007, even if there later were regulatory changes applicable to newer plants.[1618] But this conclusion was not a matter on which they took any Spanish legal advice, and it certainly was not consistent with the legal advice that Novatec had obtained contemporaneously from Cuatrecasas and shared with EBL. Nothing in the Cuatrecasas Report suggests a basis for complacence in that respect. There is certainly no suggestion in that Report that once an installation achieves RAIPRE registration or begins operations, it was guaranteed by law not to be affected, even if "further changes of the current legal framework … occur in the future," as the Report stated that "past experience demonstrates … could" indeed come to pass.[1619]

753. In this context, the Tribunal recalls its discussion in Section VII.D(1)d(i) of the relevance of due diligence under the "reasonable investor" standard applicable to a legitimate expectations analysis. EBL is certainly not the first investor in Spain to have chosen not to seek advice on regulatory risk.[1620] But that does not immunize it from the consequences of that choice. The legitimate

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[1616] Mr. T. Andrist explained that EBL did not consider it necessary to take legal advice on this issue, because "we of course have read 661/2007 at the time, and what we read there was clear to us, what it stated." Tr. Day 2, T. Andrist, 28:6-7.

[1617] C-16, Investment Agreement, Clauses 3.1, 3.2.

[1618] *See, e.g.,* Cl. Reply, ¶¶ 257-259.

[1619] C-168, Cuatrecasas Report, p. 14.

[1620] *See, e.g.,* CL-191/RL-145, *Hydro*, ¶ 616 ("The striking result is that the Claimants never sought, nor received, advice on regulatory risk"); CL-139/RL-131, *RWE*, ¶¶ 508, 510, 513 ("although there was undoubtedly due diligence

expectations analysis is based not on the subjective expectations of a particular investor, but rather on the knowledge that a reasonably informed investor would have, based on the exercise of appropriate due diligence that includes, *inter alia*, a presumptive inquiry into the relevant legal framework, including decisions of a State's highest courts. In this case, the Cuatrecasas Report makes clear that the possibility of future change to the RD 661/2007 regime, applicable potentially to existing as well as new plants, was contemporaneously foreseeable. Novatec had been advised of that possibility in a legal report it made available to EBL. Whether or not EBL took the point on board, or chose to investigate further, is irrelevant to the objective analysis that the legitimate expectations standard requires.

d. Conclusion on Primary Stability/Legitimate Expectations Claim

754. In conclusion, the Tribunal is unable to accept the Claimants' first and principal complaint, which is that Spain violated the terms of ECT Article 10(1) when it deprived the Plant of the specific benefits of RD 661/2007, to which the Claimants say the Plant was entitled for its operational life. The text of RD 661/2007 did not provide them with any such stabilization or grandfathering rights, and particularly not with the clarity that would be required to read a single regulation as a broader relinquishment of a State's future regulatory authority. This is even more apparent when RD 661/2007 is viewed in the broader context of Spain's many prior regulatory changes to renewable energy remuneration, and the Supreme Court's confirmation that the Government had discretion to make such changes in pursuit of the broader objectives of the 1997 Electricity Law. This broader context was objectively knowable and could have been known with the exercise of reasonable due diligence into the question of regulatory stability. For these collective reasons, the Tribunal rejects the Claimants' claim to a "legitimate expectation[] that no changes to the regulatory regime applying to existing CSP plants would be made."[1621]

(3) The Rationale for Change and the General Approach of the "New Regime"

755. This conclusion is not the end of the analysis, however. Even though a State retains authority in principle to change its regulatory regime, it remains subject (in doing so) to the other requirements of ECT Article 10(1). This includes the requirements of reasonableness and proportionality.

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with respect to the economics of the major acquisitions and matters such as whether good title was being obtained, the position was different for the regulatory regime and the risk of changes to the regime…. [N]o external legal advice was sought on the regulatory regime" or "on the applicable law and regulations").

[1621] Cl. Mem., ¶ 125.

756. In this next section, the Tribunal accordingly examines the Claimants' contention that it was unreasonable and disproportionate for Spain to change the regime for renewable energy remuneration for the *stated reasons* and in the *general manner* that it did, as expressed particularly in RDL 9/2013 and subsequently Law 24/2013.[1622] The following section, Section VII.D(4) below, then turns to several more specific complaints about particular features of the New Regime and the way in which it was implemented with respect to the Plant. In order to put these complaints in context, however, it is useful first to recall the broader economic and policy context of Spain's approach to renewable energy development, in which the debate occurs.

a. The Long-Standing Focus on Balancing Generator Subsidies and Consumer Costs

757. The first contextual point is that the issues in this case all concern *State subsidies* to support the development of energy technologies that could not compete effectively on a liberalized, competitive energy market. In granting such subsidies, Spain pursued policy goals regarding clean energy that were encouraged by various EU energy directives. But the nature of State subsidies is nonetheless that they distort competition by providing benefits to certain undertakings over others, and that they do so at a cost which must be borne by someone – either taxpayers or energy consumers. In the Spanish context, where the law had long established a principle of sustainability of the overall electricity system, the burden of State subsidies to energy producers was intended to be borne by consumers, without the need for the State to inject additional funds into the system that ultimately would be financed by consumers. These principles were clearly reflected in the 1997 Electricity Law, as discussed in Section III.A(2) above.[1623]

758. For this reason, the 1997 Electricity Law also emphasized the need to balance the extent of State subsidies with the burden on consumers, and to do so in a way that encouraged and rewarded efficiency in energy production, to make that burden no greater than necessary. The 1997 Electricity Law recognized that renewable energy producers would need to be assured the

[1622] The Tribunal does not focus on RDL 2/2013, which the Claimants describe as having "a limited effect in practice," because for that measure the Claimants do not allege FET violations based on purported unreasonableness or disproportionality. Their only complaint about the short-lived RDL 2/2013 (which was itself replaced by RDL 9/2013) is that it made clear the broader intention "to cut the FIT." Cl. Mem., ¶¶ 128, 232; Cl. Reply, ¶¶ 494-495. Since the Tribunal has found that the Claimants had no FET right that the FIT would remain unchanged, this particular complaint about RDL 2/2013 falls away. The Tribunal therefore focuses from here on the Disputed Measures that were alleged to be wrongful under the FET by virtue of their content and effect, not simply because they constituted a change from what had gone before.

[1623] *See* C-10/R-27, 1997 Electricity Law, Article 15 (stating that the remuneration of supply activities would "determine the rates and prices that consumers must pay").

possibility that, assuming they operated efficiently, in the sense of "generat[ing] … economically justifiable" output after incurring reasonable "investment costs," they could "achieve reasonable profitability rates with reference to the cost of money on capital markets."[1624] The very notion of a "reasonable" return for efficient installations reflected an understanding that State subsidies should not be used to support returns that were substantially higher than reasonable, given the burdens on consumers and the implicit distortion of competition.

759. These principles, reflecting the need to balance multiple objectives, were explicit in the Preamble and first Article of the 1997 Electricity Law. As previously noted, the Preamble referred to a "basic purpose" of regulating the sector with "the traditional, three-fold goal of guaranteeing the supply of electric power, its quality and the provision of such supply at the lowest possible cost," and Article 1 reiterated the goal of using regulation to make supply "more efficient and optimised, while heeding the principles of … implementation at the lowest possible cost."[1625] At the same time, the 1997 Electricity Law did not provide specific terms to implement these broader objectives, which instead were to be established through a process of regulation (see Section VII.D(2)b above).[1626] This inherently preserved authority for regulators to adopt – and later to adapt – implementing rules that were aimed at maintaining the delicate balance among objectives that the 1997 Electricity Law enshrined as the *leitmotif* of the system as a whole.

760. Indeed, as discussed in Sections III.A(2) and III.A(3), the various regulations that Spain did adopt, in the years between 1997 and 2009 when EBL purchased its Tubo Sol shares, repeatedly referred to the existence of these multiple objectives and the need to fairly balance among them.[1627] For example, the Preamble of RD 436/2004 explained that it was intended to "guarantee" *both* that operators of special regime installations would receive "fair remuneration for their investments" *and* that electricity consumers would bear "an equally fair allocation … of the costs that can be attributed to the electricity system."[1628] The Preamble of RD 661/2007 echoed this notion,

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[1624] C-10/R-27, 1997 Electricity Law, Article 30.4.

[1625] C-10/R-27, 1997 Electricity Law, Preamble and Article 1.

[1626] C-10/R-27, 1997 Electricity Law, Article 30.4.

[1627] *See generally* CL-195/RL-143, *PV Investors*, ¶ 618 ("in all relevant legislative and regulatory instruments, the principle of reasonable return or profitability is always intertwined with other considerations, in particular the State's concern about the cost of electricity and the competitiveness with other means of production of energy"); CL-96/RL-95, *RREEF*, ¶ 385 ("in all the relevant texts, this assurance of a reasonable return or profitability is systematically intertwined with other considerations …. In other words, the reasonable return ensured to the investors – which guarantees them at a minimum against any financial loss – must be assessed keeping in mind the Respondent's concern about the cost of electricity and the competitiveness with other means of production of energy.").

[1628] C-2/R-48, RD 436/2004, Preamble.

explaining that while it replaced the terms of RD 436/2004 *in toto*, it did so in the service of the broader "principles set forth" in the 1997 Electricity Law, which "guarantees the owners of special regime installations a reasonable return for their investments, and the consumers of electricity an assignment of the costs attributable to the electricity system which is also reasonable …."[1629]

761. It is worth mentioning, before proceeding further, that Spain was not alone in grappling with this kind of complex balancing exercise. Other States have designed renewable energy programs involving these same interrelated policy objectives, and have been challenged for implementing regulatory changes that were said to prioritize some elements and interests over others.[1630] Nor are these issues unique to the promotion of renewable energy sources. As the *Electrabel* tribunal observed in a case that involved Hungary's successive regulation of *conventional* electricity generation, "[r]egulatory pricing (by operation of law) was and remains an important measure available to State regulators in liberalised markets for electricity. It is, even at best, a difficult discretionary exercise involving many complex factors."[1631]

762. Finally, the balancing exercise inherent in regulatory pricing decisions has particular resonance in the context of EU State aid policy, which was binding on Spain as on all other EU Member States. As mentioned in Section III.A(2), Spain's renewable energy regime was developed in the context of the 2001 Renewables Directive, which recognized the need for EU Member States to grant public aid to promote the development of renewable energy, but also established that such subsidies would be set within the framework of EU State aid policy.[1632] While there is no evidence that Spain was worried about any imminent EC enforcement action as of the time it implemented the New Regime,[1633] the fact remains that EU law does require Member States to monitor and control

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[1629] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 74).

[1630] *See, e.g.,* CL-211/RL-157, *Eskosol* Award, ¶¶ 390-391 (explaining that Italy's incentive program "from the outset was … nuanced, involving the interaction of at least three related policy objectives: (i) *increasing PV capacity*, (ii) doing so by means of long-term subsidies over market pricing, which would ensure sector investors an overall '*fair return*' … on the costs they incurred …, and (iii) *managing the burden* of these tariff subsidies on electricity consumers, since incentive payments to plant operators ultimately were to be factored in to electricity prices" (emphasis in original)).

[1631] CL-83/RL-2, *Electrabel* Decision, ¶ 8.35.

[1632] C-11/RL-25, 2001 Renewables Directive, Recital 12.

[1633] *See generally* RL-159, *Eurus*, ¶¶ 425-426 ("There is no indication that [the EC] did anything to raise with Spain the state aid issue until the Disputed Measures were belatedly raised by Spain itself in December 2014, well after the cessation of Special Regime subsidies and the repeal of the 1997 Law. … The illegality of unnotified Special Regime subsidies played no role in subsequent events, including the enactment of the Disputed Measures, which were driven by purely domestic concerns, notably the tariff deficit.").

all subsidy systems to ensure that their scope and attendant burdens remain properly tailored to their purpose.

b. The Rationale for Change and the Possibility of Alternative Measures

763. In the context of the multi-faced objectives that underlie regulatory pricing in general, it is rational for regulators to become concerned when the overall costs of a regulated system – and particularly those attributable to subsidies for otherwise non-competitive activities – exceed the revenues generated by that system. The development of a deficit between costs and revenues logically must be addressed either by lowering costs or by raising revenues. This was clearly the dilemma that Spain faced: the Tariff Deficit was growing quickly despite numerous prior efforts to address it, and it now posed a fundamental risk for the sustainability of the SES as a whole.

764. As set out in more detail in Section III.A(2), Spain's concerns about a growing Tariff Deficit were evident even before EBL entered into the Investment Agreement in June 2009. By that time, RD 1578/2008 had already departed from RD 661/2007 for photovoltaic plants, citing both the unexpected growth in installed capacity and the reduction in component costs for such plants. Together, these developments meant that under the prior regulatory regime, Spain was paying greater compensation to photovoltaic plants than they needed to obtain a reasonable return, and was doing so for many more plants than it had expected. This justified adapting "the support framework for this technology," including "modify[ing] the economic regime downward" to avoid "excessive compensation" and relieve unnecessary burdens on the SES.[1634] Similarly, RDL 6/2009 introduced "various urgent measures" in April 2009, expressly invoking "[t]he growing tariff deficit, [*i.e.*,] the difference between revenue from the regulated tariffs … that consumers pay for their regulated supply … and the real costs associated with these tariffs," which were said, "in the current context of international financial crisis," to be "having a profound effect on the system and placing at risk … the very sustainability of the system."[1635] RDL 6/2009 sought to implement a series of decreasing annual limits to the Tariff Deficit, with a view to eliminating it by 2013.[1636]

765. The difficulty was that these measures did not solve the broader challenges Spain was facing; to the contrary, the Tariff Deficit continued to grow. The Regulatory Impact Analysis Report that was issued in late 2010, in advance of RD 1614/2010 (a measure that the Claimants do not challenge),

[1634] R-50, RD 1578/2008, PDF p. 1.

[1635] C-13/R-37, RDL 6/2009, Preamble (quoting from the English translation of C-13, pp. 1-2).

[1636] *See* C-32/R-43, RDL 9/2013, Preamble (explaining history of prior measures, including RDL 6/2009).

warned ominously of "problems that need to be addressed before they pose an irreversible threat to the economic and technical sustainability of the system." In particular, it noted that Spain was now facing an avalanche of extra capacity from both wind and solar thermal plants, which were imposing significant extra costs on the system in large part due to the scope of Special Regime subsidies. The Report cautioned that "inaction … would mean … that some technologies would obtain remuneration above what is reasonable, and the tariff deficit would continue to grow … unless there was an unbearable rise in access fees for consumers."[1637] The Report also cautioned that the CNE regarded the forthcoming measures as "insufficient" to address the severity of the problem Spain was facing.[1638]

766. Indeed, in another report issued one week after RD 1614/2010 – and one week before another measure, RDL 14/2010, was enacted – the CNE warned again that the Tariff Deficit would continue to grow, because of the abiding gap between the costs of the Special Regime and the access tariffs that consumers were proposed to pay.[1639] The Preamble to RDL 14/2010 explained, however, that the Tariff Deficit problem could not be "borne exclusively by consumers" through increased access fees, particularly given the struggles of "household finances" resulting from the financial crisis. The Preamble noted that the financial crisis had revealed broader structural problems, namely that while Ordinary Regime power plants were reducing their energy production in light of reduced demand that had depressed wholesale market prices, Special Regime producers were incentivized to keep expanding production, since the current regime ensured the sale of all their generated electricity at preferential rates. The document recognized a need for measures "so that all industry agents" – including Special Regime producers – "contribute, in a further and combined effort, to the reduction of the deficit of the electricity system," while still being assured a reasonable return.[1640]

767. Again, however, the enacted measures failed to resolve the growing problem. RDL 1/2012 explained that particularly for solar thermoelectric and solar photovoltaic technologies, the "outperformance of the installed power targets … has made it clear that there is an imbalance between the production costs and the value of the premiums," leading to a ballooning Tariff Deficit measured already in the billions of Euros and expected to double by 2014.[1641] RDL 1/2012

[1637] R-30, Regulatory Impact Analysis Report, pp. 3-4.

[1638] R-30, Regulatory Impact Analysis Report, p. 8.

[1639] C-203, CNE Report 39/2010, pp. 1-2.

[1640] R-38, RDL 14/2010, Preamble, pp. 1-2.

[1641] R-39, RDL 1/2012, Preamble, p. 1.

explained that since "the measures adopted to date have not proven sufficient," it "has become necessary to design a new remuneration model … that promotes market competitiveness" and "incentivise[s] a reduction in costs …."[1642] Two months later, the CNE again cautioned that "the financial path of the system is unsustainable," while also reiterating that the Tariff Deficit could not be addressed simply by raising the rates paid by consumers, who already were paying "among the highest prices … in Europe" – high prices which were "mainly explained … by the addition to system costs of a growing volume of costs recognised for regulated activities, … and, particularly … by the surcharges [for remuneration of] special regime facilities."[1643]

768. This, then, was the context in which the Initial Disputed Measures were enacted. The Tariff Deficit was invoked contemporaneously as the rationale for replacing the prior regulatory regime with a new one. The first of the measures within the Tribunal's jurisdiction to address (RDL 2/2013) specifically attributed the Tariff Deficit "to a greater increase in the cost of the special regime … and to a decrease in revenue from fees due to a very marked fall in demand" by users. It noted the difficulty in raising consumer access fees significantly given the current economic situation, and explained therefore that the measure was implementing "certain urgent cost-reduction measures which avoid consumers having to bear a new burden." The specific measures included in RDL 2/2013 – the adjustment to the inflation index and the elimination of the Premium tariff option for the remaining Special Regime producers (photovoltaic plants having already lost this option through RD 661/2007 itself) – were both expressly linked to this rationale, in particular avoiding "an over-remuneration" of producers while still "guaranteeing [them] a reasonable return."[1644]

769. The Claimants argue that Spain invoked only certain "temporary issues" to justify the next challenged measure, RDL 9/2013, namely recent "[b]ad weather and drops in electricity demand" during the first half of 2013. In the Claimants' view, such temporary challenges cannot rationally justify the "major regulatory interventions" that RDL 9/2013 put in place.[1645] This is too simplistic a reading of RDL 9/2013, however. It is true that the Preamble noted recent "unusual meteorological conditions" that had increased wind energy production at the same time that demand and market prices had fallen even more dramatically than anticipated, which together "created a notable upward deviation in the extra costs of the special regime."[1646] The Preamble also explained

[1642] R-39, RDL 1/2012, Preamble, pp. 1-2.

[1643] C-97/R-72, CNE Report/2012 (quoting from the English translation of R-72, PDF pp. 13, 17, 19).

[1644] C-28/R-42, RDL 2/2013, Preamble (quoting from the English translation of C-28, pp. 1-2).

[1645] Cl. PHB, ¶¶ 58-59.

[1646] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 7).

that these events in the "first half of 2013" had "altered the hypotheses on which the estimates were made at the beginning of the year, which consequently will mean that new imbalances will arise at the end of the year if urgent steps are not taken to correct the situation." [1647] At the same time, it made clear that this was occurring in a broader context, namely that of a "tariff deficit which, over time, has become structural" and "unsustainable," leading to "the need to adopt urgent and immediately-applicable measures that … bring such a situation to an end."[1648] It explained the various measures previously implemented to try to control the Tariff Deficit, including both measures affecting Special Regime remuneration and "other measures … which have meant an increase in consumer access fees and consequently of revenue for the electricity system."[1649] It then connected the most recent events to the broader ongoing challenge, by stating that the recent developments:

> … make patently obvious the pressing need to immediately adopt a series of *urgent measures* to guarantee the financial stability of the electricity system *and at the same time*, the necessity of undertaking a review of the regulatory framework which will allow it to adapt to events that define the reality of the industry in each given period in the interest of maintaining the sustainability of the electricity system.[1650]

770. In other words, while RDL 9/2013 invoked recent events, it did so in the context of explaining not why the Government was adopting a new approach to the remuneration regime, but rather why that approach was being ushered initially on an urgent basis in July 2013, through the RDL mechanism,[1651] rather than awaiting the formal enactment of legislation – which would come five months later through Law 24/2013. That Law, which codified the elements of the New Regime prefaced earlier in RDL 9/2013, made clear that the reforms were based on overarching considerations that had been developing for some time, and not simply on the short-term impact of temporary conditions. Indeed, the Preamble to Law 24/2013 referenced the "continuous action by the legislator" in the 16 years since the 1997 Electricity Law had come into place, which had now "led to the need to endow the electrical system with a new normative framework." It explained that "[a] decisive element for undertaking this reform" was the Tariff Deficit which had become "structural," and which had now "introduced the risk of the bankruptcy of the electrical system,"

[1647] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 7).

[1648] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, pp. 1-2).

[1649] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 6).

[1650] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 8) (emphasis added).

[1651] The Tribunal addresses separately, in Section VII.D(5) below, the Claimants' "transparency" objections to the use of the RDL mechanism.

notwithstanding increases in consumer user fees which already placed electricity prices in Spain well above the EU average. In short, the new Law explained that the prior one "has proven insufficient to ensure the financial balance of the system, amongst other reasons because the remuneration system for regulated activities has lacked the flexibility required for its adaptation to major changes in the electrical system or in the evolution of the economy."[1652]

771. This history certainly suggests that Spain's decision to attempt a new approach to remunerating renewable energy was taken "with the aim of addressing a public interest matter,"[1653] and not "without justification of an economic, social or other nature,"[1654] as required under the test for "reasonableness" outlined in Section VII.D(1)d above. Notably, the Claimants have not suggested that the measures were founded "on caprice, prejudice or personal preference" rather than on reason.[1655] Nor have they argued that the public policy rationales Spain provided contemporaneously were a mere pretext for some ulterior motives.[1656] There also seems little doubt that the measures were "correlated" to achieve the stated public policy objective, in the sense they were *aimed* at achieving the stated goals;[1657] they in fact had the effect of *achieving it*. According to the Claimants' own regulatory expert, the Tariff Deficit was effectively eliminated by 2014.[1658] This accordingly also eliminated the threat to the sustainability of the SES.[1659]

772. Nonetheless, the Claimants contend that it was both unreasonable and disproportionate for Spain to tackle the Tariff Deficit by reducing renewable energy subsidies, for three reasons: (i) Spain was responsible for creating the Tariff Deficit in the first place, by keeping consumer prices too low to cover renewable energy subsidies;[1660] (ii) CSP plants in particular did not contribute significantly

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[1652] C-29/R-26, 2013 Electricity Law, Preamble (quoting from the English translation of R-26, PDF p. 2).

[1653] RL-33, *AES* Award, ¶ 10.3.8; *see also* CL-211/RL-157, *Eskosol* Award, ¶¶ 385, 400.

[1654] CL-72, *El Paso*, ¶ 372.

[1655] CL-57/RL-14, *Plama*, ¶ 184; *see also* CL-211/RL-157, *Eskosol* Award, ¶ 385.

[1656] *Cf.* CL-211/RL-157, *Eskosol* Award, ¶ 386 (discussing the relationship between "pretexts" and unreasonable acts).

[1657] RL-33, *AES* Award, ¶ 10.3.9; *see also* CL-211/RL-157, *Eskosol* Award, ¶¶ 385, 401; CL-195/RL-143, *PV Investors*, ¶ 626.

[1658] *See* First Brattle Regulatory Report, Figure 21: "Evolution of the Annual Tariff Deficit," p. 80 (reproduced in RD-6, Resp. Closing Statement, Slide 184); *see similarly* First Accuracy Economic Report, ¶¶ 125-130 (explaining how the Disputed Measures enabled the SES to reach economic equilibrium).

[1659] *See generally* CL-139/RL-131, *RWE*, ¶ 560 (noting that "the Disputed Measures were suitable in terms of addressing the Tariff Deficit: they were directly aimed at reducing the Deficit and in the event the Deficit dropped rapidly as a result of their implementation").

[1660] *See, e.g.,* Cl. Mem., ¶¶ 302, 304-305, 313; Tr. Day 6, 70:18-22 (Claimants' Closing Presentation).

to the Tariff Deficit;[1661] and (iii) in any event, Spain could have addressed the Tariff Deficit through alternative measures that "would have been far less harmful to the Claimants' investment."[1662]

773. As a threshold matter, the Tribunal sees these complaints as related more logically to the issue of proportionality than to the FET requirement of reasonableness, in the sense of "based on reason." The complaints are each aimed at the fairness of a State's allocation of burdens, rather than the rationality of taking a particular action to achieve a particular public policy goal. By contrast, the question of rationality is less focused on the choice among alternative measures. As the *El Paso* tribunal rightly observed, "there are always several methods for dealing" with challenging circumstances in a country, but the requirement of reasonableness and non-arbitrariness does not examine "whether the measures taken were or were not the best"; it simply examines whether they were "based on a reasoned scheme" that was reasonably connected to "the aim pursued."[1663] The *Electrabel* tribunal further explained, in the context of assessing the rationality of a challenged measure, that it is not the task of a arbitral tribunal "to sit retrospectively in judgment" upon a State's "discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith" towards particular investors at the relevant time.[1664]

774. As for proportionality, the Tribunal recalls (as discussed in Section VII.D(1)d) that the thrust of this element of the FET standard is that State action not impose burdens on foreign investment that go "far beyond what [is] reasonably necessary to achieve good faith public interest goals."[1665] States are provided some latitude in how to balance stakeholder interests; that is a policy choice which is theirs (rather than arbitrators') to make. However, proportionality does require that a State seek to achieve "a fair balance between competing interests and/or principles affected by the regulation, taking into account all relevant circumstances."[1666] This includes the interests of foreign investors "who may have committed substantial resources on the basis of the earlier regime."[1667]

775. In this context, then, the Tribunal first considers the Claimants' argument that the Tariff Deficit was essentially Spain's fault, for establishing a regime in the past under which electricity consumers

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[1661] *See, e.g.*, Cl. Mem., ¶¶ 303, 305, 307-308.

[1662] Cl. Mem. ¶ 305; *see also* Cl. Mem., ¶¶ 309-310; Cl. Reply, ¶ 561 (giving as examples a tax on the sale of petrol and gas, a tax on carbon dioxide emissions, and FIT profiling).

[1663] CL-72, *El Paso*, ¶¶ 320-322, 325; *see also* CL-211/RL-157, *Eskosol* Award, ¶ 385.

[1664] CL-83/RL-2, *Electrabel* Decision, ¶ 8.35.

[1665] CL-211/RL-157, *Eskosol* Award, ¶ 410.

[1666] CL-96/RL-95, *RREEF*, ¶ 465; CL-191/RL-145, *Hydro*, ¶ 574; RL-159, *Eurus*, ¶ 360.

[1667] RL-64, *Blusun*, ¶ 319(5).

could purchase power at rates that were insufficient to cover the subsidies Spain anticipated paying renewable energy producers. The Claimants argue that renewable energy producers should not bear the burden of Spain's system design error. As to this point, the Tribunal agrees with other tribunals that have rejected the relevance of similar arguments based on historic "fault." As the *Cavalum* tribunal explained:

> It is unnecessary for the Tribunal to express a view on whether Spain properly managed the costs and benefits of the SES, and it is doubtful whether it is properly equipped with material which would enable it to express such a view, especially because a claimant would bear a very heavy burden to show mismanagement of a vital national industry in the context of the overall national economy and social conditions in the country.[1668]

The more important point was that, whatever led to the current predicament, Spain now "faced a serious public policy issue and … it was entitled to take measures to deal with it."[1669]

776. As to what those measures might involve, the Claimants say that it was disproportionate to lower subsidy levels for CSP operators, since their subsidies had not contributed substantially to the overall size of the Tariff Deficit. This argument ignores the reality that the Disputed Measures were not aimed solely at CSP plants, but rather were measures of general application to the electricity sector. They did not single out CSP plants for treatment that was different than that provided to all other renewable energy technologies. In these circumstances, as observed in *Eskosol*, the proportionality of "general sector-wide measures taken in the public interest, with no targeting of a particular investor," must be assessed from the perspective of the measures' "overall features and impacts, and not through the narrow lens of [their] impact on a particular investor."[1670] The fact that CSP operators were among the many others impacted by general electricity sector measures does not require the proportionality analysis under the FET standard to be tailored specifically to their circumstances.[1671]

[1668] RL-152, *Cavalum*, ¶ 619.

[1669] RL-152, *Cavalum*, ¶ 620.

[1670] CL-211/RL-157, *Eskosol* Award, ¶ 413.

[1671] *See similarly* CL-139/RL-131, *RWE*, ¶¶ 573-574 (considering claimants' argument that "wind and hydro plants only played a limited role in the accumulation of the Tariff Deficit" to be of "limited evidentiary value given that … the Disputed Measures … were not aimed solely at the wind and mini-hydro sector," and that the extra costs of the renewable energy sector as a whole accounted for almost half of the Deficit for 2013); *see also* CL-180/RL-130, *Stadtwerke*, ¶ 320 ("Spain, exercising its constitutional powers as a democratic State, adopted several measures to deal with the tariff deficit, and it had a right to do so. Various segments of the population would be negatively affected,

777. Finally, with respect to the Claimants' suggestion that Spain had other ways of addressing the Tariff Deficit that "would have been far less harmful *to the Claimants' investment*,"[1672] the threshold difficulty with this argument is that it starts from the proposition that a State's duty under the FET standard is to minimize harm to a particular stakeholder, even if the consequence is to increase harm to others. The proportionality standard does not, however, require the adoption of policies that absolutely prioritize investment interests. Rather, States are permitted to pursue "good faith public interest goals" that take into account the protection of a variety of societal interests. The point is simply that the measures adopted be proportionate to the goals pursued, in the sense that they not extend far beyond what is reasonably necessary to achieve those goals, and that they take foreign investment interests into account in seeking a reasonable balance of interests.

778. In this case, it is clear that most of the alternatives the Claimants suggest – including increasing consumer tariffs for electricity, raising the tax on petrol and gas sales, or imposing a tax on CO2 emissions[1673] – would have significantly increased the burden on the public. The Claimants' regulatory experts conceded as much during the Hearing.[1674] Yet Spanish policymakers already had reached the conclusion that consumers could not bear substantially higher burdens at that time, particularly given the sizeable increases in electricity rates they already had absorbed in past years, the relatively high price of electricity in Spain compared to other EU Member States, and the impact of the global financial crisis on household economics.[1675] Policymakers did not avoid the question of burden-sharing; they considered it, but ultimately chose not to impose further burdens on

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as they often are in times of significant policy change, but the Government was certainly not required to exempt the investors from those policies because the investors, according to the Claimants, were not responsible for the problem").

[1672] Cl. Mem., ¶ 305 (emphasis added).

[1673] First Brattle Regulatory Report, ¶¶ 160-173. These were options the CNE had floated in March 2012 as possible measures that might be *combined* with cuts to solar thermoelectric plant premiums. Cl. Reply, ¶ 561 (citing C-97, CNE Report/2012, pp. 59, 76).

[1674] Tr. Day 3, Lapuerta, 32:1-7. The Respondent's experts emphasized the same point, while also noting that the proposed alternatives were "merely theoretical," as the Claimants' experts did "not assess the feasibility or impact of the measures given the Spanish economic conditions at the time." First Accuracy Economic Report, ¶¶ 101-122.

[1675] *See, e.g.,* C-28/R-42, RDL 2/2013, Preamble (considering that a "new increase in the access fees paid by consumers … would directly affect household economies and company competitiveness, both in a delicate situation given the current economic situation") (quoting from the English translation of C-28, pp. 1-2); C-32/R-43, RDL 9/2013, Preamble (noting that "other measures have been adopted which have meant an increase in consumer access fees and consequently of revenue for the electricity system," but alluding to the current "impact of the economic crisis on household economies" as a reason to focus now on cost reduction measures) (quoting from the English translation of C-32, pp. 6, 8); C-29/R-26, 2013 Electricity Law, Preamble (noting that consumer tolls already had increased substantially between 2004 and 2012, positioning electricity prices in Spain well above the EU average) (referring to the English translation of R-26, p. 2).

consumers at this particular time. This was a judgment call that they were entitled to make.[1676] It was hardly an irrational one, considering that in 2013 – when RDL 2/2013, RDL 9/2013 and Law 24/2013 were introduced – the unemployment rate in Spain had soared to 26.1% due to the economic crisis.[1677] In that context it can be understood why policymakers were reluctant to ask struggling families to absorb even higher electricity bills, to support continued subsidies to producers at rates that policymakers believed exceeded the "reasonable return" commitments of the 1997 Electricity Law.

779. This last point is crucial to any evaluation of the issue of burden-sharing. The New Regime was aimed at maintaining a key safeguard for renewable energy producers, namely that so long as they operated with reasonable efficiency, they would be able obtain a reasonable return on their investments, measured in terms of the cost of capital. In other words, this is not a case where a State abruptly removed all subsidies and required operators instead to compete on the market without a government safety net. To the contrary, renewable energy producers in Spain, including CSP plants, continued not only to enjoy priority access to the grid for their electricity,[1678] but also to receive the benefits of substantial financial support, now framed as a "Special Payment" above market prices. This continuing subsidy was expressly intended to ensure their ability to obtain reasonable returns, even if not the *same* level of returns that they otherwise might have obtained. The retention of this principle from the 1997 Electricity Law, notwithstanding the replacement of that Law by one of equal rank (Law 24/2013), was itself an exercise in burden-sharing.

780. In other words, policymakers *did* give consideration to the reliance interests of investors.[1679] They devised a regime that they rationally believed would respect those interests while also taking into

[1676] *See similarly* CL-180/RL-130, *Stadtwerke,* ¶ 321 ("The Spanish Government chose a policy solution that sought to protect the interests of the consumers while requiring producers to bear additional costs of maintaining the electrical system of which they were also beneficiaries. While that solution may have been objectionable to producers, one cannot say that it was unreasonable."); CL-195/RL-143, *PV Investors,* ¶ 629.

[1677] First Accuracy Economic Report, ¶ 230(a). Accuracy also reports that consumer electricity prices had grown twice as fast in Spain as in the rest of Europe since 2007. First Accuracy Economic Report, ¶ 90.

[1678] C-29/R-26, 2013 Electricity Law, Article 26(2); *see* CL-139/RL-131, *RWE,* ¶ 611.

[1679] *See* CL-139/RL-131, *RWE,* ¶ 591 (finding that "[a]lthough the new regime put in place in 2013-2014 involved a radical change in the way subsidies for the RE sector were calculated, the Tribunal considers that, from RDL 6/2009 onwards, the Respondent was attentive to the need to protect investors in its attempts to address the growing problem of the Tariff Deficit").

account the needs of users and the systemic needs of the SES as a whole.[1680] This process is consistent with FET requirements of proportionality.

781. In such circumstances, the Tribunal agrees with the *Eurus* tribunal that "it is not for the Tribunal to … propose *alternative* policies that could have been adopted, or to weigh up for itself the competing demands of generators and consumers," to determine whether a different policy might have been feasible that would strike a different balance between their interests, in particular one more favorable to the generators.[1681] Other tribunals have likewise rejected the invitation to examine theoretical alternative solutions to the urgent policy dilemma that Spain faced.[1682] As the *PV Investors* tribunal explained more generally:

> … States, as the entities tasked with balancing the often competing interests involved, enjoy a margin of appreciation in the field of economic regulation. This means that an arbitral tribunal asked to review general economic regulation will normally not second-guess the State's choices; it will not review *de novo* whether they are well-founded, nor assess whether alternative solutions would have been more suitable. Governments often have to make controversial choices, which especially those directly affected may view as mistaken, based on misguided economic theory, placing too much emphasis on certain social values over others. It is not the task of an investment treaty tribunal to evaluate the policy choices that often underpin economic decisions.[1683]

782. In short, the Claimants' arguments about potential alternative paths do not persuade the Tribunal that Spain acted either irrationally or disproportionately, as a *general* matter, in introducing the New Regime to try to eliminate the structural problems that it believed had led to the burgeoning Tariff Deficit and were threatening the sustainability of the SES. The Tribunal accepts that the

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[1680] *See* CL-195/RL-143, *PV Investors*, ¶ 628 ("Faced with these pressing problems, Spain had a range of available options. In simple terms, it could have either imposed the burden on the producers, or on the consumers, or on the state budget. Rather than selecting one option over another, it chose a middle course, i.e. it reduced the producers' rate of return while still guaranteeing a reasonable profit"); *see similarly* RL-124, *OperaFund* Dissent, ¶ 41 ("No doubt a range of alternative options were available to [Spain. It] might have decided to sacrifice the Claimants' investments, or it might have decided to protect the Claimants' economic returns and profitability and imposed greater costs on electricity consumers, or on the public purse, knowing that such an approach risked exacerbating the economic crisis. It chose neither path, opting instead for something of a middle course, a revised and reduced rate of economic return that nevertheless fell within parameters, accepted and approved by the European Commission").

[1681] RL-159, *Eurus*, ¶ 338 (emphasis added).

[1682] *See, e.g.,* CL-96/RL-95, *RREEF*, ¶ 468 ("the Tribunal will abstain to take any position on the issue of the existence of other or more appropriate possible measures to face this situation"); CL-128/RL-129, *BayWa*, ¶ 480 ("it is not for the Tribunal … to propose alternative policies that could have been adopted, or to weigh up for itself the competing demands of generators and consumers").

[1683] CL-195/RL-143, *PV Investors*, ¶ 583.

reforms were adopted in a good faith effort to try to tame the Tariff Deficit, which was clearly a pressing matter of public interest which it was rational for policymakers to seek to resolve.

783. This conclusion does not, however, obviate the need to address the *particular* features of the New Regime about which the Claimants complain. In principle, a measure might be unreasonable or disproportionate *in the manner in which it is implemented*, even if not in its general objectives and design.[1684] The Tribunal therefore turns below to specific issues of implementation.

(4) Specific Challenged Features of the New Regime

784. With respect to the specific features of the New Regime, the Claimants take particular issue with the following: (i) the notion that "reasonable return" was a "dynamic" concept, so that policymakers could reset target rates of return every so often, in particular lowering them in a new cycle below the levels used to determine remuneration in a prior cycle; (ii) the methods used to determine the target return levels in 2013 and 2019, and the levels thus selected (7.398% and 7.09%, respectively); (iii) the application of the "reasonable return" construct to a plant's entire regulatory life, so that prior profitability above the targeted rates would effectively lower remuneration for the new cycle; (iv) the use of hypothetical "standard" facilities to determine remuneration levels, including production assumptions based on installed capacity and cost assumptions that were deemed "efficient" for plants of equivalent technology and size; (v) the way the June 2014 Order ultimately applied these "standard" plant calculations to the unique PE2 Plant; and, finally, (vi) the period of "uncertainty" before the applicable figures were released, and the limited scope and timing of consultations during this process.

785. These features are discussed in turn below.

a. The "dynamic" Application of Reasonable Return Constructs

786. The Claimants complain that under the New Regime, the notion of "reasonable return" was effectively a moving target, rather than being defined at a given rate for the life of an installation.

787. As described in Section III.F(3), RDL 9/2013 stated that the target return rate used to determine the Special Payment would depend on the average yield from ten-year Government Bonds with an

[1684] *See* RL-33, *AES* Award, ¶ 10.3.9 (noting that the requirement of "an appropriate correlation" between a State's public policy objective and the measure adopted to achieve it "has to do with the nature of the measure *and the way it is implemented*" (emphasis added)).

"appropriate differential,"[1685] which was set initially at 300 basis points,[1686] resulting in a target rate of 7.398% before taxes. RDL 9/2013 also provided that the remuneration parameters would be reviewed every six years, in order to "maintain the legally recognised principle of reasonable return."[1687] Then, in 2019, as described in Section III.J, RDL 17/2019 adopted a different formula for determining target rates for the 2020-2025 regulatory cycle, based on the WACC for the renewable energy sector, which resulted in a new target rate of 7.09% before taxes. The regulation again envisioned a future review to determine target returns for the following regulatory cycle.

788. The Respondent explains that these provisions were based on the notion of reasonable return as a "dynamic" concept.[1688] In its view, "reasonable" refers to adequacy and proportionality, but "does not require that the profitability granted to producers under the special regime be 'inalterable,' 'fixed' or similarly defined."[1689] The Respondent emphasizes that the 1997 Electricity Law defined reasonable profitability by reference to the cost of money in capital markets, which is "not a static element."[1690] The Respondent clarifies however, that it is not suggesting remuneration "should always follow the trend of the cost of money," but rather that it is appropriate to adapt remuneration "tak[ing] into account all the concurrent circumstances" that affect the SES, particularly the "technical and financial equilibrium" related to its sustainability. The Respondent's point is that there is a "single limit" to the permitted dynamism of "reasonable returns," namely that "remuneration must always be reasonable, by reference to the cost of money on the capital market."[1691] In support of this concept, the Respondent invokes several judgments of the Spanish Supreme Court, including its statement in 2006 that the remuneration regime "does not … guarantee the intangibility of a certain level of profit or income … in relation to that which was obtained in previous years, or the indefinite permanence of the formulas used to set the premiums."[1692] The Respondent further references the Supreme Court's explanation in 2012 as

[1685] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 10); *see also* C-32/R-43, RDL 9/2013, Article 1(2).

[1686] C-32/R-43, RDL 9/2013, First Additional Provision (referring to the English translation of C-32, p. 23).

[1687] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 10); *see also* C-32/R-43, RDL 9/2013, Article 1(2).

[1688] Resp. C-Mem., ¶¶ 16(e), 436(i), 437-441.

[1689] Resp. C-Mem., ¶ 437.

[1690] Resp. C-Mem., ¶¶ 438-440.

[1691] Resp. Rej., ¶¶ 1029, 1362.

[1692] Resp. C-Mem., ¶ 445 (quoting R-81, Judgment App. 12/2005) (quoting from the English translation in Resp. C-Mem.).

follows:

> Depending on the change of economic circumstances and changes of other types, a rate of return percentage may be 'reasonable' at that first moment and then require subsequent adjustment precisely to maintain that 'reasonableness' due to the modification of other economic or technical factors.[1693]

789. By contrast, the Claimants argue that "[r]easonable return is not a 'dynamic' concept."[1694] They contend that nothing in RD 661/2007 had signaled that tariff rates would be reduced if interest rates went down.[1695] To the contrary, the Claimants say, the RD 661/2007 FIT was meant to remain stable (subject only to inflation adjustments) for the lifetime of the installations, precisely to provide stability.[1696] Yet under the New Regime, the Government "retains a significant degree of discretion to modify what it deems to be a reasonable rate of return every six years (at the end of each Regulatory Period)."[1697]

790. In the view of the Tribunal, the Claimants' argument confuses two concepts – the notion of "reasonable profitability rates with reference to the cost of money on capital markets" that was one of the stated objectives of the 1997 Electricity Law, to be implemented through a future process of regulation,[1698] with the offer of a fixed tariff option under one such implementing regulation (RD 661/2007). The Tribunal already has found, in Section VII.D(2), that the Claimants had no protected right under the ECT for the PE2 Plant to receive RD 661/2007 tariffs for life. To the contrary, the Claimants – like all other operators in Spain – should have reasonably understood that economic and technological developments might lead Spain to consider other mechanisms to implement the objectives of the 1997 Electricity Law, and that if so, the PE2 Plant – like all other installations in the SES – might become subject to such new mechanisms. Since the 1997 Electricity Law itself had never specified a particular rate of return, much less a particular formula for calculating it, there was nothing inherently wrong in a periodic review of both targeted rates of return and specific mechanisms for calculating them – provided that the underlying "reasonable

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[1693] Resp. C-Mem., ¶ 441 (quoting R-90, Judgment, Third Chamber of the Supreme Court, 25 September 2012 (App. 71/2011)) (quoting from the English translation in Resp. C-Mem.).

[1694] Cl. Reply, p. 85 (header).

[1695] Cl. Reply, ¶ 305.

[1696] Cl. Reply, ¶ 307; *see also* Cl. Reply, ¶ 309 ("To be clear, the New Regime now does provide that changes in remuneration can be made to existing investments based on changes in the cost of money in the capital markets. This is not, however, how the RD 661/2007 regime worked ….").

[1697] Cl. Reply, ¶ 508.

[1698] C-10/R-27, 1997 Electricity Law, Article 30.4.

profitability" principles of the 1997 Electricity Law, to which Spain declared itself still bound, were maintained.

791. Other tribunals have found the same. For example, the *RREEF* tribunal stated as follows:

> [T]he Respondent has the possibility to modify this return as long as it remains reasonable. The Tribunal then considers that this return is not fixed and may evolve, depending on the cost of money in the capital market. In other words: (1) what could have been considered as reasonable in 2007 might not be reasonable anymore in 2012 or 2014; and (2) 'reasonable' is not an absolute notion and a reasonable return does not correspond, even at a given date to a fix[ed] number, but rather to a range of possible numbers.[1699]

The *Eurus* tribunal similarly concluded:

> [T]he Respondent has the right to modify and amend its regulations, *i.e.* the amount of the targeted IRR, as long as they remain reasonable and do not breach the ECT. …
>
> The Tribunal does not take any position on the exact amount of the reasonable return. This return can change over time depending on various factors. The Respondent emphasizes that the reasonable return is a 'dynamic' concept. The Tribunal agrees. The term 'reasonable' allows the state to accommodate a change in these factors instead of fixing the IRR at a certain number.[1700]

792. This Tribunal agrees. The fact that over time, and considering various developments in the SES, Spain reduced the level of returns that it considered reasonable for setting tariffs going forward is not in itself a violation of the ECT. What matters is whether the *particular* rates it adopted in 2013-2014 and 2019 were themselves correlated to the stated objectives, which included maintaining remuneration at levels that would enable efficient installations to obtain reasonable returns with reference to the cost of capital.

b. The Methods Used to Calculate Target Returns and the Levels thus Calculated

793. This is a natural segue to the Claimants' next complaint, which is that the rates of return that Spain selected as the basis for calculating subsidies under the New Regime (first 7.398% and then 7.09%, both post-tax) were *not* "reasonable." In particular, the Claimants say that these rates were

[1699] CL-96/RL-95, *RREEF*, ¶ 567.

[1700] RL-159, *Eurus*, ¶¶ 364, 366.

significantly lower than those Spain previously had envisioned providing operators.[1701] This complaint is directly connected to the Claimants' "alternative case" on legitimate expectations, which postulates that they had a protected right to expect that any regulations would still enable PE2 to earn a return at the levels "offered by Spain at the time of the Claimants' investment," which the Claimants equate to "the reasonable return that was implicit" in the RD 661/2007 tariffs.[1702] The Claimants contend that this "implicit" return, for a "standard [CSP] plant" choosing the Premium option under RD 661/2007, was an average of 9.5% after taxes.[1703] These figures are drawn from the *Memoria Económica* that was prepared in connection with RD 661/2007.[1704]

794. Beginning with this "alternative" legitimate expectations argument, the threshold point is that, as the Claimants concede, the *Memoria Económica* was "an internal document" of the Government.[1705] It is undisputed that the Claimants never saw this document at the time of their investment.[1706] Accordingly, they could not have relied on it – nor could a reasonably diligent investor have done so – given its status as a non-public document. However, even if the Claimants hypothetically had seen the document, the 9.5% projection related only to the Premium option,[1707] which RD 661/2007 had offered as an annual choice to certain types of plants, while expressly eliminating the Premium option for others (photovoltaic plants) that had enjoyed such an option under the prior RD 436/2004. The Tribunal noted in Section VII.D(2)b above that this history should have alerted a diligent investor that Spain could alter RD 661/2007 too. In any event, it is not clear that Tubo Sol always would have elected the Premium option even if that option remained available to it. As Fichtner had advised EBL before its investment, the Regulated Tariff would be more favorable than a Premium over the market price, in circumstances of low market prices for

[1701] It is clear that the relevant returns should be calculated at the plant or "project" level (here, Tubo Sol's return on PE2), not at the level of shareholder returns on their upstream investment (*e.g.,* EBL's returns on its investment in Tubo Sol). *See, e.g.,* CL-128/RL-129, *BayWa*, ¶ 505 ("there is a difference between the project IRR and the shareholder IRR. Whereas the ECT protects shareholders' rights and accords different protection standards to them, … the relevant IRR targeted by the legitimate expectation to a reasonable return is the project IRR over the useful lifetime of the plants"); CL-96/RL-95, *RREEF*, ¶ 573 (distinguishing between a "project reasonable return" and a "shareholders' reasonable return").

[1702] Cl. Reply, ¶¶ 506, 724-727, 637.

[1703] Cl. Reply, ¶ 733 & n. 1137 (citing First Brattle Quantum Report, ¶¶ 275-278 and First Brattle Regulatory Report, ¶ 123 & n. 156); *see also* Cl. Reply, ¶ 506.

[1704] Cl. Reply, ¶ 733 & n. 1137; Cl. PHB, ¶¶ 205 & nn. 369, 210.

[1705] Cl. Reply, ¶ 733.

[1706] *See* Tr. Day 2, T. Andrist, 46:8-10; Tr. Day 6, 146:3-12; Tr. Day 6, 157:12-19.

[1707] C-155/R-29, *Memoria Económica* for RD 661/2007 ("For the market option, a premium is proposed that ensures a project IRR of 9.5% for the typical 25-year case, with a minimum of 7.6% and a maximum of 11% in the band limits") (quoting from the English translation of C-155, PDF p. 16).

electricity.[1708] For the Regulated Tariff option, the *Memoria Económica* had projected returns for a standard facility in the range of 7-8% after tax, not the 9.5% that Claimants now claim as their "legitimate expectation" under their alternate case.[1709] These lower figures were in the same range as earlier planning documents, such as the PFER 2000-2010, PER 2005-2010, which had referred to targeted returns for standard projects as being in the range of 7% after taxes.[1710]

795. Importantly, *all* of these projected rates of returns were each expressly predicated on the assumption of efficient construction and operation. As discussed further in Section VII.D(4)d below, from the time of the 1997 Electricity Law onwards, subsidy levels were always calculated through a metric that sought to provide a reasonable return based on the presumed costs and production of "standard" facilities of a given type and size. This "standard plant" construct was intended to try to incentivize and reward efficiency as well as technological development, in order that, over time, the State could reduce the burden of above-market subsidies that fell on the Spanish consumer. At no point did the prior regime ever guarantee *specific* plants any minimum rate of return irrespective of their efficiency or inefficiency.

796. In fact, the Claimants' own quantum expert confirmed that the PE2 Plant *never would have achieved* returns anywhere near those they now claim as required under the ECT to meet their legitimate expectations, even absent any of the Disputed Measures. According to Brattle's own calculations, the Plant's after-tax return if the Disputed Measures had *never been enacted* would have been 4.2%, based on the Plant's actual CAPEX levels.[1711] The Claimants' expert attributes this shortfall from the return levels originally contemplated partly to the fact that the Plant has never achieved production levels anywhere near those initially projected,[1712] and partly to the fact that

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[1708] C-72, Fichtner Due Diligence Report, p. 9.5.

[1709] C-155/R-29, *Memoria Económica* for RD 661/2007 ("The regulated tariff has been calculated in order to guarantee a return of 7-8% depending on the technology") (quoting from the English translation of C-155, PDF p. 12); *see also* C-155/R-29, *Memoria Económica* for RD 661/2007 (projecting that for the solar thermoelectric sector, the "proposed value of the regulated tariff provides a rate of return … of 8%" after taxes) (quoting from the English translation of C-155, PDF p. 16).

[1710] *See* C-46/R-62, PFER 2000-2010, pp. 181-182 (explaining that profitability projections were "calculated on the basis of maintaining an [IRR] … for each standard project, at a minimum of 7%, with [its] own capital, before financing and after tax") (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84); C-3/BRR-69, Summary PER 2005-2010, p. 56 (explaining that in determining the profitability of typical projects, "[r]eturns were calculated based on an [IRR] … for each project type of close to 7% …").

[1711] *See* Second Brattle Quantum Report, ¶ 282 & Table 12; *see also* Second Brattle Quantum Report, Table 13.

[1712] *See* Second Brattle Quantum Report, ¶ 288 (explaining that PE2's "underperformance" even in the "But For" scenario is attributable, *inter alia*, to the fact that the Plant "produces relatively less than originally forecasted"). In particular, while Fichtner had advised EBL that "conservative" energy production estimate would be 49.12 KW, *see* C-71, EBL Circular VR 09/02, 14 January 2009, p. 4, and the Claimants' expert now suggests they projected a long-

the cost to build and operate the Plant both ran far higher than EBL had expected.[1713] EBL understood before its investment that its actual returns would depend very much on these variables,[1714] apart from any issue of where tariff levels were set.

797. In other words, even under the terms of RD 661/2007 itself, EBL had no legitimate expectation that it would *actually obtain* a return of any particular level, much less the 9.5% after-tax figure to which the Claimants now say they had a legitimate expectation for the life of the plant. This represents a core fallacy of the way the Claimants have framed their alternative claim.

798. In any event, as discussed in Section VII.D(2) above, a reasonable investor could not have legitimately expected that RD 661/2007 tariffs necessarily would remain applicable to a plant for its entire life, notwithstanding developments that might rationally justify further regulatory change. For this reason, an investor could not have legitimately expected that its plant would enjoy *whatever* rates of return the Government might have contemplated as achievable at the time of RD 661/2007, even if the plant *arguendo* was built and operated at expected costs and with expected levels of production. For this reason, as other tribunals have found, it would not be appropriate to base a legitimate expectation claim solely on RD 661/2007's projected return levels.[1715]

799. Rather, what a diligent investor *could* legitimately expect of any regulatory change is that the State would act *reasonably* and *proportionately*, as those terms are understood in the FET standard (*see* Section VII.D(1)d above). With respect to target return levels, this means investors were entitled to expect that Spain would employ its regulatory discretion in a manner that attempted rationally

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term production rate of 46 GWh/year, the Plant's actual energy production has never exceeded its one-year maximum of 43.1 GWh (in 2017). In all other years from 2013 to 2019, production ranged from 36.1 GWh (in 2015) to 42.5 GWh in 2019. First Brattle Quantum Report, Table 3; Second Brattle Quantum Report, Table 1. The Claimants accordingly "have revised downwards their expectations for long-run production … to 40 GWh per year, equivalent to a 13% reduction." First Brattle Quantum Report, ¶ 42.

[1713] *Compare* Second Brattle Quantum Report, ¶ 285 ("The actual costs of fresnel turned out relatively higher than for other types of CSP technology, reducing returns") *with* C-67, EBL Circular VR 08/38, 26 November 2008, pp. 11-13 (Fichtner advising EBL that Fresnel technology "requires 71% less material per thermal MWh and simpler construction compared to … parabolic trough solar fields"). *See also* Second Brattle Quantum Report, ¶ 288 (stating that PE2's "underperformance" even in the "But For" scenario "reflects the high construction costs of innovative fresnel technology" and that "operating costs turned out higher"). The Claimants' expert attributes the higher-than-expected operating costs to the "innovative nature of the technology and the materialisation of the risk that the plant would not produce precisely what was originally forecast."). First Brattle Quantum Report, ¶ 43.

[1714] *See, e.g.,* C-71, EBL Circular VR 09/02, 14 January 2009, p. 9 (noting the risk of lower returns if production were lower than assumed); C-75, EBL Circular VR 09/15, 15 April 2009, pp. 3-5 (noting the risk of cost overruns that it believed would be mitigated by an EPC contract with Novatec, and acknowledging that PE2's returns would depend on plant availability and production levels, as well as applicable tariffs).

[1715] CL-139/RL-131, *RWE*, ¶ 549 (rejecting claimants' "alternative claim as to legitimate expectations … based on an alleged reasonable return" at rates described by the CNE at the time of RD 661/2007).

to comply with the core proportionality assurance of the 1997 Electricity Law, namely that even while the State sought to minimize burdens on consumers, it would still seek to ensure that *efficient* operators could achieve profitability that was *reasonable* considering the costs of capital. Because that is the real question, this Tribunal does not accept that the appropriate liability analysis is simply to focus on a plant's *actual* returns after the Disputed Measures, and then find fault with the State under the ECT, *ipso facto*, if these returns fell below any particular target rate of return.[1716]

800. With the operative question thus understood as above – were the Disputed Measures reasonably tailored to ensuring that *efficient* operators would be able to achieve returns that were *reasonable* in light of the costs of capital? – the Tribunal turns next to the methodology Spain employed in 2013 and 2019, to calculate the new target returns of 7.398% and 7.09%, respectively.

801. The record demonstrates that both figures in fact were rationally calculated by Spain to supply efficient operators with an appropriate spread over what was understood to be the prevailing cost of capital. Before these rates were adopted, regulators conducted an inquiry into the cost of capital, initially based on the 10-year average Government Bond rate and later the WACC for the renewable energy sector. The first inquiry led to a finding of a 4.398% average Bond rate, to which a 300-point "spread" was added to obtain the 7.398% pre-tax return rate. The second inquiry led to a finding of a 7.09% rate. Both determinations were based on reason rather than caprice, and both mechanisms were rationally related to assessing the "cost of money on capital markets," which was the objective set out in the underlying 1997 Electricity Law.[1717] Indeed, the first methodology, using the return on 10-year Government Bonds plus 300 basis points, had been proposed by APPA in May 2009, prior to the Claimants' investment in Spain.[1718]

802. As for the fact that the methodology *changed* in 2019, a review of target rates had always been scheduled to occur in that year, after the first six-year cycle of RDL 9/2013 and before the next regulatory cycle beginning in 2020. It was not irrational at that time to revisit the computational

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[1716] Although certain past decisions have approached the analysis in these terms, the Tribunal considers this to be overly simplistic. That kind of analysis fails to account for causation, namely the question of whether a given plant had project-specific inefficiencies that would have reduced its actual returns below the target level even *absent* the Disputed Measures. Spain never guaranteed that every plant would *actually* achieve a given return. *Cf.* CL-96/RL-95, *RREEF*, ¶ 589 (concluding that "the reasonable return must not be below 6.86% post-tax," and since "[t]he actual return earned by Claimants for their CSP plants" was lower than this, "[c]onsequently, the Respondent must be held responsible for a breach of its obligation to insure a reasonable return to the Claimants investment and it must pay to them a compensation amounting to the difference").

[1717] C-10/R-27, 1997 Electricity Law, Article 30.4.

[1718] R-158, APPA Draft Bill, Article 23.4.

methodology as well as the resulting rate. The adjustment in methodology was reached in a rational way: the CNMC explained contemporaneously that the WACC rate was used to calculate an *appropriate spread* over the 10-year Government Bond rate, just as a spread over the Bond rate had been used in 2013.[1719] There is nothing inherently wrong with this approach: Claimants' expert confirms that "WACC is typically considered a proxy for the reasonable return."[1720] RDL 17/2019 then adopted the same WACC figure that the CNMC had proposed. Notably, this methodology resulted in a *higher* target rate than would have resulted from maintaining the earlier spread of 300 basis points, given the very low Bond rates prevailing in 2019 (1.6%, according to Claimants' experts).[1721] The Respondent explains this greater spread as follows:

> The economic situation in general, and of the capital market in particular, required in 2013 a spread of 300 basis points to ensure that the return was *reasonable* in the first regulatory period. The economic situation in general, and of the capital market in particular, has required a greater spread in the second regulatory period in order to continue to ensure a *reasonable* return. This is not an inconsistent remuneration mechanism defined in the current Law 24/2013 but, on the contrary, a manifestation absolutely in line with the legality of how this remuneration system works.[1722]

803. The Claimants do not argue that the Government performed its computations erroneously – either that it measured the average Government Bond rate wrong in 2013 or that it measured the sector-wide WACC wrong in 2019 to determine the appropriate spread over the Bond rate in that year. Rather, the Claimants' basic argument is that the target rates of return thus calculated *were simply too low*, particularly given that the new figures were expressed in pre-tax terms whereas prior figures had been expressed in post-tax terms.

804. As to this issue, the Tribunal accepts that both the 7.398% and 7.09% pre-tax rates were a reduction from the levels previously discussed over the years, taking those to be around 7% after taxes. The Parties debate how much of a reduction this was, considering the effective tax rates of plants of this nature. The Claimants say that the 7.398% pre-tax target rate was equivalent to an after-tax return of 5.4% for a standard installation,[1723] while the 2019 pre-tax target rate of 7.09% was equivalent

[1719] C-115/R-345, CNMC Agreement, File INF/DE/113/18, 30 October 2018, p. 40.

[1720] First Brattle Quantum Report, n. 117; Second Brattle Quantum Report, ¶ 269.

[1721] *See* First Brattle Quantum Report, ¶ 277.

[1722] Resp. Rej., ¶ 1149 (emphasis in original).

[1723] First Brattle Quantum Report, ¶ 276.

to an after-tax rate of 5.2%.[1724] The Respondent takes issue with these calculations, describing the Claimants' conversion between pre- and post-tax rates as "fictitious" and not corresponding to the "reality" of the projects. In its view:

> [D]ue to (i) the high capital outlays involved in these investments, (ii) the accounting depreciation and (iii) the tax benefits from which they benefit, the effective tax rate paid by these projects during the first years of their life is very low and therefore the real difference between pre-tax and post-tax is negligible.[1725]

805. The Tribunal considers it unnecessary to determine precisely what the effective tax rate was in each year for renewable energy facilities in Spain. As other tribunals have noted, this would require evaluation not only of the "general corporate tax rates for companies operating" in that sector, but also the "general financial structures used by the companies involved."[1726] It is not clear that the tribunal has sufficient evidence to make this determination with any degree of assurance.[1727] However, the fact remains that even towards the *higher* range of the effective tax rates suggested, the targeted returns that Spain used to set remuneration in the New Regime still were above the cost of capital. The Claimants' own expert calculates the WACC at 4.84% as of June 2014 and 3.35% as of January 2020.[1728] Both Parties' experts calculate that Spain's pre-tax targets of 7.398% and 7.09% in these years equate to effective post-tax rates that are above these WACC levels.

806. In other words, while the Parties debate the *extent* of the post-tax spread over WACC, depending on their different views of the effective tax rate on renewable energy plants, there is no dispute that regulators chose targets for standard installations that would exceed the prevailing cost of capital to some extent, even after taxes. Moreover, the target rates that Spain adopted were not an industry outlier: they were generally in line with those used to set subsidies for renewable energy projects

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[1724] First Brattle Quantum Report, ¶ 277.

[1725] Resp. Rej., ¶ 1492(iii); *see also* Second Accuracy Economic Report, ¶ 31 (arguing that Brattle "underestimates the effective tax rate by overlooking the tax benefit associated with financial expenditure linked to shareholder financing and tax losses carried forward"). Spain has presented similar evidence in other cases. *See, e.g.,* CL-180/RL-130, *Stadtwerke*, ¶¶ 340, 343 (noting evidence that on a sector-wide basis, which the tribunal considered more relevant than an individual-plant basis, the effective discounted tax rate was around 6%, with the result that a 7.398% pre-tax return would be equivalent to a 7% post-tax return).

[1726] CL-180/RL-130, *Stadtwerke*, ¶ 340.

[1727] *See similarly* CL-191/RL-145, *Hydro*, ¶ 730 (explaining that the claimants in that case "assert that 7.398% pre-tax is equivalent to a post-tax reasonable rate return of 5.549%: the Respondent asserts the equivalent post-tax figure is 7%. It is not clear to the Tribunal what taxes have been included by the respective experts in their calculations, so the Tribunal is not in a position to decide whether the post-tax equivalent of the pre-tax figure of 7.398% is 5.5%, 7% or another figure").

[1728] Second Brattle Quantum Report, ¶ 42.

in other EU Member States.[1729] This confirms that Spain did not reduce its targets grossly out of proportion to then-prevailing regulatory norms.

807. This latter point is a reminder that context matters. Notably, Spain had never promised any *particular* spread over the cost of capital, only "reasonable profitability," the phrase used in the 1997 Electricity Law. What is reasonable and proportionate for the profitability of a regulated and subsidized activity cannot be determined in a vacuum: it must take into account surrounding circumstances, including the objectives of policymakers and the economic constraints within which they acted. In this case, Spain was grappling with a major crisis involving the solvency and stability of the SES, at a time of massive unemployment in Spain and consumer electricity prices that already were higher than the EU average. In that environment, a decision to reduce target rates of return for a subsidized sector, no doubt below the profits they had hoped to obtain but still designed to enable efficient installations to obtain returns over the cost of capital, was not disproportionate to the aim and purpose of the Disputed Measures. As the *Stadtwerke* tribunal explained:

> [T]he concept of disproportionate … seems to call for a *relative* analysis, that is, a determination whether there exists a reasonable *relationship* between the burden placed on the foreign investor by the contested measures and the aim sought to be realized by those same State measures. In the present case, the aim sought to be realized by Spain in adopting the contested measures was to protect the solvency and stability of the public electricity system. It is undeniable that such State aim was vitally important to the public welfare of Spain. In order to achieve that aim, Spain adopted an approach of 'shared sacrifice,' that is, that those benefiting from the system should contribute to its continued operation and financial stability. With respect to the present case, [the disputed measures required operators] to forego a modest amount of revenue for the sake of preserving the electricity system. Thus, the aim, the method and the effect of the State measures were reasonable. From a relative perspective, one may therefore conclude that the burden … was reasonably proportionate to the aim and purpose of the measures ….[1730]

808. In conclusion, the Tribunal is unable to find that the target return rates that regulators adopted in 2013 and 2019, for determining the level of subsidies to be provided to plants that could not

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[1729] CL-137/RL-3, 2017 EC State Aid Decision, ¶ 120; *see also* CL-195/RL-143, *PV Investors*, ¶ 628 (finding that Spain's revised rate of return was "aligned with those granted," *inter* alia, by France, Italy, Estonia, Latvia, and the Czech Republic). The Tribunal considers it less relevant that the EC eventually approved the 7.398% pre-tax return rate as "not lead[ing] to overcompensation" of operators beyond "the minimum [amount] needed to achieve the objective" for which subsidies were granted. CL-137/RL-3, 2017 State Aid Decision, ¶¶ 113-118. The EC never opined that the higher rates under the earlier regime were *incompatible* with EU State aid principles, just that the lower rates were acceptable.

[1730] CL-180/RL-130, *Stadtwerke*, ¶ 354 (emphasis in original).

compete at market prices, were either irrational or disproportionate, as those concepts are understood within the FET standard of the ECT.

809. The Tribunal thus turns to other features of the Disputed Measures, which must be examined as well in light of the additional criticisms the Claimants present in this case.

c. The Consideration of Prior Returns in Calculating Future Remuneration

810. The Tribunal recalls, as discussed in Section III.F(4) above, that the "Third Final Provision" of the 2013 Electricity Law introduced an additional feature for calculating remuneration: that "reasonable return" would be calculated "throughout the regulatory life of the installation."[1731] Pursuant to this provision, the profits that a plant earned in prior periods would be taken into account in determining whether any subsidy was still required in the new cycle (and if so, at what level) in order to put it in a position to earn a 7.398% pre-tax return over its regulatory life.

811. The practical effect of factoring past profitability into the calculations is that if the past profits were above the new targeted level of return, the overage would operate as an offset against future remuneration. In other words, a plant whose past returns were well above 7.398% before taxes would now receive a lower Special Payment than a less profitable plant, even if the two plants were assigned to the same "standard" installation category. The rationale for this was that the New Regime was intended (as first described in RDL 9/2013) to provide additional remuneration only where "*necessary* [to] cover[] those investment costs that an efficient and well-run company cannot recover from the market"[1732] – meaning that subsidies would "not go beyond *the minimum level necessary* to cover the costs that are necessary for installations to compete on an equal footing" with other technologies and "to obtain a reasonable return, by reference to the standard installation …."[1733] The Preamble of the 2013 Electricity Law reiterated this principle, stating that the Special Payment would be used to enable plants "to attain *the minimum level required*" to cover costs and obtain a "suitable return with reference to the installation type applicable in each case."[1734] These repeated references to the "minimum" subsidies required made clear that the objective of the New

[1731] C-29/R-26, 2013 Electricity Law, Third Final Provision, ¶ 3 (quoting from the English translation of R-26, PDF p. 96).

[1732] C-32/R-43, RDL 9/2013, Preamble (emphasis added) (quoting from the English translation of C-32, p. 9).

[1733] C-32/R-43, RDL 9/2013, Article 1 (emphasis added) (quoting from the English translation of C-32, p. 20).

[1734] C-29/R-26, 2013 Electricity Law, Preamble (emphasis added) (quoting from the English translation of R-26, PDF p. 7).

Regime was not to continue granting subsidies *beyond* those levels, so as to enable some plants to obtain returns well over the targeted level, ultimately at the expense of consumers.

812. At the same time, the consideration of past returns to calculate the minimum future returns needed to achieve the new target rate should not be seen as placing a "cap" on lifetime returns. Certainly, for some plants with substantial past earnings (which was not PE2's situation), the result of the Third Final Provision was that in the new cycle, they would receive no subsidy at all.[1735] However, such plants would not be required to refund any money to the State on account of their past profitability above the new target rate. The Third Final Provision of the 2013 Electricity Law made clear that "[u]*nder no circumstances* may said new remuneration model result in any claim for remunerations received for energy produced prior to July 14th 2013, even if it ascertained that on said date it could have outperformed said return."[1736] Accordingly, the Third Final Provision has been described by some tribunals as imposing a "set-off" of past profits rather than a "claw back [of] money actually paid above the total allowable amount of subsidies."[1737]

813. The Claimants nonetheless characterize this feature as a "clawback," and argue that it constituted a retroactive regulation in violation of Spain's FET obligations.[1738] They describe the Third Final Provision as "[p]erhaps the most significant feature of Law 24/2013," and say that its effect was "that the Plant would be penalised for its past returns, effectively altering the rules which had applied to the energy already produced and already sold on the market by the Claimants."[1739]

814. The Respondent rejects the accusation of retroactivity, contending that taking into account past performance "may be retrospective, but it is certainly not retroactive."[1740] The Respondent characterizes the Third Final Provision as applying historical facts (past cash flows) to the calculation of subsidies going forward, but not affecting any rights to past subsidies that already were paid for PE2.[1741] The Respondent emphasizes that retroactivity under international law refers

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[1735] CL-128/RL-129, *BayWa*, ¶ 488 (stating that this was the situation "for the Claimants' facilities"); RL-159, *Eurus*, ¶ 347 (the result was that "11 of the Claimant's 13 facilities" were no longer entitled to any subsidies); CL-139/RL-131, *RWE*, ¶ 615 ("The impact of this new methodology has been that ten of the Claimants' plants now receive no subsidy at all").

[1736] C-29/R-26, 2013 Electricity Law, Third Final Provision, ¶ 4 (emphasis added) (quoting from the English translation of R-26, PDF p. 96).

[1737] CL-128/RL-129, *BayWa*, ¶ 487; RL-159, *Eurus*, ¶ 346.

[1738] Cl. Mem., ¶¶ 136(b), 237; Cl. Reply, ¶¶ 501, 731; Cl. PHB, ¶¶ 49-50.

[1739] Cl. Mem., ¶ 237.

[1740] Resp. PHB, ¶ 114 (citing RL-131, *RWE*, ¶ 617) (the Respondent refers to RL-122 by mistake). *See also* Resp. Rej., ¶ 1495.

[1741] Resp. Rej., ¶¶ 1116-1117.

to measures that affect acquired rights, and contends that the Claimants never had an "acquired right" to future subsidies at any particular level.[1742] It also notes that both the Spanish Constitutional Court and the Spanish Supreme Court have rejected charges of retroactivity, on the basis that the New Regime does not affect acquired rights but applies only to the future.[1743]

815. In evaluating this issue, the Tribunal recalls first that both the 1994 and 1997 Electricity Laws had been intended to incentivize, not just the *growth* of the renewable energy sector, but specifically advancements in *efficiency*.[1744] This is one of the reasons why (as discussed further in Section VII.D(4)d below) successive regulations in Spain always calculated remuneration levels based on "standard" facilities that were assumed to be operating with reasonable costs and production. One consequence of this choice was that the system did not provide inefficient operators with any guarantee of a minimum return level – just that tariffs would be set at levels rationally calculated to enable efficient operators to earn a reasonable return.[1745] But the flip side of this was that some operators would be enabled to earn return levels that were *higher than the target rates*, essentially as reward for exceeding efficiency goals. As the *PV Investors* tribunal observed:

> [R]easonable return does not imply that it acts as a 'cap.' When RD 661/2007 was in force (and the economic conditions allowed it), it cannot be doubted that efficient installations could outperform the reasonable return target and were entitled to keep the profits which the system allowed them to make.[1746]

816. Spain retained the sovereign right to change this approach on a prospective basis. As discussed in Section VII.D(1)d above, in the absence of specific assurances to investors of either legal stabilization or grandfathering, States are allowed to change their regulatory regimes prospectively, and apply them on a sector-wide basis, without exempting existing installations. Accordingly, Spain could have put operators on notice that from *now on*, any returns obtained beyond a declared

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[1742] Resp. C-Mem., ¶¶ 1103-1109; Resp. Rej., ¶ 1111.

[1743] Resp. C-Mem., ¶¶ 1113-1116; Resp. Rej., ¶ 1121.

[1744] *See, e.g.*, R-18, 1994 Electricity Law, Article 16(1) (remuneration parameters based on criteria "which motivate improvement" in "efficacy"); C-10/R-27, 1997 Electricity Law, Article 1 (the Law was intended to make the supply of electric power "more efficient and optimised") and Article 15(2) (remuneration to "act as an incentive to improve the effectiveness of management, the economic and technical efficiency of said activities and the quality of the electricity supply").

[1745] This was implicit in the Government's statement, at the time of RD 436/2004, that "any plant … in the special regime, *provided* it is equal to or better than the standard … for its group, will obtain reasonable return." R-32, *Memoria Económica* for RD 436/2004 (emphasis added).

[1746] CL-195/RL-143, *PV Investors*, ¶ 619; *see also* CL-195/RL-143, *PV Investors*, ¶ 813.

rate of reasonable return would be treated as offset against future subsidies, since plants enjoying higher profitability evidently would not need as substantial a Special Payment as others in order to achieve the targeted level of returns. The Claimants are correct that the *economic effect* of such a policy might well be to disincentivize rather than encourage efficiency during the next regulatory cycle, because any improvements making it possible to achieve higher returns would henceforth operate to reduce future subsidies, transferring the benefits of efficiency gains to consumers rather than to the operators who had achieved them. But even accepting the logic of this criticism, the fact remains that it is a State's prerogative to make policy decisions on a prospective basis, whether economically wise or unwise. It is not the prerogative of arbitral tribunals to tell States how to construct their subsidy regimes.

817. The difficulty with the Third Final Provision is that the change in rules took a proverbial "look back" at the profits obtained during *past* regulatory cycles, when operators had been encouraged to believe they could retain the benefits of efficient operation, and now effectively removed at least a portion of those benefits. Plants would not have to pay anything back to the State, but the past returns in excess of the new target would now be used to reduce future remuneration. Recalling that the whole rationale for subsidies was that renewable energy plants remained unable to compete effectively at market prices, the new policy had the effect of telling operators – only *after* the fact – that they should have been conserving past earnings because, in future, they might be expected to sell electricity without the full subsidies otherwise required to make their product competitive. Yet business planning can only take place prospectively.

818. A number of tribunals have considered this to be a critical distinction. As explained by the *BayWa* tribunal:

> It is one thing to amend payments for future production with immediate effect, and another to reduce payments that would have otherwise been made by reference to payments lawfully made in the past in respect of past production. …
>
> The Tribunal agrees that there was no contractual right or legitimate expectation to an unchanging subsidy, and it agrees that (subject to considerations of proportionality) Article 10.1 did not preclude new regulations from having immediate effect. But it is one thing to give new regulatory measures immediate effect for existing installations, and quite another to eliminate future subsidies otherwise payable by reference to

> amounts lawfully paid and received in earlier years on a quite different basis.[1747]

819. The tribunals that have found this feature to violate Spain's obligations under ECT Article 10(1) have invoked different elements of the FET standard in their analyses. For example, the *RREEF*, *BayWa* and *Cavalum* tribunals referred to "stability" obligations embedded in ECT Article 10(1).[1748] The *RREEF* tribunal also referred to what it called "shareholders' acquired rights" to retain dividends that already had been distributed, and referenced the legitimate expectations of claimants in that regard.[1749] The *PV Investors* tribunal stated that it would not be "reasonable" to take into account prior profitability, in assessing the claimant's alternative claim based on a legitimate expectation of a reasonable return, because "the inclusion of past profits in the computation would be tantamount to repealing or clawing back earnings which were legitimately made under the previous regime," which would "imply that the State can change legislation with retroactive effect, which would be contrary to the principle of non-retroactivity."[1750] The *Hydro* tribunal found an FET violation but did not articulate which strand(s) of the standard it considered to be at issue.[1751]

820. By contrast, the cases that found this feature not to violate ECT Article 10(1) were persuaded of that outcome on the basis of a distinction between retroactivity and immediate application. The *Isolux* tribunal explained as follows:

> The Arbitral Tribunal considers, in accordance with the distinction between retroactivity and immediate application adopted by the tribunal in the Nations Energy v. Panama case, that the system put in place by RDL 9/2013 does not have retroactive effect, but is rather of immediate application. It is because it does not revoke any rights acquired by the Claimant regarding the use of the Plants. It applies to the future. RDL 9/2013 does not provide for the return of remuneration received prior to 14 July 2013, which are intangible. The fact that the new remuneration system takes existing and past parameters into consideration … is nothing

[1747] CL-128/RL-129, *BayWa*, ¶¶ 490, 493.

[1748] CL-96/RL-95, *RREEF*, ¶ 325; CL-128/RL-129, *BayWa*, ¶¶ 496, 591(d); RL-152, *Cavalum*, ¶ 637.

[1749] CL-96/RL-95, *RREEF*, ¶¶ 328-329.

[1750] CL-195/RL-143, *PV Investors*, ¶¶ 812-813.

[1751] CL-191/RL-145, *Hydro*, ¶ 694 ("it would be objectionable and contrary to FET for past remuneration to be taken into account when determining a reasonable rate of return for the future. It is not necessary to resort to the concepts of acquired rights to conclude that removing subsidies for the future on the basis that reasonable returns have been made in the past may involve … unfair and inequitable treatment in breach of the FET standard").

> abnormal, since it applies to installations constructed prior to the reform, projecting all of its effects to the future.[1752]

821. The *RWE* tribunal likewise considered that "the key question … is whether the Disputed Measures have an impermissibly retroactive effect."[1753] In its view, they did not:

> There is no doubt that this marked a radical change to the way in which the Claimants' plants were remunerated. However, it appears to the Tribunal that, as a factual matter, the new regime has a retrospective rather than an impermissible retroactive effect: sums that were duly received under the RD 661/2007 regime in the period 2007 to July 2013, and to which the plant owners had an unrestricted entitlement, are now brought back into account, but there is – at least in theory – no question of repayment of such sums.[1754]

Given the non-retroactivity of the new provision, the *RWE* tribunal considered that it did not violate any requirement of stability under ECT Article 10(1), because the claimants had no legitimate expectation that the prior regime would not change, and the specific change at issue did not qualify as a "total and unreasonable change or subversion" of the prior regime, as other "key elements of the prior regime have remained substantially unchanged."[1755]

822. In the Tribunal's view, the principal problem with this feature of the New Regime is not about legitimate expectations or an obligation of stability in ECT Article 10(1). As discussed in Section VII.D(2)d above, Spain was entitled to change its approach to subsidizing renewable energy plants, provided that (i) it continued to respect the "reasonable return" framework that its own courts had established as a core commitment to investors; and (ii) it complied with the fundamental FET requirements of reasonableness (rationality) and proportionality. In this instance, the Tribunal also accepts the *rationality* of a new policy designed to minimize lifetime returns beyond a stated target level of profitability, and to end the provision of State subsidies for particular plants once that target had been achieved.

823. However, the Tribunal is not persuaded that the application of this new approach was *proportionate*, as required by the FET standard. The Tribunal recalls, as discussed in Section VII.D(1)d above, that the principle of proportionality requires that States seek to achieve

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[1752] RL-17/RL-105, *Isolux*, ¶ 814 (emphasis in original).

[1753] CL-139/RL-131, *RWE*, ¶ 613.

[1754] CL-139/RL-131, *RWE*, ¶ 617.

[1755] CL-139/RL-131, *RWE*, ¶ 619.

"a fair balance between competing interests and/or principles affected by [a measure], taking into account all relevant circumstances,"[1756] and that in seeking such a fair balance, they consider the interests of investors "who may have committed substantial resources on the basis of the earlier regime,"[1757] and not impose burdens on foreign investment that go "far beyond what [is] reasonably necessary to achieve good faith public interest goals."[1758]

824. In particular, the challenged feature effectively removes from the most efficient plants the benefits of past efficiencies that they had been led to believe they could retain. As the *BayWa* and *Eurus* tribunals observed, "the subsidies paid in earlier years were duly paid and duly taken into account in the operation of the [local companies], in their financing and (presumably) their taxation arrangements."[1759] Removing these benefits, by deducting them from subsidies that otherwise would be paid in a new regulatory cycle based on the cost structure of the standard installation category to which plants are assigned, is a significant impact on the interests of foreign investors. Spain has not demonstrated that this particular impact was reasonably necessary to address its legitimate public policy interest in resolving the Tariff Deficit problem. Indeed, with the other significant elements of the New Regime in place, it seems likely that the problem "would have been solved in any event by the Disputed Measures without much further delay and without the element of claw-back of payments earlier lawfully made."[1760]

825. For this reason, the Tribunal finds that this feature of Law 24/2013 violated the FET obligation in ECT Article 10(1).

826. That said, there may be little practical consequence of this finding for the Claimants in this case. As discussed further in Section VIII below, the Parties agree that the PE2 Plant was not harmed to any appreciable extent by this feature of the New Regime, because the Plant had operated only for a short time prior to the change in law and with very poor results, not high levels of profitability. Presumably for that reason, the Claimants have not presented the Tribunal with any damages figure

[1756] CL-96/RL-95, *RREEF*, ¶ 465; CL-191/RL-145, *Hydro*, ¶ 574; RL-159, *Eurus*, ¶ 360.

[1757] RL-64, *Blusun*, ¶ 319(5).

[1758] CL-211/RL-157, *Eskosol* Award, ¶ 410.

[1759] CL-128/RL-129, *BayWa*, ¶ 496; RL-159, *Eurus*, ¶ 355.

[1760] CL-128/RL-129, *BayWa*, ¶ 496 (adding that "[i]t may have been reasonable to take into account, in calculating subsidies going forward, the 7.398% that the Plants were deemed to be entitled to under the Disputed Measures. To count against them the amounts previously earned in excess of that threshold was to penalise the Plants for their successful operation during those years."); RL-159, *Eurus*, ¶ 355 (same).

corresponding directly to this feature of the New Regime, even though they classify it as a violation of ECT Article 10(1).

d. The Use of "Standard" Rather than Actual Facilities for Tariff Calculations

827. By contrast, it appears that the Claimants' damages claim is largely driven by a different issue, which concerns the way in which the New Regime was *implemented* specifically with respect to the PE2 Plant. The Claimants complain that Spain used a "standard plant" construct in the context of a plant that employed a unique technology, but then set the cost base for this "standard" category far below PE2's actual costs, in a manner that allegedly violated its FET obligation under ECT Article 10(1).

828. To examine this proposition, the Tribunal breaks it into two logical parts. This section considers Spain's decision to base Special Payments under the New Regime on a series of hypothetically "standard" facilities, rather than utilizing the actual costs of individual plants. In general, the Tribunal finds no problem with this approach, given the long use of "standard plant" constructs in successive energy regulations in Spain. The real question is whether the approach was then implemented in good faith through a rational analysis, even if that analysis ultimately involved some inaccurate assumptions. That second question is examined in the following section, where the Tribunal turns to the way that "efficient" investment costs were calculated in the June 2014 Order specifically for category IT-00617 (to which PE2 was assigned).

829. First, however, the Tribunal recalls that under RDL 9/2013, the 2013 Electricity Law and RD 413/2014, Special Payments were to be calculated based on hypothetical "standard" facilities, distinguished by technology and size. For each category, production assumptions were to be based on installed capacity (rather than actual production), and cost assumptions were based on CAPEX and OPEX levels that were deemed "efficient" for plants of equivalent technology and size (rather than actual costs of actual plants).[1761]

830. The justification for this approach is reflected, *inter alia*, in the measures' Preambles. RDL 9/2013 speaks of the principle that installations would "receiv[e] the revenue deriving from market participation, with an additional remuneration which, were it to prove necessary, covers those investment costs that an *efficient and well-run company* cannot recover from the market." Correspondingly, "[t]he objective is to guarantee that the high costs of an *inefficient* company are

[1761] C-32/R-43, RDL 9/2013, Article 1 (referring to the English translation of C-32).

not used as a benchmark."[1762] Remuneration thus was to be calculated on the basis of the costs of a "standard installation," presumed to be "efficient and well-run," with the regime set up "based on standardised parameters depending on the different standard installations that are established."[1763] RDL 9/2013 emphasized that through this mechanism, subsidies would "not go beyond the minimum level necessary to cover the costs that are necessary for installations to compete on an equal footing … in order to allow those installations to obtain a reasonable return, by reference to the standard installation."[1764]

831. The Preamble of the 2013 Electricity Law echoed these explanations for the use of "standard" plant constructs to calculate Special Payments. It explained that the Special Payment was intended to enable plants "to attain the minimum level required to cover any costs … and … to obtain a suitable return with reference to the installation type applicable in each case," and that the level of above-market remuneration for each installation type would consider the "mean operating costs … and the value of the initial investment of the installation type," based on "an efficient, well-managed company."[1765]

832. The calculation parameters were developed further in RD 413/2014, which explained that the Special Payments for each "standard installation" would be based on the return they were projected to receive over their "regulatory useful life,"[1766] assuming "the standard revenues from the sale of energy valued at market price, the standard operating costs necessary to carry out the activity and the standard value of the initial investment … as if for an efficient and well-managed company."[1767] The specific remuneration parameters for "each of the different standard installations … classified according to their technology, electrical system, power, age, etc." would be established by a forthcoming Ministry order,[1768] and "every installation, depending on its characteristics, shall be assigned a standard installation."[1769]

833. The Claimants complain about this approach, saying that "the effect of the Special Payment being calculated by reference to the costs of a 'standard facility' is that plants that involved higher costs

[1762] C-32/R-43, RDL 9/2013, Preamble (emphasis added) (quoting from the English translation of C-32).
[1763] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32).
[1764] C-32/R-43, RDL 9/2013, Article 1(2) (quoting from the English translation of C-32, p. 20).
[1765] *See* C-29/R-26, 2013 Electricity Law, Preamble (quoting from the English translation of R-26, PDF p. 7).
[1766] C-30/R-56, RD 413/2014, Preamble, Part II (quoting from English translation of C-30, PDF p. 3).
[1767] C-30/R-56, RD 413/2014, Preamble, Part II (quoting from the English translation of C-30, PDF p. 3).
[1768] C-30/R-56, RD 413/2014, Preamble, Part II (quoting from the English translation of C-30, PDF p. 3).
[1769] C-30/R-56, RD 413/2014, Article 11.4 (quoting from the English translation of C-30).

are penalised." The Claimants point out that using "data averages" to determine standard costs by definition excludes outliers which "do not conform."[1770] In the Claimants' view, any calculation of the Special Payment "by reference to a Standard Installation (i.e. not an actual plant, but what the Government considers to be 'standard') creates further uncertainties."[1771]

834. The Tribunal is not impressed by these complaints. While the Claimants might have preferred an "actual cost" analysis that considered each plant in Spain individually, the fact remains that prior energy regulations in Spain had *always* employed "standard" plant constructs to determine appropriate subsidy levels, long before EBL invested in Tubo Sol and Tubo Sol invested in PE2. On each occasion, the use of such "standard" constructs was closely tied to the goal of motivating improvements in efficiency.

835. Thus, as explained further in Section III.A(2) above, the 1994 Electricity Law had provided for the Government to establish remuneration parameters based on "objective and non-discriminatory criteria which motivate improvement" in efficiency, with "[t]he costs granted to the different activities … calculated in a standard manner based on transparent and objective formulas and parameters."[1772] The 1997 Electricity Law reiterated the principle that remuneration of electricity suppliers should "act as an incentive" to improve both the "effectiveness of management" and "the economic and technical efficiency" of activities.[1773] RD 2818/1998 categorized renewable energy plants by their relevant technology, for purposes of determining the tariff levels available. For solar energy, the premium was higher than for other technologies, but no distinction was made among solar facilities based on their individual characteristics; all would receive the same tariff per kWh of electricity produced.[1774] The PFER 2000-2010 explained that remuneration levels were "determined for each technology according to its profitability, defining a range of standard projects for the calculation model."[1775] In particular, "[t]hese standard projects have been characterised by technical parameters relating to their size, equivalent operating hours, unit costs, periods of implementation, lifespan, operating and maintenance costs and sale prices per final unit of

[1770] Cl. Mem., ¶ 136(a).

[1771] Cl. Mem., ¶ 297(c).

[1772] R-18, 1994 Electricity Law, Article 16(1).

[1773] C-10/R-27, 1997 Electricity Law, Article 15(2).

[1774] C-1/R-46, RD 2818/1998, Articles 2, 28, 32.

[1775] C-46/R-62, PFER 2000-2010, p. 180 (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84).

energy."[1776] In other words, the plan was not based on an assessment of the actual capital and operating expenses of each electricity plant in the country, but rather on certain assumptions about the reasonable costs of different *types* of facilities, operating on the assumption of reasonable efficiency.

836. The use of "standard" plant constructs to calculate subsidies for renewable energy was continued in RD 436/2004. Specifically, Article 40.4 of RD 436/2004 empowered the CNE to establish "the definition of standard or typical technologies and installations or plants,"[1777] with the understanding that the performance of any actual installation might fare worse or better than the standard, based on its own particularities, including efficiencies or inefficiencies.[1778] In the PER 2005-2010, which described anticipated revisions to RD 436/2004, the use of "standard" plant constructs was again maintained, with "the funding needs of each technology" determined by assessing "the technical and economic parameters of … typical projects for each technology."[1779] Returns were calculated "for each *project type*."[1780]

837. Finally, RD 661/2007, which was in effect when EBL decided to purchase Tubo Sol's shares, again calculated tariffs on the basis of standard facilities, "classif[ied] into categories, groups and sub-groups."[1781] Tariffs under RD 661/2007 were "determined as a function of the Category, Group, or Sub-Group to which the facility belongs," and as well as the installed power.[1782] The same tariff was provided for all CSP plants, which were classified as Subgroup b.1.2 for purposes of the listed tariffs and premiums.[1783] The Claimants directly admit as much:

> [T]he FIT schemes under the Special Regime were not designed by Spain to offer each RE 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 CSP plant. Rather, the FIT schemes under the Special Regime were designed by Spain to offer a

[1776] C-46/R-62, PFER 2000-2010, pp. 180-181 (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84).

[1777] C-2/R-48, RD 436/2004, Article 40.4.

[1778] *See* R-32, *Memoria Económica* for RD 436/2004, p. 4 (emphasizing that "any plant in Spain in the special regime, *provided* it is equal to or better than the standard (the standardised plant) for its group, will obtain reasonable return" (emphasis added)).

[1779] C-3/BRR-69, Summary PER 2005-2010, pp. 55-56; *see also* C-48/R-63, PER 2005-2010, p. 273 (referring to the English translation of R-63, PDF p. 115).

[1780] C-3/BRR-69, Summary PER 2005-2010, p. 56 (emphasis added); *see also* C-48/R-63, PER 2005-2010, p. 274 (referring to the English translation of R-63, PDF p. 116).

[1781] C-4/R-49, RD 661/2007, Preamble (quoting from the English translation of C-4, p. 77).

[1782] C-4/R-49, RD 661/2007, Article 25 (quoting from the English translation of C-4, p. 102).

[1783] C-4/R-49, RD 661/2007, Article 36 (referring to the English translation of C-4, pp. 113-114).

> particular return (after tax) *on the marginal plant* and the actual return for a particular CSP investment would vary based on its own characteristics.[1784]

838. Based on this history, it is hardly surprising that while the New Regime introduced various changes in methodology for calculating subsidy levels, it did not change the core practice of doing so based on "standard" plant types rather than the varying cost structures of actual individual plants. This was a common motif under all successive regulatory regimes in Spain, and there was nothing either irrational or disproportionate in principle, nor contrary to any legitimate expectations that investors could have held, about maintaining the use of standard installation metrics as the basis for calculating subsidies. As the *BayWa* and *Eurus* tribunals both observed in rejecting similar challenges to Spain's use of a "standard facility" metric:

> It was argued that the Claimants' legitimate expectation related to its own plants: to adopt some other standard of calculation deprived them of the benefit of their prudent investment and management of the plants. On the other hand, Spain had to deal with some 6,000 wind plants, not to mention other RE facilities; there were elements in earlier legislation of calculations based on standard facilities, and it was not unreasonable, at least for the future, to calculate subsidies on the basis of standard facilities, adapted to the method of power generation. In the end, in the Tribunal's view, this aspect of the Disputed Measures did not breach Article 10.1 of the ECT.[1785]

839. The Tribunal agrees. It finds that Spain's use of "standard" rather than actual facilities as the basis for calculating subsidies does not breach the FET standard in the ECT.

e. The Manner in Which Costs Were Calculated for the Plant's "Standard" Category

840. As noted in Section VII.D(3) above, in theory a State measure may be acceptable in design but still fundamentally flawed in implementation and execution. That is the real remaining issue in this case: did Spain violate its FET obligation by the way in which it determined the benchmark investment costs that were reflected in the June 2014 Order, for the "standard" plant category to which PE2 was assigned (IT-00617)? The Claimants state that 90% of their alleged damages "arise from Spain's incorrect establishment of the standard investment costs of the PE2 plant."[1786]

[1784] Cl. Reply, ¶ 511 (emphasis added).

[1785] CL-128/RL-129, *BayWa*, ¶ 485; RL-159, *Eurus*, ¶ 345.

[1786] Tr. Day 1, 89:5-7; Tr. Day 6, 82:15-17.

841. The June 2014 Order set the "standard" initial investment costs for category IT-00617 at €3,541,793/MW, which for a plant with 30 MW of installed capacity implied a total initial investment cost of €106,253,790.[1787] The Claimants assert that this was well below the costs actually incurred to construct PE2, and that it was "particularly unreasonable" for Spain not to use Tubo Sol's actual costs in the June 2014 Order, given that PE2 was the only plant assigned to its category and therefore its experience was the only source of reliable data.[1788] The Claimants moreover say that Spain disregarded reports which the IDAE (a State-owned advisory body that reports to the Ministry) had commissioned from two consultants, Roland Berger and BCG, and which identified higher costs for construction of a Fresnel plant.[1789] Instead, Spain set the benchmark investment costs with reference to a 2011 study that the Claimants say was "outdated" and prepared without access to complete or reliable information,[1790] and which led to "artificially depressed investment costs."[1791] In the Claimants' view, this process was without "any rigorous basis,"[1792] "clearly not based on a reasonable method of assessment,"[1793] undertaken in "wilful disregard" of the impact it would have on PE2,[1794] and ultimately "both unreasonable and arbitrary" under the ECT.[1795]

842. The starting point in examining these complaints is that legally, the analysis under the ECT does not turn on the accuracy *per se* of the benchmark costs that Spain set for category IT-00617. The relevant legal question is whether Spain selected the benchmark *in good faith* and through a *rational analysis* in light of the contemporaneous circumstances, which include the information available to it at the time. In general, the fact that regulators may make mistakes or adopt inaccurate assumptions in the course of an otherwise rational analysis is not enough to constitute an international treaty breach. It is well established that FET does not command errorless decision-making. The *AES* tribunal explained this point as follows:

> [I]t 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

[1787] Second Brattle Quantum Report, n. 231; Resp. Rej., ¶ 959.

[1788] *See, e.g.,* Cl. Mem., ¶ 136(a); Cl. Reply, ¶ 512.

[1789] Cl. Reply, ¶ 564; Cl. PHB, ¶ 140.

[1790] Cl. PHB, ¶¶ 127, 137, 140, 146-147.

[1791] Cl. PHB, ¶ 141.

[1792] Cl. Reply, ¶ 564.

[1793] Cl. Mem., ¶ 316.

[1794] Cl. PHB, ¶ 127; *see also* Cl. PHB, ¶ 140 (accusing Spain of being "determin[ed] to impose a reduction in the remuneration of the PE2 Plant at any cost even where there was no rational basis for doing so").

[1795] Cl. PHB, ¶¶ 127-128, 131, 140.

> 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 of juridical propriety) … that the standard can be said to have been infringed.[1796]

The *Eskosol* tribunal similarly observed that "[j]ust as good faith errors about existing facts do not amount to arbitrary or irrational conduct, an inaccurate but good faith prediction of future events – particularly one made in a highly dynamic environment – is hardly evidence of conduct founded in caprice rather than in reason or honest belief."[1797]

843. Before turning to the process that Spain followed for the June 2014 Order, it is worth recalling that under the prior regulatory regime, Spain had set tariffs for all CSP plants at the same level, regardless of any differences in the costs of constructing or operating individual plants. The regulatory regime did not differentiate in any way among CSP technologies or take into account any particular challenges encountered by particular plants.[1798] The Claimants accept that since there was only one tariff for all CSP facilities, it was for investors to make business judgments about which CSP technology to develop.[1799] The profitability of a given plant would rise or fall on its actual costs, without expectation of tariff differentials to account for more or less expensive CSP facilities.

844. With that understanding, the Claimants chose to develop a *unique* technology, without any proven track record of commercial operation either in Spain or elsewhere in the world.[1800] They did so on the presumption that Fresnel technology would cost less to construct than traditional parabolic trough technology.[1801] This presumption was consistent with the general industry expectation at the time that Fresnel was "a simpler and lower-cost technology … [which should] cost less than Parabolic Trough on a per surface and per installed megawatt basis," thereby justifying its lower

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[1796] RL-33, *AES* Award, ¶ 9.3.40; *see also* RL-33, *AES* Award, ¶¶ 9.3.42, 9.3.66 (examining whether the "evidence describes a not culpably unreasonable implementation process" in relation to electricity pricing decrees, and concluding that "the several procedural shortcomings in Hungary's implementation of the price decrees … are [not] sufficient to constitute unfair and inequitable treatment").

[1797] CL-211/RL-157, *Eskosol* Award, ¶ 389.

[1798] Cl. Reply, ¶ 737.

[1799] Tr. Day 6, 47:8-11.

[1800] Cl. Reply, ¶ 565 (explaining that at the time of the Disputed Measures, the Plant was "the only Linear Fresnel CSP plant in Spain (and in the world)"); C-72, Fichtner Due Diligence Report, p. 3-1 ("For the time being the Fresnel technology … has been demonstrated in a few prototypes and collector test beds").

[1801] C-72, Fichtner Due Diligence Report, pp. 1-3, 9-1 ("Even if there are no other solar thermal power plants on the basis of the Fresnel technology to compare the investment with, the consultant presumes that there should be some cost reduction potential for the solar field").

technical efficiency (requiring more surface area to produce the same electricity).[1802] As it turned out, however, the cost to build and operate PE2 ran far higher than the Claimants had expected, and production levels were much lower than they had projected. According to the Claimants' expert, both factors depressed the returns that PE2 would have achieved even if Spain had not enacted the Disputed Measures.[1803]

845. The new regulatory regime introduced by RDL 9/2013 and the 2013 Electricity Law changed the remuneration calculation in numerous respects, but one point remained consistent: efficiency in construction and operation mattered to profitability. As discussed above, remuneration was targeted to deliver a defined level of "reasonable return" to plants that achieved certain benchmarks that regulators believed would reflect efficient construction and operation. In setting these benchmarks, regulators were constrained by the extent of information available about different technologies. For some renewable technologies, such as wind plants, there were hundreds of data points available, from which average costs could be calculated and benchmark efficient costs in turn derived. For traditional parabolic trough CSP technology, there also were ample data points. But with respect to the novel Fresnel technology, there was no equivalent wealth of information. Rather, there was a single small prototype plant (PE1) and a single commercial facility in Spain (PE2); the latter had begun operating commercially only in August 2012. There were no other operating plants, either in Spain or anywhere else in the world, to serve as comparables in an analysis of what the costs *should be* for an efficiently constructed and operated Fresnel facility. Both Parties emphasize the lack of quality information available at the time.[1804]

846. In these circumstances, it would not have been surprising if regulators in 2013-2014 had opted again to treat all CSP plants alike, subject only to differentiation based on non-technical features such as their year of commissioning and their amount of installed capacity. That would have been consistent with the prior regime's provision of a single tariff applicable to all CSP plants. It is far from clear that regulators have a duty to adapt their subsidy regimes immediately, to differentiate each new *sub-type* of technology within a given category (such as CSP), shortly after novel technologies are introduced by the first investor to attempt them commercially.

847. Nonetheless, the June 2014 Order *did* recognize, at least in principle, that there was a new type of CSP technology (Fresnel) in play: it assigned an IT- code specifically for the new PE2 Plant.

[1802] Servert/Nieto CAPEX Report, ¶¶ 14-17.

[1803] Second Brattle Quantum Report, ¶¶ 285, 288.

[1804] *See, e.g.,* Cl. Reply, ¶ 567 (citing C-224, BCG Report, p. 42); Resp. Rej., ¶ 983.

Having done so, regulators then needed to develop some figures to serve as the construction and operation costs that were deemed efficient for this novel type of CSP plant. The conundrum flowing from limited data presumably remained, however. The legal question is whether Spain's conduct in the face of this conundrum was rational, in the sense of having been based on reason rather than caprice, or alternatively was manifestly unfair and unreasonable, rising to the level of culpable conduct that would justify a finding of a FET violation under the ECT and applicable international law.

848. The record reflects that, as in prior regulatory cycles, Spain asked the IDAE to recommend the figures to be used for the new subsidy regime. The IDAE had drawn up the figures in the PFER 2000-2010 and the PER 2005-2010.[1805] In approaching its new task, the IDAE considered the same categories of investment costs as it had done in the past, namely those items that were directly required for electricity production.[1806] These categories excluded financing costs, which likewise had been excluded in all prior regulatory regimes as inappropriate to be covered by public subsidies.[1807]

849. The Respondent explains that because the PE2 Plant was commissioned in 2012, the IDAE focused on the data available in 2012 regarding investment costs for IT-00617, analyzing all reports and studies then available. The IDAE apparently drew data in particular from a technical study, entitled "Assessment of the Potential of Thermo-Electric Solar Power," that had been prepared in connection with the PER 2011-2020 by the National Renewable Energy Center ("**CENER**"), the engineering consulting firm IDOM, and the Association of Investigation and Industrial Cooperation of Andalusia ("**AICIA**") (the "**2011 Technical Assessment**").[1808] Section 3.3.1 of the 2011 Technical Assessment stated that its authors had studied the PE1 prototype plant as a "reference technology" for the PE2 Plant then under development, and Section 4.3.1 displayed "the total investment cost of the reference power plant with 30MW of direct saturated steam generation … broken down by its defined functional sub-systems." Table 10 summarized the report's findings, concluding that the total investment cost for a Fresnel linear collector was believed to be €106.55

[1805] Resp. Rej., ¶ 1084.

[1806] Resp. Rej., ¶¶ 944-945.

[1807] Resp. Rej., ¶¶ 948-950; *see, e.g.*, C-46/R-62, PFER 2000-2010, pp. 181-182 (explaining that the concept of reasonable return under the 1997 Electricity Law was "before financing") (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84).

[1808] Resp. Rej., ¶¶ 959-960 (citing R-350, 2011 Technical Assessment); *see also* STAC-8, IDAE, "Request for information about IT-000617 of the Ministerial Order of the European Institute of Innovation and Technology 1045/2014," 31 July 2019, p. 3 (IDAE explaining in 2019, in response to an information request, that it drew its data about IT-00617 from the 2011 Technical Assessment by CENER, IDOM and AICIA).

million.[1809] Further tables showed the cost breakdown for each of the sub-systems listed in Table 10.[1810] The 2011 Technical Assessment predicted that the total investment costs for a future Fresnel facility "will experience an 8% to 14% reduction by 2020," based on expected improvements and standardization of components, and in light of the cost reductions seen more generally in the solar energy field (including for parabolic trough CSP technology).[1811]

850. The IDAE also commissioned studies by two outside technical consultants, BCG and Roland Berger. BCG issued a report dated 30 July 2014,[1812] and Roland Berger issued one dated 31 October 2014.[1813] Both of these reports therefore post-dated the June 2014 Order. The Claimants contend that earlier drafts were submitted to IDAE but were not favored, perhaps because "they did not reflect the extent of reform that the Ministry envisaged."[1814] The Respondent admits that the IDAE received certain drafts before the June 2014 Order, to which it provided feedback,[1815] but also notes that these drafts expressly required confidentiality,[1816] were not used for the public consultation processes that Spain conducted before issuing the June 2014 Order,[1817] and ultimately were "not taken into account by the regulator" in preparing the June 2014 Order.[1818] The Respondent contends that it was not required to delay issuing determinations pending the completion of these consultants' reports to IDAE,[1819] and was entitled instead to rely on the IDAE's own recommendations, as it had done for earlier subsidy determinations.[1820]

[1809] R-350, 2011 Technical Assessment, Sections 3.3, 4.3 and Table 10 (listing presumed investment costs for the "Solar energy collection mechanism," the "Solar to thermal energy conversion mechanism," the "Thermal energy storage system," the "Power block," and a "Engineering and EPC margin").

[1810] R-350, 2011 Technical Assessment, Tables 11-14.

[1811] R-350, 2011 Technical Assessment, Section 4.3.2.

[1812] C-224, BCG Report. The Claimants characterize this as a "final report," whereas the Respondent characterizes it as a draft, contending that BCG's contract was terminated before any final report was issued. *Cf.* Cl. Reply, n. 882-884, 886-887 with Resp. Rej., ¶¶ 980, 1406.

[1813] C-196/C-223, Roland Berger Report.

[1814] Cl. Reply, ¶ 535.

[1815] *See, e.g.*, R-325, "Comments by IDAE on the Document Drafted by Boston Consulting Group, 'Analysis of standards of electricity production projects under the special regime,' January 2014, and Instructions to Rectify the Errors Noticed," 21 March 2014.

[1816] Resp. Rej., ¶¶ 1089-1092 (noting, for example, Roland Berger's insistence on confidentiality in an earlier draft, R-361, Roland Berger, Analysis of standards for electricity production projects in special regime, IDAE, 4 February 2014).

[1817] Resp. Rej., ¶ 1076.

[1818] RD-1, Resp. Op. Statement, Slide 213; Resp. Rej., ¶ 980.

[1819] Resp. Rej., ¶ 1098.

[1820] Resp. Rej., ¶¶ 1078, 1081, 1084.

851. By contrast, the Claimants say it was irrational for Spain to adopt the investment cost figures from the 2011 Technical Assessment, when it "should have, instead, taken the PE2 Plant's Capex as the reference to define the standard cost."[1821] According to the Claimants, the Plant's actual investment costs were €167 million, and the reasonableness of these costs is confirmed by the figures that BCG and Roland Berger ultimately calculated for a Fresnel plant: €5.2/MW and €5.77/MW, respectively, which for a 30 MW plant would amount to €157 million or €173 million, respectively.[1822] The Respondent counters that it would have been irrational and improper to equate *actual* outlay with *efficient* outlay, without any analysis to justify such equivalence, given that the 2013 Electricity Law required subsidy calculations to be aimed at reasonable returns for benchmark plants operating efficiently.[1823] As for the BCG and Roland Berger reports, the Respondent contends that these simply adopted the cost figures in Tubo Sol's annual accounts, which had been reported to the Commercial Registry (*Registro Mercantil*), without any additional analysis.[1824] In the Respondent's view, the reports (and the Claimants' position) fail to grapple with substantial evidence that the development of the PE2 Plant was anything but efficient.

852. The Tribunal has studied both the BCG and Roland Berger reports. As for the former, it expressly states that its recommendations for all the different renewable technologies studied are "[b]ased on the[] ranges of observed values" for investment and operating costs that were obtained from "samples of audited accounts presented to the Commercial Registry."[1825] The main point of the BCG report seems to be that a "payment methodology based on standard values does not align with the reality" of the actual costs expended by operators.[1826] That is of course inherent in the regulatory exercise charged by the 2013 Electricity Law, which required subsidies to be linked to efficient activities and not simply activities *per se*. Moreover, while observed reality is obviously an important source of data, and may lend itself to inferences about average or optimum expenditure given enough data points to reflect a range of experiences, the actual costs of any *one* facility – much less the first ever to attempt a new technology – cannot be assumed, without analysis, to represent the "standard" for efficient construction of such plants in general.

[1821] Cl. PHB, ¶ 201.

[1822] Cl. PHB, ¶ 140 and n. 262 (citing C-196, Roland Berger Report and C-224, BCG Report).

[1823] Resp. Rej., ¶ 968 ("to simply finance the costs reflected in the annual accounts … would amount so subsidising inefficiencies"), ¶¶ 1434-1435.

[1824] Resp. Rej., ¶¶ 984, 986, 1103, 1437; Resp. PHB, ¶ 122 & n. 241.

[1825] C-224, BCG Report, p. 8.

[1826] C-224, BCG Report, p. 8.

853. As for the Roland Berger report, this devotes a total of nine lines to Fresnel technology. It states that because there is only one commercial Fresnel plant in Spain, "[t]herefore, the *typical* plant in this *unique case* would be a 30 MW plant," and "[t]he investment cost would be 5.77 million euros per MW broken down into EPC, interlayer, development, fees and others."[1827] The document is devoid of any analysis of how it derived a "typical" investment cost – much less one that could be presumed efficient as per the regulatory approach – from the "unique case" reflecting PE2's actual costs. According to Drs. Servert and Nieto, the report cites information sourced from "Registro Mercantil and Sector interviews" as the basis for its estimation of CSP technologies in general.[1828]

854. The Respondent's experts provide specific examples of why it is not persuasive in this context to simply equate "actual" with "efficient" investment costs. First, they contend, PE2's recorded costs include substantial "soft costs" which had a "disproportionate weight" on the total CAPEX figures,[1829] and were not part of the official methodology for calculating subsidies, because they were not directly required for electricity production. In addition, they note several expenditures that they consider to be excessive based on prevailing costs, such as more than €14 million in "Project Development" expenses,[1830] and expenditures on the water treatment plant and plant control systems which "do not match their reasonable cost at that time."[1831] To put these cost overruns in context, the experts recall that the competitive advantage of Fresnel technology was supposed to be its *low cost* compared to other technologies, which would compensate for its expected lower rates of production. According to the Respondent and its experts, this advantage is lost if far more is spent than should be needed for the technology in question.[1832]

855. This latter point about PE2 being plagued by cost overruns is interesting in light of the advice that EBL had received from Fichtner before investing in 2009. As discussed in Section III.C(1), Fichtner had recommended that EBL's investment contract with Novatec be structured to include safeguards to protect EBL if Plant development costs exceeded €125 million, including a right of rejection if

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[1827] C-196/C-223, Roland Berger Report, p. 115 (emphasis added).

[1828] Servert/Nieto CAPEX Report, ¶ 23.

[1829] RD-5, Servert/Nieto Hearing Presentation, Slide 7 (referring to "Fees, Lease costs, Taxes and Interest paid"), Slide 15 ("The annual accounts deposited at the 'Registro Mercantil' that served as the base for Roland Berger and [BCG] are inflated with soft costs and are not representative of the actual capex.").

[1830] Servert/Nieto CAPEX Report, ¶¶ 86(x), 97, 194-198.

[1831] Servert/Nieto CAPEX Report, ¶¶ 87, 92-93.

[1832] Resp. PHB, ¶ 144; Servert/Nieto CAPEX Report, ¶¶ 14-17; *see also* Tr. Day 5, Nieto, 190:5-14 (Mr. Nieto testifying that "in the end it would not be reasonable to invest €150 million in something generating 50 GW when you could invest less than twice in something generating three times more").

they exceeded €135 million.[1833] Fichtner evidently saw €125 million as a rational target for investment costs. EBL's management accepted this advice, and advised its Supervisory Board to assume "a total project investment of 128 million to 135 million EUR."[1834] The Supervisory Board then authorized an offer to Novatec to be conditioned on both a contractual right of rejection if total investments exceeded €135 million and a "right of reduction" if they exceeded €125 million.[1835] This is all part of the history of the Claimants' investment. While the Tribunal is unable to determine precisely *why* PE2's costs ultimately exceeded these levels by such a significant amount,[1836] the fact that they did renders somewhat curious the Claimants' insistence in this arbitration that *Spain* was irrational in not accepting PE2's actual costs of €167 million as the efficient "standard" upon which "reasonable return" subsidies should be based.

856. Taking all these issues into account, the Tribunal concludes that State regulators were not obligated to accept either PE2's actual costs, or the suggestions of BCG and Roland Berger that were largely based on those costs, given significant grounds for concern as to their appropriateness.[1837] For an exercise that was intended to ensure that public funds subsidized only efficient expenditures, and not all expenditures *per se*, it was reasonable for regulators not to simply adopt without scrutiny the "actual" expenditures of a given operator. This point has been accepted by other tribunals,[1838] and at least at the level of principle by the Claimants' own regulatory experts.[1839]

[1833] C-72, Fichtner Due Diligence Report, pp. 8.3-8.4. This recommendation regarding CAPEX levels for PE2 should not be confused with some of Fichtner's higher estimates for total investment costs by EBL. As Drs. Servert and Nieto note, the latter included various financing costs which are not related to the CAPEX calculation. *See* Servert/Nieto CAPEX Report, ¶ 66. It should be recalled that financing costs were always excluded from Spain's calculation of reasonable returns for purposes of determining subsidy levels, long before EBL's investment and any of the Disputed Measures. *See, e.g.,* C-46/R-62, PFER 2000-2010, p. 182 ("before financing") (quoting from the English translation provided in RD-1, Resp. Op. Statement, Slide 84).

[1834] C-71, EBL Circular VR 09/02, 14 January 2009, p. 8.

[1835] C-70, Minutes of meeting of EBL's Supervisory Board, 14 January 2009, PDF p. 3.

[1836] The Respondent suggests that this may have been due to Novatec's lack of experience in the EPC role. *See* Resp. PHB, ¶ 21 (noting also Mr. T. Andrist's testimony that EBL would have preferred other EPC contractors but they declined to participate; that EBL later terminated Novatec's contract for maintenance of the Plant, and that Novatec went into bankruptcy a few years later). Drs. Servert and Nieto observe that 51.4% of the EPC budget was for a subcontract performed by Novatec itself. Servert/Nieto CAPEX Report, ¶ 188.

[1837] *See similarly* CL-139/RL-131, *RWE*, ¶ 663 ("A State is not obliged to follow … expert advice that it has commissioned" but "with which it disagrees").

[1838] *See* CL-180/RL-130, *Stadtwerke*, ¶ 351 ("The Spanish regulator used the concept of a 'standardized facility' making its projections for a reasonable rate of return both in respect of the remuneration regime under RD 661/2007 and under the disputed measures and hence if costs were unreasonably excessive at a particular facility they would not be taken into account for these purposes").

[1839] *See* Tr. Day 3, Caldwell, 122:15-21 (Q: "As an expert, do you think that it is wise for the Spanish taxpayers to contribute to pay subsidies to inefficient companies so that they may be competitive in the market?" A: "No. We have

857. Of course, the conclusion that the BCG and Roland Berger figures were likely too high for the purpose does not mean that the *alternate* figures Spain adopted, based on the IDAE's reliance on the 2011 Technical Assessment, were accurate either. As to this issue, the Respondent's experts say the IDAE's figure of €106.55 million was in the correct order of magnitude, based on a modelling exercise that Profs. Servert and Nieto developed for this arbitration, which resulted in an estimation of €101.6 million (within a range of €93.9-117.3 million) as a reasonable CAPEX for developing PE2 on an efficient basis.[1840] The Respondent's experts also say that the figures used for the June 2014 Order are consistent with a 2012 World Bank report which estimated that a 30 MW Fresnel plant in India could be developed for an equivalent of €107.8 million,[1841] and are further "validated" by information that later became available about a much larger Fresnel plant in India that started operations in 2014 – the only other large-scale Fresnel project now in operation.[1842] By contrast, the Claimants point out that the figures in the 2011 Technical Assessment were far lower than estimates in *another* technical study prepared in 2011 for the PER 2011-2020, that one by BCG, which the Claimants say estimated investment costs for Fresnel plants as between €5.9-6.5/MW (equating to €177-195 million for a 30 MW plant).[1843] The Claimants also reject any analogy to costs in India, noting that the 2012 World Bank report suggests that an international CSP project would cost almost twice that of an equivalent project in India.[1844] The Tribunal considers this criticism of the India analogy to be of considerable force.

858. Ultimately, however, the Tribunal is not required to find that the figures Spain adopted for the June 2014 Order were "*correct*." IDAE chose to rely on the 2011 Technical Assessment that CENER, IDOM and AICIA had prepared for the PER 2011-2020,[1845] rather than the 2011 technical study that BCG prepared for the PER 2011-2020.[1846] It is entirely possible that *other* experts, reviewing the limited data then available, would come to still different conclusions, perhaps at some intermediate figure. The bigger point is that, given the novelty of Fresnel technology, there

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always said that the regulatory framework should set out an efficiency standard and provide remuneration in relation to an efficiency standard.").

[1840] Servert/Nieto CAPEX Report, ¶¶ 26-29.

[1841] Servert/Nieto CAPEX Report, ¶¶ 117-126.

[1842] Servert/Nieto CAPEX Report, ¶¶ 223-225, 227.

[1843] Cl. PHB, ¶ 155 (citing BRR-89, BCG "Technological and Prospective Evolution of Renewable Energy Costs, Technical Study PER 2011-2020," 2011, p. 4).

[1844] Cl. PHB, ¶¶ 159, 162 (citing STA-10, PDF p, 16).

[1845] R-350, 2011 Technical Assessment.

[1846] BRR-89, BCG "Technological and prospective evolution of renewable energy costs, Technical Study PER 2011-2020," 2011.

was simply no significant and reliable data set available from which Spain could definitively divine either best practices or optimum costs. The 2014 reports being developed by Roland Berger and BCG did not seem even *aimed* at that exercise, as opposed to simply collating and reporting actual costs without analysis of efficiency. In these circumstances, there was always bound to be some degree of guesswork in determining the reliable target for efficient construction of a Fresnel facility. But as noted above, the *legal* question is not whether regulators guessed "correctly" in 2014, when they were required to come up with a figure in the absence of any comparative data. It is whether they acted in good faith and based on logic rather than caprice.

859. Based on its understanding of what occurred, the Tribunal is unable to conclude that either the IDAE's reliance on the 2011 Technical Assessment, or Spain's reliance on the IDAE's recommendation, rises to the level of arbitrary, capricious or irrational conduct to justify a finding of culpably wrongful conduct under the FET standard. In particular, given the command in the 2013 Electricity Law to incentivize efficiency and to set subsidies only at the minimum level necessary to generate reasonable returns, it was not irrational for regulators to be conservative in selecting a "standard" cost base for setting subsidies going forward, when the alternative of a much higher cost base would risk subsidizing inefficiencies, at an additional burden to Spanish consumers. It was also not irrational for regulators, lacking any reliable data about what was "standard" in the (not-yet existing) Fresnel "industry," to default to the data the IDAE had favored in 2011, when considering a plant that commenced operations in 2012. The Tribunal does not consider their decision to do so as evidence of internationally wrongful conduct.

860. In these circumstances, the Tribunal does not consider Spain to have violated the FET standard in connection with the calculation of the figures in the June 2014 Order.

861. Nonetheless, the Tribunal must note its concern that RD 413/2014 on its face does not allow regulators any avenue to update or correct past regulatory determinations of benchmark investment costs, even where such determinations admittedly were based on limited data in light of the novelty of new technologies. To recall, RD 413/2014 stated that while remuneration parameters may be reviewed and modified at the end of each regulatory period under the 2013 Electricity Law, "[i]n no case may the … standard value of the initial investment of a standard installation be reviewed after these values have been recognized."[1847] That provision put lasting weight on the first guess by regulators about the efficient costs for developing a new technology. It effectively cemented in

[1847] C-30/R-56, RD 413/2014, Preamble, Part II (quoting from the English translation of C-30, PDF p. 4).

place initial estimates that – even if made in good faith – might *later* be revealed to have been mistaken, and significantly lower than additional data might suggest was warranted.

862. In principle, the absence of any mechanism for review and correction of past benchmarks could have significant consequences not only for investors, but also for a State. One could imagine a scenario in which many other plants of a given technology were developed since regulators initially formed their estimates on the basis of limited data, and the expanded data set subsequently made clear that average or "efficient" development costs were much higher than originally assumed. If those circumstances were to be shown, it arguably might not be rational for regulators to have to continue basing subsidies on the original (outdated and incorrect) estimates, because of a decree that barred them from ever considering the implications of the improved data for existing plants.

863. This, however, is not such a case. There has been no showing that Spain *now* has a significantly broader data set available regarding the development of Fresnel facilities, upon which regulators would likely reach very different conclusions about "standard" investment costs, if only they were permitted to revisit their prior assessment. To the contrary, from the record in this case, it appears that no other Fresnel plants have been developed in Spain. The only other Fresnel plant in the world that has even been discussed in this case was the much larger facility in India that started operation in 2014, and the evidence regarding that plant is limited to a single report. There has been no suggestion that the data in that report is so compelling as to reasonably dictate a reopening of the earlier findings that were reflected in the June 2014 Order.

864. In these circumstances, just as the Tribunal cannot condemn Spain under the ECT for its original estimate of efficient development costs in circumstances of a novel technology for which there was very limited data, the Tribunal is equally unable to conclude, on the facts of this case, that Spain violated FET obligations by improperly barring regulators from updating their figures to take advantage of a subsequently expanding data set. The bottom line is that Fresnel appears to *remain* a globally undeveloped technology, for which data is still very limited. This fact no doubt complicates the mission of developing an accurate efficiency standard to be used in calculating appropriate subsidy levels to be financed by consumers, but it does not translate to a violation by Spain of its fundamental duties under the ECT.

(5) "Transparency" Complaints

865. The final category of complaints asserted by the Claimants involve contentions that Spain violated, in several different ways, the "transparency" obligations that are embedded in ECT Article 10(1).

In general, the Claimants assert transparency violations as a secondary or tertiary complaint, after arguing more broadly that Spain's changes to its subsidy regime were contrary to its obligations to provide stability and to respect legitimate expectations, and were also unreasonable and disproportionate.

866. Before turning to the Claimants' specific complaints, the Tribunal observes that any assessment of the transparency of State action must take place in the context of what is required by international law, not against the backdrop of what degree of openness and public participation might be preferred as a matter of governance. Arbitrators are not empowered to make public policy decisions such as this. The question is simply whether the FET standard in the ECT *compels* its State signatories to provide a particular level of transparency, such that a failure to do so would constitute a violation of a State's obligations to its treaty partners and their protected investors.

867. In considering this issue, it is also useful to recall that States vary widely in their own laws regarding public access and participation. While not every violation of domestic law will constitute a violation of FET – nor does compliance with domestic law provide blanket immunity from FET review – it is certainly *relevant*, in assessing FET allegations, whether a State attempts rationally and in good faith to comply with the requirements of its own law. This is as true in the area of transparency as in any other area of FET.

868. Beyond that, the Tribunal simply recalls what it said about transparency obligations in Section VII.D(1)d above. That is that States should strive "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."[1848] This standard must be approached at a "more general level," not specific to the circumstances of any particular investor, but rather in the sense of "whether the State acted secretively to conceal its plans or announced those plans openly and with reasonable explanation and detail."[1849] An assessment of the State's conduct in this regard necessarily must take into account the surrounding circumstances, which include, *inter alia*, its obligations under domestic law, the degree of urgency involved, and the extent to which prior public statements may have alerted interested stakeholders to the potential for further State action.

[1848] CL-211/RL-157, *Eskosol* Award, ¶ 416 (quoting CL-83/RL-2, *Electrabel* Decision, ¶ 7.79).

[1849] CL-211/RL-157, *Eskosol* Award, ¶ 418.

The focus is less on isolated slip-ups and more on patterns of conduct, in the sense of whether the evidence reveals a "continuing pattern of non-transparent actions by a government over time."[1850]

a. The Use of an RDL in 2013

869. With this preface, the Tribunal turns to the Claimants' first complaint, which is that Spain abused the RDL process in 2013 to avoid prior consultations before introducing major changes to its subsidy regime through RDL 9/2013.[1851] As explained in Section III.A(1) above, RDLs carry the force of Laws enacted by the legislature but can be issued by the Government, in cases of "extraordinary and urgent need,"[1852] without the prior consultations that would be required when the Government acts instead through RDs, which are subordinate to (and intended to implement, specify or supplement) Laws and RDLs. The Claimants allege as follows with respect to RDL 9/2013:

> A Royal Decree can be modified by a subsequent Royal Decree; hence the modification of RD 436/2004 by RD 661/2007. As such, there was no need for a higher ranking law to be used to replace RD 661/2007. It is therefore reasonable to assume that the only reason Spain implemented the new Regime via Royal Decree Law was to deprive stakeholders of the possibility to influence or challenge the measure.[1853]

870. The Claimants further argue that the fact that the Government took more than 11 months after RDL 9/2013 to determine the precise remuneration for individual plants "demonstrates there was no urgency to implement the New Regime and thus no right to use a Royal Decree Law to implement it."[1854] Further, while Spain did offer a consultation process after RDL 9/2013, that process concerned the elaboration of parameters leading to RD 413/2014 and the June 2014 Order, not the basic principles of the New Regime which already had been introduced by RDL 9/2013. "This consultation came too late," the Claimants contend, and "was not a proper consultation as it could only address the finer details of the implementation of" the New Regime that already been decided in its broad outlines.[1855]

871. The Tribunal is not persuaded that Spain violated the ECT by its use of an RDL in July 2013.

[1850] CL-180/RL-130, *Stadtwerke*, ¶ 311.

[1851] Cl. Mem., ¶ 297(a); Cl. Reply, ¶ 524.

[1852] C-41/R-7, 1978 Constitution, Article 86(1).

[1853] Cl. Mem., ¶ 297(a).

[1854] Cl. Mem., ¶ 297(b); Cl. Reply, ¶ 524.

[1855] Cl. Reply, ¶ 525; Cl. PHB, ¶ 52.

872. First, it was a matter of general knowledge that the Government was extremely concerned at this time by the state of the Tariff Deficit, and was working on further ways to address it. That had been the subject of numerous public statements during 2011 and 2012 (as well as before),[1856] and of a public consultation exercise in the context of a CNE report in early 2012, which stated that the "urgent adoption of regulatory solutions is needed."[1857] As of 2013, "it was plain to all that the Tariff Deficit was unsustainable, and that the Respondent was engaged on an ongoing basis in seeking to address it."[1858] Moreover, the notion that the Government intended to promulgate new regulations applicable to *all* plants, which would link remuneration to the returns on Spanish 10-year bonds plus a differential, had already been mentioned to renewable energy producers in 2010, with an explanation that this plan was intended to tie returns more closely to a reasonable rate of return.[1859] The idea of using a spread of 300 basis points, and of the Government's estimating the investment costs associated with different classes of facilities distinguished by technology and size, had itself been proposed in 2009 by APPA, the Association of Renewable Energy Producers, as part of a draft renewable energies law.[1860]

873. Moreover, the Government explained in RDL 9/2013 why it considered it urgent to act in July 2013, rather than waiting until a new law could be finally enacted. At that time, a draft of the new law *already had been prepared* and was circulating for official comment.[1861] As discussed in Section III.F(3) above, the Preamble to RDL 9/2013 explained that "new imbalances will arise at the end of the year if urgent steps are not taken to correct the situation," and referenced "the pressing need to immediately adopt a series of urgent measures to guarantee the financial stability of the electricity system," while "at the same time … undertaking a review of the regulatory framework" to provide more adaptability in the interest of maintaining the sustainability of the SES.[1862] The

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[1856] *See generally* RL-158, *FRIEF*, ¶¶ 573-577.

[1857] C-97/R-72, CNE Report/2012 (quoting from the English translation of C-97, PDF p. 4); *see* CL-139/RL-131, *RWE*, ¶ 661.

[1858] CL-139/RL-131, *RWE*, ¶ 593.

[1859] R-270, Cinco Días Journal, "Industry proposes to cut premiums for renewables by 2.5 billion," 8 May 2010; R-277, Cinco Días Journal, "Industry will lower premiums to all renewables in operation," 14 June 2010.

[1860] R-158, APPA Draft Bill; *see also* CL-139/RL-131, *RWE*, ¶ 593 & n. 706 (acknowledging that APPA had proposed this provision apply only for new plants, but considering the proposal "still of some relevance" in considering the Government's eventual introduction of a methodology based on 10-year Government bonds plus a spread of 300 basis points).

[1861] *See* R-65, Opinion 937/2013, pp. 9-11 (indicating that the Secretary of State for Energy submitted the draft law on 16 July 2013, requesting reports from the National Energy Commission and the National Competition Commission, and that the same date, reports were also requested from the Ministries of Finance and Public Administration, Development, Agriculture, Food and Environment, and Economy and Competitiveness).

[1862] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, pp. 7-8).

new 2013 Electricity Law was enacted five months later, in December 2013, codifying in legislation the principles established by RDL 9/2013, and explicitly repealing the 1997 Electricity Law. In these circumstances, RDL 9/2013 can be seen as an urgent advance roll-out of policies to be implemented soon by *new legislation*, rather than as a mere implementation, specification, or supplementation of prior legislation, which is the function of RDs. In fact, RDL 9/2013 explicitly modified Article 30.4 of the 1997 Electricity Law to "introduce the concrete principles" on which "a new legal and economic regime … will be based."[1863] Only an RDL, which carries the force of a Law in the Spanish legal framework, could have modified a prior law. An RD by contrast could only have regulated within the framework established by the prior hierarchically superior norm.

874. The use of an RDL to implement significant changes to the remuneration scheme should also be seen in the context of numerous prior examples of the same being done. For example, in 2006 the Government had adopted RDL 7/2006, "establishing urgent measures in the energy sector" in view of the inefficiency of the then-applicable RD 436/2004.[1864] It was understood at the time that a broader new remuneration regime was under development, and that RDL 7/2006 was addressing certain urgent issues until the broader regime could be implemented. RDLs were used again in 2009 (RDL 6/2009),[1865] twice in 2010 (RDLs 6/2010 and 14/2010), and four times in 2012 (RDLs 1/2012, 13/2012, 20/2012 and 29/2012)[1866] – all in the context of the growing Tariff Deficit. Each was characterized as an urgent measure that was needed to protect the sustainability of the SES. On the basis of the record before this Tribunal, none of these RDLs – which were all regularly published and made available to investors – were subsequently declared by the Spanish courts to have been issued in violation of a requirement to proceed instead through RDs, following public consultations.

875. As for RDL 9/2013, the Constitutional Court of Spain, sitting in plenary session, rejected the contention that RDL 9/2013 was in violation of the Spanish Constitution due to the absence of the requisite urgency.[1867] Like the *RWE* tribunal before it, this Tribunal "has no sound basis on which to reach a conclusion on urgency different to that of the Constitutional Court."[1868]

[1863] C-32/R-43, RDL 9/2013, Preamble (quoting from the English translation of C-32, p. 9).

[1864] C-50/R-36, RDL 7/2006 (quoting from the English translation of R-36, p. 1).

[1865] C-13/R-37, RDL 6/2009.

[1866] C-32/R-43, RDL 9/2013, Preamble (listing RDLs issued in 2010 and 2012).

[1867] R-95, 2015 Constitutional Court Judgment, Legal Basis, ¶¶ 3-5, pp. 13-19; *see also* R-96, Judgment, Constitutional Court, 18 February 2016 (Unconstitutional App. 5852/2013).

[1868] CL-139/RL-131, *RWE*, n. 707.

876. Certainly, it cannot do so on the basis of the Claimants' further argument that the subsequent time it took to announce the parameters for each individual plant demonstrates that RDL 9/2013 cannot have been urgent. This objection is ill conceived. It was RDL 9/2013 which set out the nature of the exercise that the Government would need to undertake to determine the parameters for individual plants. The fact that this work then took time to complete does not render it irrational for the Government to have established promptly the legal mechanism which allowed the implementation exercise to get started.

877. Taking all these circumstances into account, the Tribunal does not consider Spain's use of an RDL in 2013, to implement quickly in circumstances of stated urgency certain new policies that would soon be enacted in legislation, as a violation of any obligations of transparency embedded in ECT Article 10(1).

b. The Period of "Uncertainty" Before Final Parameters Were Announced

878. The Claimants' second transparency complaint concerns the 11 months between July 2013, when RDL 9/2013 was issued, and June 2014, when the specific parameters that would apply to each plant were announced through the June 2014 Order. According to the Claimants, this "11 months of complete uncertainty" itself violated Spain's ECT obligations, because it kept "[i]nvestors such as the Claimants … completely in the dark as to the amount of remuneration their plants would receive under the New Regime."[1869]

879. The Tribunal accepts, as have prior tribunals before it, that the uncertainty about precise remuneration during this period "must have caused difficulties for RE operators."[1870] But any complaint that the State unreasonably delayed providing clarity to investors must be seen in the context of all the work that had to be completed in the interim. One need only review the June 2014 Order to see how large a task was involved. As the Respondent notes, that Order is 1761 pages, and "considers 1967 different types of facilit[ies]. Thus, the definition of such a high volume of standard facilities and the calculation of a series of parameters for each of them represented a technical task of much greater magnitude than initially envisaged."[1871] In this context, the Tribunal cannot condemn the Government for excessive delay. As the *Stadtwerke* tribunal noted, "[g]iven the

[1869] Cl. Mem., ¶¶ 133, 235; *see also* Cl. Mem., ¶ 297(b); Cl. Reply, ¶ 481.
[1870] CL-139/RL-131, *RWE*, ¶ 661.
[1871] Resp. C-Mem., ¶ 1128.

complexity associated with the elaboration of such a compensation scheme, a period of eleven months is not … outside the bounds of reasonable administrative practice."[1872]

880. Moreover, the implementation period was affected by the fact that during this period, two drafts of RD 413/2014 and one draft of the Ministerial Order were circulated, and submissions were received from many stakeholders, resulting in the State taking some industry suggestions into account.[1873] The Claimants themselves admit that Spain offered a consultation process focused on the elaboration of parameters leading to RD 413/2014 and the June 2014 Order.[1874] The Respondent clarifies that "[b]oth in the drafting of [RD 413/2014] and that of [the June 2014 Order], hundreds of statements from producers, the sector's associations and individuals were taken into account."[1875] In this context, it is hardly surprising, as the *PV Investors* tribunal noted, that "consultation steps involving a variety of stakeholders – which *fosters* rather than hinders transparency – … may typically entail delays in the issuance of the final piece" of legislation or regulation.[1876] In the meantime, energy producers continued to sell electricity under the former regime, with the proviso that the subsidy levels under the new regime eventually would be calculated as from the date of RDL 9/2013's entry into force.

881. Taking these factors into account, the Tribunal rejects the Claimants' transparency objections based on the 11-month period prior to issuance of the June 2014 Order. The Tribunal has no doubt that during these months, investors experienced a state of uncertainty regarding the precise value of their future subsidies. Nonetheless, the fact that Spain took some time to roll out the plant-by-plant details of the new subsidy rates, after having previously announced the general principles and meanwhile conducting a public consultation exercise about specific parameters, is insufficient to amount to a violation of any ECT requirement of transparency.[1877]

c. Non-Disclosure of Methodology and Sources

882. The Claimants' final transparency complaint is that when the Government did roll out the June 2014 Order identifying the remuneration parameters that would apply to each individual plant,

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[1872] CL-180/RL-130, *Stadtwerke*, ¶ 313.

[1873] Resp. C-Mem., ¶ 1129; Resp. Rej., ¶¶ 1393-1394; RD-1, Resp. Op. Statement, Slide 209 (citing evidence regarding submissions received on the first and second drafts of RD 413/2014 and on a draft "Parameters Order" that was circulated in February 2014, four months before the final June 2014 Order).

[1874] Cl. Reply, ¶ 525.

[1875] Resp. C-Mem., ¶ 1126.

[1876] CL-195/RL-143, *PV Investors*, ¶ 632 (emphasis in original).

[1877] *See similarly* CL-139/RL-131, *RWE*, ¶ 661; *see also* CL-211/RL-157, *Eskosol* Award, ¶ 422.

it was not accompanied by an explanation of how the investment costs for each plant had been set.[1878] Relatedly, the Claimants object that the Government did not make public the (draft) BCG and Roland Berger reports which it had received by that date.[1879]

883. Taking these points in opposite order, the Tribunal recalls that Spain did not rely on the draft reports from BCG and Roland Berger, considering them unhelpful because, *inter alia*, they simply relied on recorded figures of actual expenditures without any analysis of efficiencies and inefficiencies. The Tribunal agrees with the *RWE* tribunal that there is no obligation under international law for regulators to list all the data sources they gathered during an investigation, particularly non-final drafts of reports which they considered unreliable and on which they did not in fact rely.[1880]

884. As to the objection that the State did not provide a contemporaneous explanation for the figures it did include, it is important to recall that both the 2013 Electricity Law and RD 413/2014 explained the general principles that underlay the calculation exercise. The Claimants have not shown that there is an international law obligation for regulators to "show their work" in subsequent implementing orders, explaining their precise methodology and identifying the data sources from which they drew particular figures. That type of disclosure might be preferable from a governance standpoint, but the Tribunal has no basis to believe it is commonly required by most States' domestic laws, such as to rise to the level of a customary international law requirement. Nor is there any reason to accept that the ECT signatories intended Article 10(1) to impose such a detailed disclosure requirement as a matter of treaty undertaking.

d. Conclusion on Transparency

885. In conclusion, the Tribunal has not seen any evidence of the kind of pattern of concealment that could violate Spain's obligation of FET under ECT Article 10(1). Each new regulatory enactment was accompanied by a detailed Preamble explaining its rationale and was published promptly upon issuance. The specific plant-by-plant calculations were released after a period of work that involved

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[1878] *See* Cl. Mem., ¶ 297(c) ("neither RD 413/2014 nor the June 2014 Order provides any transparent analysis explaining the underlying criteria or calculations behind the Special Payment (including how the standard costs of the Standard Installation were calculated"); Cl. Reply, ¶ 536.

[1879] Cl. Reply, ¶ 533. As noted in Section VII.D(4)e above, the updated versions of the BCG and Roland Berger reports, upon which the Claimants rely, were not completed until after the June 2014 Order.

[1880] CL-139/RL-131, *RWE*, ¶ 663 ("As to the allegation that Spain denied access to its expert reports, … [i]f it is assumed that, as the Claimants suggest, Spain did not abide by the views of these experts because of [a] disagreement as to the regime that should be implemented, it does not follow there is a failure of transparency such as to engage Article 10(1). A State is not obliged to follow or wait for expert advice that it has commissioned, nor to make initial expert views with which it disagrees public (although that may be desirable)").

a public consultation process. While the explanations accompanying these calculations may have been less detailed than investors might wish, there has been no showing that international law mandates more. The Claimants' transparency claims under ECT Article 10(1) accordingly are denied.

(6) Conclusion on Liability

886. In conclusion, the Tribunal has found a violation of ECT Article 10(1) only with respect to one feature of the New Regime, namely the 2013 Electricity Law's requirement that "reasonable return" must be calculated "throughout the regulatory life of the installation,"[1881] in a manner that effectively applied against future remuneration any returns earned in the past that were above the new regulatory targets. In Section VII.D(4)c above, the Tribunal has found that this provision was disproportionate, in violation of Spain's FET obligations under the ECT.

887. Beyond that issue, the Tribunal has found no violation of Spain's FET obligations. For avoidance of doubt, the Tribunal reaches the same conclusions under ECT Article 10(1)'s prohibition on "impair[ment] by unreasonable or discriminatory measures the[] management, maintenance, use, enjoyment or disposal" of qualifying investments.[1882] As discussed in Section VII.D(1)e, the Parties have provided no differential briefing on this standard, but rather agreed on its overlap with FET, a conclusion that is consistent with that of many other tribunals.

VIII. DAMAGES

888. Given that the Tribunal has found a Treaty breach only with respect to one feature of the Disputed Measures, there is no need to summarize Parties' broader submissions regarding damages, which relate to the impact of other features of the Disputed Measures that the Tribunal has found not to violate Spain's obligations under ECT Article 10(1).

889. With respect to the single feature constituting a breach – the Third Final Provision of the 2013 Electricity Law, which the Claimants characterize as a "clawback" and the Tribunal has characterized instead as an "offset" – the Claimants assert that this was one of the elements of the New Regime that *collectively* contributed to their harm. But at the same time, it is apparent that the

[1881] C-29/R-26, 2013 Electricity Law, Third Final Provision, ¶ 3 (quoting from the English translation of R-26, PDF p. 96).

[1882] CL-1/RL-20, ECT, Article 10(1).

consequences of this feature for Tubo Sol on a *standalone* basis were minor at best. The Plant entered into operation only in the summer of 2012, and apparently with very low production levels.

890. The Tribunal has found no standalone figures for this feature referenced in the First Quantum Report of the Claimants' expert (Brattle). In Brattle's Second Quantum Report, this feature is listed qualitatively as one of "four ways" in which the New Regime "caused harm,"[1883] but again, the report does not appear to provide any breakout figures. The same was true for Brattle's presentation at the Hearing, which referenced "Clawed-back prior earnings" as one of "five fundamental changes to the Original Regulatory Regime,"[1884] but did not separately quantify the impact of this feature, despite providing slides showing the impact of various other liability scenarios, where the Tribunal might accept some of the Claimants' claims and not others.[1885] In other words, the Claimants' expert made no effort to bring to the Tribunal's attention, in any of the reports or Hearing presentations, any standalone impact of this feature.

891. In their closing argument at the Hearing, the Claimants sought to avoid conceding *how* minor an impact this feature might have had on PE2, explaining only that, unlike other cases where this feature of the regime yielded high damages, "here, the plant had been in operation for far less time before the new regime was implemented, and that will explain the *lesser focus* on this feature in our case."[1886] The Tribunal then asked specifically about differential harm: "do you contend that your client was separately harmed by the clawback; or because of the fact that the plant was fairly recently in operation, it had a *de minimis* impact in this case?"[1887] The Claimants again resorted to a comparative statement involving their other claims, stating that "it is *part* of the features that have harmed our client, but it is not the feature that has harmed it *most*."[1888] The Tribunal tried again: "are you alleging that there were differential damages as a result of it?"[1889] The Claimants again provided only a general response: "[I]t does have an impact: it does reduce the remuneration going forward just mechanically. It's just a question of: by how much? In this case, far less than it did in other cases, so it didn't have a massive impact."[1890]

[1883] Second Brattle Quantum Report, ¶ 289.

[1884] CD-3.1, Brattle Quantum Presentation, 24 July 2021, Slide 24.

[1885] CD-3.1, Brattle Quantum Presentation, 24 July 2021, Slides 25-29.

[1886] Tr. Day 6, 64:23-65:11 (emphasis added).

[1887] Tr. Day 6, 65:13-18.

[1888] Tr. Day 6, 65:19-21 (emphasis added).

[1889] Tr. Day 6, 66:3-5.

[1890] Tr. Day 6, 66:9-12.

892. The Respondent's closing argument in turn emphasized the absence of evidence on damages associated with this feature:

> We were happy to see that at least we can agree on a very specific point: indeed, it is true that the clawback probably has no consequences. If it has any, it would be very minor for the Puerto Errado 2 plant.
>
> This plant entered into operation in the summer of 2012 and it did so with terrible production. Those were the only months which could be subject to clawback, and if there is any amount to be taken from there, it would be very small. In any case, we must insist that – as opposed to other changes – *you have not been provided with a number of the clawback at this stage of the proceedings.*[1891]

893. This last statement was a gauntlet to the Claimants, who could have responded in their Post-Hearing Brief by pointing the Tribunal to any part of their quantum submissions – even something embedded in Brattle's worksheets – where a differential damages claim had been calculated. Instead, in their Post-Hearing Brief, the Claimants returned to a comparative statement, namely that "because the impact of the 'clawback' depends on the vintage of the installation, it is *not the most significant* source of damages in this case."[1892] The Respondent's Post-Hearing Brief in turn asserted that the impact on PE2 "would have been minimal," and pointed out again that "the Claimants have not provided the Tribunal with a figure for that clawback claim."[1893]

894. The Tribunal agrees with the Respondent in that respect: the Claimants have not presented any identifiable separate harm to PE2 from this feature of the New Regime. In these circumstances, the Tribunal is unable to award any damages on account of the Tribunal's finding of an ECT breach associated with it. For the same reason, the Tribunal rejects the Claimants' request for an order of restitution requiring Spain to withdraw any offending measures, in order to place the Claimants under a legal framework that would have existed had such measures not been enacted.[1894] In the absence of any identified harm to the Claimants (much less harm that could be remedied only by restitution, not monetary compensation) it would be wholly disproportionate to require Spain to make specific revisions to its regulatory regime. The Claimants themselves recognize that

[1891] Tr. Day 6, 165:25-166:12 (emphasis added).

[1892] Cl. PHB, ¶ 50 (emphasis added).

[1893] Resp. PHB, ¶ 113.

[1894] Cl. Mem., ¶ 321; Cl. Reply, ¶ 631.

restitution is an inappropriate remedy where it would be disproportionate to any harm sought to be remedied.[1895]

IX. COSTS

A. THE CLAIMANTS' COST SUBMISSIONS

895. The Claimants seek an award ordering the Respondent to pay all costs they incurred during this arbitration proceeding. These costs (as of the time of the Claimants' submission on costs) amounted to € 4,444,800.50 and included the Claimants' legal and expert fees, costs and disbursements directly incurred by the Claimants in connection with the proceedings, and institutional, Tribunal and Hearing costs covered by the Claimants in advance payments made directly to ICSID.[1896] In their submission on costs, the Claimants detail these costs as follows:[1897]

[1895] Cl. Mem., ¶ 322.

[1896] Cl. Costs, ¶¶ 2-14, 19.

[1897] The table is reproduced from the Claimants' submission. Cl. Costs, Appendix 1: Claimants' Statement of Costs up to and including 29 October 2021.

Legal Fees	Amount
Legal fees – Time-costs up to and including 29 October 2021	
Allen & Overy LLP incurred fees	€ 2,386,425.36
Bartolome & Briones SLP	€ 202,334.45
Total legal fees	€ 2,588,759.81
Disbursements invoiced through Allen & Overy LLP	
Allen & Overy LLP expenses	€ 18,727.75
Translation services invoiced through Allen & Overy LLP	€ 70,679.01
Other case-related disbursements and charges	€ 18,246.48
Total disbursements	€ 107,653.24
Total legal fees and disbursements	€ 2,696,413.05
Expert fees and disbursements	
The Brattle Group fees and disbursements	€ 626,512.50
EY fees and disbursements	€ 28,842.74
Renovetec fees and disbursements	€ 65,340.73
Total	€ 720,695.97
Other disbursements incurred by the Claimants	
Project Management costs and expenses	€ 622,931.55
Expenses incurred for attendance to hearing	€ 12,535.03
Other external professional expenses[4]	€ 20,572.90
Total	€ 656,039.48
Claimants' payments to ICSID[5]	
Lodging fee of $ 25,000	€ 22,035.09
Advance payment of $ 150,000	€ 134,993.83
Advance payment of $ 250,000	€ 214,623.08
Total ($ 425,000)	€ 371,652.00
Grand Total EUR	€ 4,444,800.50

896. The Claimants submit that the ECT is silent on how the costs of any proceedings are to be allocated. Therefore, the Claimants argue, the Tribunal "has a very broad discretion with respect to the allocation of costs."[1898] In particular, the Claimants' view is that the "exercise of the Tribunal's discretion is entirely unfettered, especially with respect to legal expenses."[1899] With reference to its earlier submissions, the Claimants submit that they have demonstrated that "the Respondent committed a number of breaches of its international-law obligations under the ECT in relation to the Claimants' investment in Spain" and that "the Respondent's challenges to the jurisdiction of the Tribunal to hear the Claimants' claims are without merit."[1900] In these circumstances, the

[1898] Cl. Costs, ¶ 16.

[1899] Cl. Costs, ¶ 16.

[1900] Cl. Costs, ¶ 17.

Claimants submit that if they prevail in this arbitration, they are entitled to their costs on a full indemnity basis.[1901]

897. Since the Claimants' submission on costs, the Claimants advanced an additional US$ 199,982.50 to ICSID to cover the arbitration costs.[1902]

B. THE RESPONDENT'S COST SUBMISSIONS

898. The Respondent seeks an order that the Claimants pay all costs related to these proceedings, including the costs of the Tribunal and ICSID, and all of the Respondent's costs.[1903] These costs (as of the time of the Respondent's submission on costs) amount to € 3,059,630.99.[1904] In its submission on costs, the Respondent details these costs as follows:[1905]

a) Advances on costs paid to ICSID in the amount of € 355,527.04;

b) Preparation of expert report in the amount of € 818,149.97;

c) Cost of translating the main submissions and documents in accordance with Section 11 of Procedural Order No. 1 in the amount of € 22,543.18;

d) Courier services in the amount of € 210.54;

e) Editing services in the amount of € 201.24;

f) Travel expenses in the amount of € 1,499.02; and

g) Legal fees in the amount of € 1,861,500.00.

899. The Respondent agrees with the Claimants' position that ICSID tribunals enjoy wide discretion to allocate costs between the Parties as they see fit and that the ECT is silent on the issue of how the costs of the resolution of any dispute are to be allocated.[1906]

[1901] Cl. Costs, ¶ 18.

[1902] *See* ICSID Letter, 17 April 2023 and ICSID Email, 17 May 2023.

[1903] Resp. Costs, ¶¶ 1, 17.

[1904] Resp. Costs, ¶ 1.

[1905] Resp. Costs, ¶¶ 8-16.

[1906] Resp. Costs, ¶¶ 2-3.

900. The Respondent refers to ICSID tribunals' practice in allocating costs "based on a number of factors, including but not limited to the extent to which a party has succeeded on its various claims and arguments."[1907] The Respondent argues that it "has extensively proved during these proceedings" that it has not violated the substantive protections in the ECT.[1908] In these circumstances, the Respondent argues that "it is beyond any reasonable doubt that the Respondent should have never been charged with the burden and the costs of defendings [*sic*] itself through this arbitration proceeding," and submits that, "in the event that it ultimately prevails in this arbitration, it is entitled to its costs on a full indemnity basis." The Respondent requests that the Tribunal order the Claimants to pay all of the Respondent's costs plus a reasonable rate of interest from the date on which the costs were incurred until the date of their actual payment.[1909]

901. In the alternative, the Respondent argues that "Spain should never be ordered to bear the Claimants' costs, even if the Tribunal were to uphold the Claimants' claim, since the case involved a number of challenging procedural and legal issues, which the Respondent addressed with professional and effective advocacy."[1910]

902. Finally, the Respondent notes that, in the event that the Tribunal renders an award condemning Spain to pay the Claimants' costs in this arbitration, "in accordance with [Rule] 28 of the ICSID Arbitration Rules, only costs that are i) reasonable and ii) incurred in connection with this arbitration, could eventually be covered by such provision to be charged on the Respondent."[1911]

903. Since the Respondent' submission on costs, the Respondent advanced an additional US$ 200,000.00 to ICSID to cover the arbitration costs.[1912]

[1907] Resp. Costs, ¶ 4.
[1908] Resp. Costs, ¶ 4.
[1909] Resp. Costs, ¶ 5.
[1910] Resp. Costs, ¶ 6.
[1911] Resp. Costs, ¶ 7.
[1912] *See* ICSID Letter, 17 April 2023 and ICSID Email, 19 May 2023.

C. THE COSTS OF THE PROCEEDING

904. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant as well as ICSID's administrative fees and direct expenses, amount to (in US$):

	Amounts in US$
Arbitrators' fees and expenses Ms. Jean E. Kalicki, President Mr. Bo G.H. Nilsson, Co-arbitrator Prof. Hélène Ruiz Fabri, Co-arbitrator	 US$ 271,574.35 US$ 135,625.00 US$ 120,450.52
Assistant's fees and expenses Mr. Dahlquist Ms. Young	 US$ 30,056.25 US$ 35,525.00
ICSID's administrative fees	US$ 262,000.00
Direct expenses	US$ 218,810.61
Total	**US$ 1,074,041.73**

905. The above costs ("**Costs of the Proceeding**") have been paid out of the advances made by the Parties in equal parts. As a result, the expended portion of each Party's advances to cover the above costs of arbitration amounts to US$ 537,020.86 (for the Claimants) and US$ 537,020.87 (for the Respondent).[1913]

D. THE TRIBUNAL'S ANALYSIS

906. Article 61(2) of the ICSID Convention provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

907. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorneys' fees and other costs, between the Parties as it deems appropriate.

[1913] The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case fund. The remaining balance shall be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

908. The Tribunal considers that both Parties and their representatives conducted themselves ably and professionally, and that the costs claimed by both were reasonable in light of the issues presented.

909. With respect to outcome, the result is a nuanced one. In this Award, the Tribunal has accepted one of the Respondent's jurisdictional objections, with respect to claims arising out of the TVPEE (*see* Section V.D), but has rejected two of the Respondent's other jurisdictional objections (*see* Sections V.B and V.C). With respect to the Respondent's admissibility objection related to RDL 17/2019, the Tribunal has rejected it in part and accepted it in part (*see* Section V.E). There is thus no completely "prevailing party" as to issues of jurisdiction and admissibility.

910. There has been an equally mixed result with respect to the Claimants' liability claims. The Tribunal has rejected all such claims except for one, where the Tribunal has found the Respondent to be in breach of ECT Article 10(1) (*see* Section VII.D(6)). At the same time, the Tribunal also found that the Claimants did not present any basis for it to award damages with respect to the one ECT breach thus established (*see* Section VIII).

911. In consequence, the Claimants ultimately make no recovery as a result of this Award, but nor can it be said that the Respondent is the "prevailing party" in all respects.

912. In these circumstances, the Tribunal considers that the most appropriate allocation of costs is as follows.

913. First, with respect to the Costs of the Proceeding (*i.e.*, the fees and expenses of the Tribunal and the Tribunal's Assistant, and ICSID's administrative fees and direct expenses), the Claimants should bear 70% and the Respondent should bear 30% of such costs. Given the total expended Costs of the Proceeding of **US$ 1,074,041.73**, which have been paid out of the advances made by the Parties in equal parts (*see* ¶¶ 904-905 above), the Tribunal orders the Claimants to reimburse the Respondent **US$ 214,808.35**.[1914]

914. Second, the Claimants should bear their own legal fees and expenses, and should reimburse the Respondent for 70% of its legal fees and expenses, excluding the Respondent's advances on costs paid to ICSID. The Respondent's applicable legal fees and expenses total **€ 2,704,103.95** (*i.e.*, €

[1914] The total for Costs of the Proceeding was US$ 1,074,041.73, and 30% of that amount (that Respondent should bear) would be US$ 322,212.52. The expended portion of the Respondent's advances was US$ 537,020.87. The difference between US$ 537,020.87 and US$ 322,212.52 is US$ 214,808.35.

3,059,630.99 less advances to ICSID of € 355,527.04, *see* ¶ 898 above). Accordingly, the Tribunal orders the Claimants to reimburse the Respondent **€ 1,892,872.76**.

X. AWARD

915. For the reasons set forth above, the Tribunal decides as follows:

a) the Respondent's request for dismissal for lack of jurisdiction is denied, except that the claims arising out of the TVPEE are dismissed on that basis;

b) the Respondent's request for dismissal on admissibility grounds of the claims arising out of RDL 17/2019 is denied in part and granted in part;

c) the Claimants' request for a declaration that the Respondent has breached its obligations under ECT Article 10(1) is denied, except in one respect: the Tribunal declares that Spain breached its obligation of fair and equitable treatment by providing in Law 24/2013 that "reasonable return" would be calculated "throughout the regulatory life of the installation";[1915]

d) the Claimants' request for restitution and/or compensation is denied, as they have not proven identifiable harm with respect to the one feature found to violate Spain's ECT obligations; and

e) the Claimants are ordered to pay the Respondent **US$ 214,808.35** for the expended portion of the Respondent's advances to ICSID and **€ 1,892,872.76** towards the Respondent's legal fees and expenses; and

f) all other relief sought by the Parties is denied.

[1915] C-29/R-26, 2013 Electricity Law, Third Final Provision, ¶ 3 (quoting from the English translation of R-26, PDF p. 96).

Mr. Bo G.H. Nilsson
Arbitrator
(Subject to the attached dissenting opinion)

Date:

Professor Hélène Ruiz Fabri
Arbitrator

Date:

Jean E. Kalicki

Ms. Jean E. Kalicki
President of the Tribunal

Date: JAN 11 2024

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