

Concurring and Dissenting Opinion of Charles N. Brower

1. I concur with my esteemed colleagues in finding that Respondent has breached the Energy Charter Treaty (“ECT”). Where I part company with them, however, is on their acceptance of Claimants’ Alternative Claim, based on an expected Reasonable Rate of Return (“RRR”), whereas I see no reason whatsoever to deprive Claimants of their Primary Claim, assessing their damages according to RD 661/2007, which every one of the eleven renewable energy awards against Spain issued by other arbitral tribunals to date, arising out of the same controversy and facts not credibly distinguishable from those of the present case, has done. The difference in the present case, as will be shown below, would appear to be possibly as high as approximately €540.9 million.
2. I am of the view that no tribunal should accept an Alternative Claim over a Primary Claim without justifiable reasons for dismissing the Primary Claim, and in the present case I discern no justifiable reason whatsoever for departing from those eleven other tribunals’ acceptance of the Primary Claim in like circumstances. In fact, the interpretation that my colleagues give to the language of the Old Regulatory Regime (“ORR”), allegedly providing such reasons, is inconsistent with the line of jurisprudence established by the tribunals that considered these very same issues before us. Unlike the position taken by my colleagues at paragraphs 638-639 of the Award, no other Tribunal has found that the RRR was *“a key element of the regime established by RD 661/2007,”* or that it served *“as the limit of ECT-compliant regulatory changes,”* let alone that *“the Claimants are only entitled to compensation under Article 10(1) of the ECT if they establish that the new regime violates the guarantee of reasonable rate of return.”* In this respect I recall well this statement in our Preliminary Award on Jurisdiction, also cited at paragraph 521 of the Award:

The Tribunal considers that it is not bound by previous decisions. At the same time, in its judgment it must pay due consideration to earlier decisions of international tribunals. Specifically, *it believes that, subject to compelling contrary grounds, it has a duty to adopt principles established*

in a series of consistent cases. It further believes that, subject always to the specific text of the ECT, and with due regard to the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment law, with a view to meeting the legitimate expectations of the community of States and investors towards the certainty of the rule of law.¹ (Emphasis added.)

3. Of the now eighteen known awards² involving the same treaty, the same Respondent State, and the same measures as are at issue in the present arbitration, fifteen have found for the Claimants.³ In all but four of those fifteen cases (all four being factually distinguishable from the present one)⁴ the tribunals have ruled that Claimants were entitled to full reparation for the injury caused by the internationally wrongful act represented by the displacement of the ORR by RDL 2/2013, RDL 9/2013, Law 24/2013, RD 413/2014 and the June 2014 Order (the “New Regulatory Regime” or “NRR”). Thus, all

¹ Preliminary Award on Jurisdiction, para. 53.

² *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final Award, 21 January 2016 (“*Charanne*”); *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Final Award, 17 July 2016 (“*Isolux*”); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017 (“*Eiser*”); *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018 (“*Novenergia*”); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (“*Masdar*”); *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (“*Antin*”); *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, (“*Greentech*”); *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*”); *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*”); *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019 (“*9REN*”); *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*”); *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019 (“*SolEs*”); *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, 2 August 2019 (“*InfraRed*”); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019 (“*OperaFund*”); *BayWa re renewable energy and BayWa re Asset Holding v Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (“*BayWa*”); *Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 (“*Stadtwerke*”); *RWE Innogy GMBH and RWE Innogy Aresa S.A.U. v Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019 (“*Innogy*”); *Watkins Holding S.A.R.L. Watkins (NED) B.V., Watkins Spain S.L., Redpiper S.L., Northsea Spain S.L., Parque Eólico Marmellar S.L., and Parque Eólico La Boga S.L. v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020 (“*Watkins*”).

³ *Eiser*; *Novenergia*; *Masdar*; *Antin*; *Greentech*; *SolES*; *9REN*; *Cube*; *OperaFund*; *Infrared*; *Watkins*; *RREEF*; *NextEra*; *BayWa* and *RWE Innogy*.

⁴ *RREEF*, *NextEra*, *BayWa* and *RWE Innogy*.

eleven tribunals have issued awards effectively granting the present Claimants' Primary Claim. The Award's rather cursory dismissal of those cases is factually misleading. In paragraph 554 of the Award, for example, after conceding in paragraph 553 that "[a] number of tribunals . . . have upheld claims that in substance were broadly similar to the Primary Claim in this arbitration," the Award argues that "[i]n particular, in several cases . . . , the tribunal appears to have been presented with no claim equivalent to the Alternative Claim," citing *Novenergia* and other cases. As demonstrated below, however, and effectively conceded in that same paragraph 554 of the Award, in every single one of the eleven cases on which my analysis relies, the Alternative Claim was either (1) pleaded by the Claimants (in five cases), (2) pleaded by the Respondent as a defense (in four cases, including the cited *Novenergia*) or (3) placed before the tribunal by the Claimants' damages expert (in two cases). Thus, each of the eleven Tribunals involved confronted and rejected the Alternative Claim, irrespective of whether it was first asserted by the Claimants, by their experts, or by the Respondent. Despite my colleagues' valiant efforts, their stance is clearly incongruent with the statistics, as in seven out of the eleven cases in which the Primary Claim has prevailed, the Claimants had indeed put before the Tribunal an alternative calculation of damages based on an RRR, and in the remaining four the Respondent undeniably had pleaded the Alternative Claim as a defense. The Award's distinction in paragraph 554 among "an *actual*" Alternative Claim pled by Claimants themselves (group (1)), the Alternative Claim pled as "merely a defense from the Respondent" (group (2)) and one in the form of "alternative damages calculations from the [Claimants'] experts" (group (3)) is a classic "distinction without a difference." The reality is that each and every one of the tribunals on whose awards I rely, and on which the Award should have relied in accordance with this Tribunal's views recorded in paragraph 2 above, confronted and dealt with the Alternative Claim. Moreover, it is with some consternation that I note my colleagues do not seem to have made up their mind as to whether the *PV Investors* case belongs to group (1) or (3), as at paragraph 665 of the Award "[f]inally, the Tribunal notes that the Claimants have formulated the relief sought not by reference to the Primary/Alternative Claim, but more generally for compensation

as a result of Spain's alleged breaches," before venturing to "understand[] that the request for restitution has been abandoned," then deciding that its "understanding" is of no consequence whatsoever as "the Tribunal would in any event not grant such relief in light of its conclusion that the Primary Claim. . . is ill-founded."

4. Below, I address each of the eighteen awards. First, I address in paragraph 5., *infra*, the eleven awards that upheld the investors' entitlement to the projected returns on their investment on the basis of the regime in place at the time of the investment (Primary Claim), namely: (i) *Eiser*, (ii) *Novenergia*, (iii) *Masdar*, (iv) *Antin*, (v) *Greentech*, (vi) *SoLES*, (vii) *9REN*, (viii) *Cube*, (ix) *OperaFund*, (x) *Infrared* and (xi) *Watkins*. Second, in paragraph 6., *infra*, I address the four cases that awarded damages on the basis of the RRR theory (Alternative Claim): (xii) *RREEF*, (xiii) *NextEra*, (xiv) *BayWa* and (xv) *RWE Innogy*. Third, in paragraph 7., *infra*, I discuss the three cases which dismissed the Claimants' claims entirely: (xvi) *Charanne*, (xvii) *Isolux* and (xviii) *Statdwerke*. Lastly, in paragraph 8., *infra*, I take stock of the awards, in light of the present case, and conclude that since like cases should be treated alike, the Claimants' Primary Claim rightly should prevail.

5. Cases in which the Primary Claim has prevailed:

- (i) In *Eiser*, Claimants invested in three concentrated solar plants ("CSP") beginning in October 2007. All three plants were registered in the Administrative Register ("RAIPRE") on 8 June 2012. Claimants sought restitution of the legal and regulatory regime (RD 661/2007),⁵ or, should restitution not be possible, damages which, pursuant to the *Chorzów Factory* standard,⁶ should be calculated on the basis of the reduction of the fair market value of their investment as measured by the (then) present value of past and future cash flows calculated on the basis of the feed-in-tariff ("FiT") to which they were

⁵ *Eiser*, para. 425.

⁶ *Case Concerning the Factory at Chorzów* (Claim for Indemnity), Jurisdiction, 26 July 1927, PCIJ Rep Series A, No. 9, p. 209.

entitled pursuant to RD 661/2007.⁷ Claimants also developed an Alternative Claim based on Respondent's theory of an RRR.⁸ The Tribunal, however, determined the RRR theory to be "unpersuasive" because "ECT Article 10(1) does not entitle Claimants to a 'reasonable return' at any given level, but to fair and equitable treatment."⁹ While the *Eiser* Tribunal did state that "[a]bsent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs,"¹⁰ it concluded that under the circumstances, not credibly distinguishable from those of *PV Investors*, the NRR "was profoundly unfair and inequitable as applied to Claimants' existing investment, stripping Claimants of virtually all of the value of their investment."¹¹ Accordingly, after rejecting the RRR Alternative Claim, the Tribunal "agree[d] that the Claimants' approach for determining its [sic] damages – assessing the reduction of the fair market value of its investment by calculating the present value of cash flows said to have been lost on account of the disputed measures – offers an appropriate means to determine the amount of reparation due in the circumstances of this case,"¹² and then awarded damages accordingly.

- (ii) In *Novenergia*, Claimant pleaded a number of breaches of Article 10(1) ECT (FET and stable/equitable/favorable/transparent investment conditions), as well as Article 13 ECT (expropriation). On damages, Claimant submitted that the Kingdom of Spain must place the Claimant in the situation in which it would have been had the Respondent not breached its international obligations by abolishing the ORR, quantified as the difference between the fair market value of its investment immediately before the expropriation occurred, using the DCF method, and its fair market value once the NRR had destroyed

⁷ *Eiser*, para. 426.

⁸ *Ibid.*, para. 433.

⁹ *Ibid.*, para. 434.

¹⁰ *Ibid.*, para. 362.

¹¹ *Ibid.*, para. 365.

¹² *Ibid.*, para. 441.

the ORR.¹³ Claimant invested on 13 September 2007 and registered its PV plants with the RAIPRE by September 2008.¹⁴ This chronology describes also the *PV Investors' Primary Claim*. The Respondent contended that the language of RD 54/1997 provided that investors could only expect to receive an RRR (effectively identical to the Alternative Claim pleaded by *PV Investors* and others), and the Tribunal found that contention to be “unconvincing, since these principles were still generally vague and insufficiently defined at the time of the Claimant's investment” and thus “they cannot be considered apposite for the assessment of the reasonability of the Claimant's expectations at the time of the investment.”¹⁵ The Tribunal then clarified that neither the pre-2013 laws nor the Supreme Court decisions “could have given the Claimant the expectation that a reasonable rate of return would be limited to 7%”¹⁶ and ultimately concluded that:

[...] the Claimant has convincingly established that its initial expectations were legitimate since there was nothing to contradict the guaranteed FiT in RD 661/2007 and the surrounding statements made by the Kingdom of Spain in e.g. “The Sun Can Be All Yours”. [...]¹⁷

Accordingly, *Novenergia* is thoroughly comparable to the present case, particularly as regards the timing and type of investment, the measures challenged, the treaty provisions invoked, and the Tribunal's rejection of the Respondent's defense identical to *PV Investors' Alternative Claim*.

(iii) In *Masdar*, Claimant, citing Article 35 of the ILC Articles,¹⁸ requested that the Tribunal order Respondent to restore the RD 661/2007 regime¹⁹ or, in the alternative, award

¹³ *Novenergia*, paras. 767-768.

¹⁴ *Ibid.*, para. 154.

¹⁵ *Ibid.*, para. 673.

¹⁶ *Ibid.*, para. 674 (Emphasis omitted).

¹⁷ *Ibid.*, para. 681.

¹⁸ ILC Articles, Article 35: “A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”

¹⁹ *Masdar*, para. 555.

damages based on the FiT expected under that regime. Claimant also developed an Alternative Claim based on an RRR. The Tribunal noted that Article 10(1) of the ECT protected investors' legitimate expectations that *"the legal framework will not be subject to modification in a manner contrary to specific commitments made to the investor."*²⁰ In particular, the Tribunal found that Spain gave investors *"a very specific unilateral offer,"*²¹ concretized vis-a-vis the RAIPRE registrations, that the qualifying installations would receive the RD 661/2007 FiT, as Article 44.3 of RD 661/2007 constituted a stabilisation commitment.²² The implication in paragraph 554 of the present Award that the aforesaid result was due *"to the investors [having] received specific individual confirmations from the State that their plants would receive the FiT payments across their life span"* is inaccurate. As highlighted in two other recent awards, the letters obtained by the *Masdar* investors *"simply confirmed what was already in RD 661/2007 and were issued **after** not before the claimant in that case made its investment,"*²³ and the *Masdar* Tribunal *"expressly left open the possibility that Article 44(3)'s stabilization promise could constitute a 'specific commitment' by Spain",* but *"did not need to decide whether the legislative commitment alone could give rise to legitimate expectations, because there were other commitments."*²⁴ In respect of the RRR theory the *Masdar* Tribunal (relying on *Eiser*) considered that Article 10(1) entitled investors not to a mere RRR, but instead to fair and equitable treatment.²⁵ In this case the Claimants invested in three CSPs which began in May 2008 and for which RAIPRE registration was secured by December 2011.

(iv) In *Antin*, Claimants sought restitution of the legal and regulatory regime under which they made their investments in two CSPs (RD 661/2007 as modified by RD 1614/2010 and RDL 14/2010 as the CSP thermosolar installations were acquired and developed in June 2011, with RAIPRE registration for both plants by 22 December 2009) or, in the alternative,

²⁰ *Ibid.*, para. 484.

²¹ *Ibid.*, para. 512.

²² *Ibid.*, para. 500-503.

²³ *9Ren*, para. 299 (Emphasis in original).

²⁴ *OperaFund*, para. 483.

²⁵ *Masdar*, para. 591.

damages for loss in the fair market value of their investments, comprised of lost historical and future cash flows.²⁶ The Tribunal observed that Spain breached Claimants' legitimate expectations in light of the "*precision and detail exhibited in the royal decrees, particularly the contemplation that treatment would be accorded for a defined period of time*".²⁷ With respect to the RRR theory (which formed both Claimant's Alternative Claim and one of Respondent's defenses) the Tribunal observed that:

[...] what Spain labels a "reasonable rate of return" seemingly depends on governmental discretion. This is in plain contrast with the relative precision of the Original Regime—in force when the Claimants made their investment—which provided for objective and identifiable criteria for determining the remuneration due to CSP plants, which were expressly specified in the regulation and were dependent on the market.²⁸

(v) In *Greentech*, Claimants submitted that Respondent breached the ECT by modifying the FiT regime resulting from the RD 661/2007,²⁹ or, in the alternative, by abrogating the ORR regime and thereby making a "*fundamental change*" in a manner that had not taken into account the circumstances of existing investments made in reliance on the prior regime.³⁰ On quantum, Claimants sought damages for the diminution in the market value of their investments.³¹ In addition, their experts (FTI) placed before the Tribunal an alternative calculation of damages paralleling the Alternative Claim, i.e., based on an RRR.³² Consequently the *Greentech* Tribunal confronted four options for assessing damages:

- a. as a projection of the FiTs that the plants would receive under the RD 661/2007 under Claimants' Expert's primary calculation;³³
- b. as a projection of the FiTs that the plants would receive under the RD 661/2007 under Respondent's Expert's alternative calculation;³⁴
- c. as an RRR under Respondent's Expert's primary calculation;³⁵

²⁶ *Antin*, para. 274.

²⁷ *Ibid.*, para. 552.

²⁸ *Ibid.*, para. 568.

²⁹ *Greentech*, para. 293.

³⁰ *Ibid.*, para. 297.

³¹ *Ibid.*, para. 439.

³² *Ibid.*, para. 392.

³³ *Ibid.*, para. 487.

³⁴ *Ibid.*, para. 501.

³⁵ *Ibid.*, para. 493.

d. as an RRR under Claimants' Expert's alternative calculation.³⁶

The Tribunal found only options a. and b. to be consistent with its finding on liability that the Respondent had abrogated the RD 661/2007 scheme when it introduced the NRR in violation of Article 10(1) of the ECT, and, accordingly, dismissed c. and d., which had reflected Claimants' expert's as well as Respondent's calculations of an RRR Alternative Claim. Claimants, in this case, had invested in two PV plants and one PV project (comprised of 18 100-KW plants) during the period May 2009 through May 2010. The plants were registered with the RAIPRE, respectively, on 28 August 2008 (Madrudejos),³⁷ 25 September 2008 (La Castilleja),³⁸ and 20 May 2008 (Fotocampillos).³⁹ The *Greentech* Tribunal found *"that the Claimants had the legitimate expectation that the legal and regulatory framework would not be fundamentally and abruptly altered, thereby depriving investors of a significant part of their projected revenues,"* while at the same time opining that *"the Claimants did not have legitimate expectations that they would receive the precise FiT specified in RD 661/2007 for the entire lifetime of their PV plants."*⁴⁰ Contrary to *9Ren* and *OperaFund* (as noted below), the Respondent's *"specific clarification . . . that [Masdar's] facilities would receive the RD 661/2007 FiTs throughout their operating lives,"*⁴¹ added to the *Greentech* Tribunal *"not [being] persuaded"* by the Claimants' view that *"Article 44.3 RD 661/2007 is a specific assurance giving rise to a legitimate expectation that the Claimants would receive fixed FiTs for the lifetime of their PV plants."*⁴² The *Greentech* Tribunal then *"[c]onclude[d] that the Respondent's enactment of the New Regulatory Regime constituted a fundamental change to the legal and regulatory framework that crossed the line from a non-compensatory regulatory measure to a compensable breach of the FET standard in the ECT"*⁴³ and awarded damages accordingly.

³⁶ Ibid., para. 495.

³⁷ Ibid., para. 97.

³⁸ Ibid., para. 102.

³⁹ Ibid., para. 107.

⁴⁰ Ibid., para. 365.

⁴¹ Ibid., para. 367.

⁴² Ibid., para. 366, citing *Eiser*.

⁴³ Ibid., para. 398.

(vi) In *SolEs*, Claimant asserted that it was entitled to damages based on the reduction in the value of net profit flows to equity investors that had resulted from Spain's implementation of the disputed measures,⁴⁴ on the basis of the FiTs. As to Claimant's legitimate expectations, the Tribunal cited *Antin* to reconfirm that "*an investor's legitimate expectations can also arise from provisions of law and regulations and from statements made by or on behalf of the State for the purpose of inducing investment by a class of investors.*"⁴⁵ The plants were registered with the RAIPRE, respectively, on 10 December 2009 (Badajoz I) and February 2010 (Badajoz II),⁴⁶ and Claimant acquired control of them in March 2010. Given that the investment in Spain effectively was made in March 2010 (when Claimant acquired its interest in the plants), the Tribunal reasoned that "*there were no developments between March 2010 and May 2010 that could have altered in a material way the legitimate expectations of a PV investor.*"⁴⁷ Respondent asserted that the investor was entitled to an RRR only and that that was guaranteed by the new measures. Claimant developed its Alternative Claim on this theory. The Tribunal determined that it was not necessary to discuss the Alternative Claim in that it did not find that Article 10(1) of the ECT entitles Claimant to a particular return.⁴⁸ Instead, the Tribunal accepted Claimants' proposal for damages based on a "*but for*" scenario with a 25-year duration of the feed-in tariffs set in 2010 under the Special Regime.⁴⁹

(vii) In *9Ren*, Claimants sought damages using two different models: (i) as diminution in the fair market value of their investments in the five *Solaica* plants (given they had been sold in June 2015); and (ii) as lost profits on their investments in the three *España* Plants on the revenues estimated on the basis of the applicable tariff rates under RD 661/2007 and

⁴⁴ *SolEs*, para. 467.

⁴⁵ *Ibid.*, para. 313.

⁴⁶ *Ibid.*, para. 135.

⁴⁷ *Ibid.*, para. 418.

⁴⁸ *Ibid.*, para. 542.

⁴⁹ *Ibid.*, para. 544.

RD 1578/2008.⁵⁰ Claim (ii) is substantially similar to the *PV Investors'* Primary Claim. Regarding the RRR, the Tribunal concluded that Claimants reasonably relied on a legitimate expectation that the FiT benefits of RD 661/2007 would continue for the useful life of seven of its eight facilities,⁵¹ having registered seven of the eight facilities with the RAIPRE before 29 September 2008,⁵² and thus that Spain's decision to abolish the regime of RD 661/2007 was "*inconsistent with the clear terms of RD 661/2007 that granted tariffs for the entire operating life of a facility.*"⁵³ Accordingly, the Tribunal ruled out Respondent's proposal for compensation based on an RRR⁵⁴ and accepted Claimant's proposal for damages based on historical performance (under the RD 661/2007 regime).⁵⁵ Claimant's date of investment, 23 April 2008, and its efforts to ensure that its projects complied with the FiT requirements (including timely registration under RAIPRE), were significant to the Tribunal in establishing that Claimant would receive the benefits set out in RD 661/2007.⁵⁶

(viii) In *Cube*, Claimants claimed for loss of expected cash flows, on the basis of RD 661/2007, to flow from fixed tariffs and market premiums. Claimants invested in the PV sector (three PV facilities) in April-June 2008 and in the hydroelectric sector (sixteen facilities) in 2011-2012. The Claimants' PV investments in the Puente Génave, San Martín de Pusa and Écija plants were duly registered under RD 661/2007 and the investment in the Rambla plant had been registered under RD 1578/2008.⁵⁷ In respect of the commitment expressed by the Spanish Government to the FiT regime, the Tribunal considered that Claimants' expectations that the regime would not be altered were legitimate, since the Spanish

⁵⁰ *GREN*, para. 378.

⁵¹ *Ibid.*, paras. 292-299.

⁵² *Ibid.*, para. 98, stating that "*Spain announced on 27 September 2007 that RD 661/2007 would close to new investments in PV projects one year later, i.e. new PV facilities would have to obtain final registration under RAIPRE before 29 September 2008 in order to be "grandfathered" under RD 661/2007.*" (internal footnotes excluded); and *ibid.*, para. 105, clarifying that the eighth plant was registered with RAIPRE on 23 March 2011 and entitled to payment of the tariff established under RD 1578/2008 and not RD 661/2007.

⁵³ *Ibid.*, para. 301.

⁵⁴ *Ibid.*, para. 407.

⁵⁵ *Ibid.*, para. 412.

⁵⁶ *Ibid.*, para. 297.

⁵⁷ *Cube*, para. 313.

regulatory regime clearly promised that the investments would be subject to certain regulatory principles that “*as a matter of deliberate policy*” were to be maintained in force for a finite length of time.⁵⁸ Respondent submitted that Claimants were entitled to an RRR only. The Tribunal ruled that Respondent’s assertions could not be substantiated, neither by the language of the ORR (including, e.g., the sole reference to “*reasonable rate of profitability*” in RD 661/2007 Article 44(3)) nor by the accompanying Press Release,⁵⁹ because “[w]hatever the rationale behind the structure of tariffs and premiums set out in RD 661/2007, the clear representation was that the structure would be maintained in the terms set out in the Royal Decree.”⁶⁰

(ix) In *OperaFund*, Claimants, citing *Chrozów Factory* and ILC Articles 31-38, pleaded that Respondent committed an internationally wrongful act, and that damages should put Claimants in the position in which they would have found themselves had Respondent not breached the ECT.⁶¹ The Tribunal, referencing *Novenergia* and *Masdar*, reasoned:

The Tribunal, therefore, has no doubt that the stabilization assurance given in Article 44(3) is applicable for the investments by Claimants. Indeed, it is hard to imagine a more explicit stabilization assurance than the one mentioned in Article 44(3): “*revisions [...] shall not affect facilities for which the functioning certificate had been granted.*”⁶²

Claimants invested in five PV installations between July 2008 and July 2009, but all of the Claimants’ facilities were registered in RAIPRE by 29 September 2008. In reference to Article 44(3) of RD 661/2007,⁶³ the Tribunal determined that “*the RAIPRE registration is an important additional element in order to assess the legitimate expectations of the investors*” and that “[s]uch a stabilization promise could be perfected by the registration

⁵⁸ *Ibid.*, para. 388.

⁵⁹ *Ibid.*, para. 287.

⁶⁰ *Ibid.*, para. 296.

⁶¹ *OperaFund*, para. 605.

⁶² *Ibid.*, para 485.

⁶³ RD 661/2007, Article 44(3): The revisions of the regulated tariff and the upper and lower limits indicated in this section shall not affect facilities for which the commissioning certificate had been granted prior to January 1 of the second year following the year in which the revision had been performed.

of the RE plants to receive the preferential FiT under RD 661/2007.”⁶⁴ The Tribunal concluded that “the formal registration led to the investors’ entitlement to receive the benefits under RD 661/2007 (including not being subject to regulatory change).”⁶⁵ Respondent also submitted in this arbitration that Claimants were entitled to an RRR only and that these were already guaranteed by the Special Regime. Claimants then submitted an Alternative Claim pleading that the Special Regime did not guarantee an RRR. The Tribunal observed: “This alternative is not applicable as, above, the Tribunal has accepted Claimants’ primary claims for breach of the FET standard and thereby of Article 10(1) of the ECT and thereby dismissed the alternative that Respondent only guaranteed a reasonable return. There is, thus, no need for the Tribunal to determine this alternative claim.”⁶⁶

(x) In *Infrared*, Claimants submitted that Spain violated their legitimate expectations that the ORR would remain stable (i.e., immutable) throughout the lifespan of the plants or, in the alternative, that Spain violated its FET obligations by abrogating essential elements of the ORR, or at least its transparency obligations.⁶⁷ The Tribunal determined that Claimants had legitimate expectations that the plants registered on the RAIPRE would be shielded from subsequent regulatory changes⁶⁸ in that they were assured that the regulated tariff and pool plus premium would have continued to apply for the operational lifespan of the plants registered on the RAIPRE.⁶⁹ As in *Greentech*, Claimants’ expert presented to the Tribunal an alternative calculation of damages based on an RRR,⁷⁰ as to which the Tribunal observed:

[...] the pith of the breach here does not consist in a variation of the reasonable rate of return, but rather in the frustration of Claimants’ legitimate expectation that the Morón and Olivenza plants would be

⁶⁴ *OperaFund*, para. 483.

⁶⁵ *Ibid.*, para. 484.

⁶⁶ *Ibid.*, para. 604.

⁶⁷ *InfraRed*, para. 343.

⁶⁸ *Ibid.*, para. 410.

⁶⁹ *Ibid.*, para. 451.

⁷⁰ *Ibid.*, para. 514.

shielded from revisions of the regulated tariff, the pool price premium and the applicable lower and upper values contained in RD 661/2007. A valuation that is premised principally on the “reasonable” rate of return without regard to the actual remuneration impaired by the Measures at Issue seems equally ill-adapted to the regulatory and legislative landscape in the present case [...].⁷¹

In this case, Infrared invested in two CSP plants in July 2011, which were registered in the RAIPRE in May and December 2012.

(xi) In *Watkins*, Claimants sought restitution and/or compensation for losses to its 2011 investment in the Spanish wind generation sector. The wind farms were duly registered with RAIPRE by 9 December 2010 and the Claimants were entitled to the RD 661/2007 economic regime.⁷² In determining that Spain radically altered the applicable legal and regulatory framework⁷³ the Tribunal rejected Spain’s contention that the investors were guaranteed only an RRR in preference to the view developed by *Eiser, Novenergia, Antin* and *Masdar* over *RREEF* (see xii, *infra*).⁷⁴ The Tribunal specifically wrote:

The Claimants in this case have put forward extensive evidence of contemporaneous documents showing that Spain offered investors a fixed guaranteed return and not just a reasonable return. The Tribunal has considered the contemporaneous evidence and it is not persuaded that the evidence adduced by the Respondent is sufficient for determining a “reasonable return” and neither is it in fulfilment of the representations made by the Respondent with regard to the stability of the legal and economic regime that would be applicable to RE projects in order to entice investments into the wind sector. The Tribunal concludes that the Respondent’s methodology for determining reasonable rate of return in the light of the amendments to the legislation is, in the Tribunal’s view, not based on any identifiable criteria. The Tribunal is therefore of the view that the *RREEF* Decision does not in any way, assist the Respondent in its primary contention that the Claimants were only entitled to a reasonable return on their investments and that in the Tribunal’s view, is a very narrow

⁷¹ *Ibid.*, para. 543.

⁷² *Watkins*, para. 599.

⁷³ *Ibid.*, para. 563.

⁷⁴ *Ibid.*, para. 500.

and erroneous interpretation of the *RREEF* Decision.⁷⁵ (Emphasis in original.)

With the parties having pled extensively on the matter,⁷⁶ the Tribunal wrote further:

The Tribunal has considered the arguments of the Claimants and the Respondent in respect of the *RREEF* Decision with regard to reasonable return and is of the view that the *RREEF* Decision does not, in any way, assist the Respondent in its contention that the Claimants were only entitled to a reasonable return on their investments and the Tribunal is of the view that the argument advanced by Spain is a very narrow and erroneous interpretation of the *RREEF* Decision, especially with regard to the issue of reasonable return.⁷⁷

Respondent's Alternative Claim also was rejected as a matter of valuation based on the Tribunal's determination on the merits, which accepted the Claimants' Primary Claim that the Claimants had a legitimate expectation to obtain tariffs under RD 661/2007 and not to receive a return that was implicit in those tariffs.⁷⁸ Regarding the standard of proof for calculating compensation, the Tribunal agreed with Claimants that "[...] *the standard is to show the existence of damage with reasonable certainty and then only offer a basis on which the Tribunal can, with reasonable confidence, estimate the amount of their loss*".⁷⁹ Ultimately, the Tribunal adopted the DCF method proposed by Claimants, which calculated compensation as the difference between the returns in the actual scenario, and the returns under RD 661/2007 of 8% and 9% post-tax for each of the two investments.⁸⁰

6. Cases in which Claimants prevailed and the Tribunal awarded damages on the basis of the Alternative Claim:

⁷⁵ Ibid., para. 503.

⁷⁶ Ibid., paras. 56-59.

⁷⁷ Ibid., para. 504.

⁷⁸ Ibid., para. 641.

⁷⁹ Ibid., para. 683.

⁸⁰ Ibid., para. 289.

(i) In *RREEF*, a case involving CSP and wind plants, the Tribunal determined that Respondent breached its obligations under the ECT via application of the NRR. As the applicable legal standard for compensation, a 2-1 majority concluded that the only legitimate expectation of the Claimants was to receive an RRR for their investment.⁸¹ In arriving at this decision, the Tribunal referred to Article 30(4) of Law 54/1997,⁸² the preamble of RD 661/2007,⁸³ and the National Action Plan for Renewable Energy in Spain of 30 June 2010.⁸⁴ Notably, in relation to the date of final registration with the RAIPRE,⁸⁵ the *RREEF* investments were made on 28 December 2010 (wind farms), 2011 (Arenales CSP Plant) and 2012 (Andasol CSP Plant), hence well after the first regulatory shift from the ORR via the 2010 Decrees⁸⁶ and months after the enactment of the National Action Plan for Renewable Energy in Spain of 30 June 2010. As the Tribunal clarified, Claimants' legitimate expectations must be judged by the regime in place at the time of the investment (relying on *Novenergia*).⁸⁷ In his dissent, Robert Volterra described Spain's conduct as "*bait and switch*,"⁸⁸ regarded Spain's admission that the switch was to reduce profit levels of the investors as fatal to its theory,⁸⁹ and stressed that Spain had not proven its assertion that the regulatory

⁸¹ *RREEF*, para. 386.

⁸² Article 30(4) of Law 54/1997 provides:

4. The remuneration arrangements for electric power generation installations operating under the special regime shall be supplemented by the payment of a premium under statutory terms set out in regulations [...]

"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."

⁸³ RD 661/2007, Preamble, provides: "the owners of facilities under the special regime a reasonable return on their investment."

⁸⁴ The 2011-2020 *Renewable Energy Plan*, p. 112, provides: "*premiums corresponding to special regime installations, provide for electricity generation remuneration levels that afford a reasonable return on investment.*" and p. 115, "Review of remuneration: [...] [The] remuneration amounts [...] may be modified on the basis of technological developments within the sectors market behavior, [...], while always guaranteeing reasonable rates of return." See also *RREEF*, paras. 382-383.

⁸⁵ Recall registration with the RAIPRE ensured legal entitlement to receive all of RD 661/2007's economic incentives. See Claimants' *Amended Statement of Claim* ("ASoC"), paras. 158, 208.

⁸⁶ *RREEF*, para. 392.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, *Partial Dissenting Opinion of Robert Volterra*, para. 26.

⁸⁹ *Ibid.*, para. 28.

restructuring to the subsidy system was made in response to the cost of money in the capital markets (as an objective and variable element to evaluate the concept of a reasonable return),⁹⁰ thus leading him to opine that Spain “breached the ECT in multiple ways, not merely in relation to a ‘reasonable rate of return,’”⁹¹ and to disagree with his fellow arbitrators regarding the scope of the Claimants’ legitimate expectations.⁹² Whereas the *PV Investors* Claimants unquestionably invested under the ORR (final registration with RAIPRE before 29 September 2008), RREEF invested at a time when the regulatory changes of 2010 already had foreshadowed alteration of the FIT regime following the introduction of more exacting RRR language into the 2011-2020 Renewable Energy Plan.⁹³ These factors distinguish *RREEF* from *PV Investors* and the eleven cases that have rejected the Alternative Claim.

(ii) In *NextEra*, Claimants asserted, relying on *Chorzow Factory* and Art. 31 of the ILC Articles, that they were entitled to full reparation by means of restitution or full compensation.⁹⁴ Claimants started investing in Spain as early as 2007 via a subsidiary of NextEra.⁹⁵ Claimants’ Primary Claim calculated compensation on the basis of the revenues expected pursuant to the pool plus premium option under Regulatory Framework I. Claimants also presented an Alternative Claim based on Respondent’s defense of an RRR. As to the RRR the Tribunal observed that:

[...] the assurances made by the Spanish authorities were not about a reasonable return; they were about the regulatory certainty and stability that NextEra could expect. The denial of legitimate expectations is based on the failure to provide that certainty and security by changing

⁹⁰ Ibid., paras. 31, 35. See also *Watkins*, para. 502.

⁹¹ Ibid., para. 22.

⁹² Ibid., paras. 37-40, 43-44.

⁹³ The 2011-2020 *Renewable Energy Plan* provides: “premiums corresponding to special regime installations, provide for electricity generation remuneration levels that afford a reasonable return on investment.” (at p. 112) and “Review of remuneration: [...] [The] remuneration amounts [...] may be modified on the basis of technological developments within the sectors market behavior, [...], while always guaranteeing reasonable rates of return.” (at p. 115). See also, *RREEF*, para. 383.

⁹⁴ *NextEra*, para. 603.

⁹⁵ Ibid., para. 168.

fundamentally the regime under which remuneration was to be calculated.⁹⁶

In addressing damages the Tribunal disregarded the DCF method proposed by the Claimants and instead calculated damages in a “*but for*” scenario based on the RD 661/2007 regime because Claimants’ Termosol Plants had been in operation only since June 2013 (final registration with RAIPRE for No. 1 and 2 Termosol Plants occurred on 29 May 2013 and 7 June 2013, respectively), i.e., less than a year before the NRR entered into full force, thus making it difficult to calculate future profits based on such a short amount of time.⁹⁷ Thus, as with *RREEF*, the circumstances of *PV Investors* and the eleven cases that rejected the Alternative Claim are easily distinguishable from *NextEra*, in that the *PV Investors* Claimants obtained their RAIPRE before 29 September 2008,⁹⁸ hence well before the 2010-2013 changes to the Spanish energy regulatory regime.

(iii) In *BayWa*, Claimants argued that they were entitled to full reparation for the harm suffered due to the disputed measures, with damages consisting of the difference in value of the Claimants’ investment under the NRR and the ORR scenarios, assuming BayWa had a right to receive payments under RD 661/2007.⁹⁹ Claimants also developed an Alternative Claim based on an RRR.¹⁰⁰ The Tribunal, by a 2-1 majority, relying on *RREEF*, held that Claimants were entitled only to an RRR and found that Claimants were already achieving more than an RRR with their wind farms. The majority determined that Spain had breached the ECT because of the clawback provision contained in the NRR, and ordered the parties and their experts to identify the quantum. A significant factor

⁹⁶ *Ibid.*, para. 600.

⁹⁷ *Ibid.*, paras. 643, 648-650.

⁹⁸ ASoC, paras. 208, 445-446. See also, e.g., *Claimants’ Witness Statement 1 – Murley*, para. 55; *Claimants’ Witness Statement 2 – van der Geest*, para. 30; *Claimants’ Witness Statement 3 – Guzmán*, paras. 22-44; *Claimants’ Witness Statement 4 – Tilstone*, para. 27; *Claimants’ Witness Statement 5 – Rossbach*, para. 56; *Claimants’ Witness Statement 6 – Pehle*, para. 30; *Claimants’ Witness Statement 7 – Kyte*, para. 22; *Claimants’ Witness Statement 8 – Gómez de la Torre*, para. 18; *Claimants’ Witness Statement 9 – Collado Arpia*, paras. 18-35; *Claimants’ Witness Statement 10 – Labouret*, para. 26; *Claimants’ Witness Statement 11 – Schreiber*, para. 29; *Claimants’ Witness Statement 12 – Scherer*, para. 27; *Claimants’ Witness Statement 13 – Schumann*, para. 22; *Claimants’ Witness Statement 14 – Ochsenkühn*, para. 24.

⁹⁹ *BayWa*, para. 595.

¹⁰⁰ *Ibid.*, para. 600.

distinguishing *BayWa* from the present case and the eleven cases that have rejected the Alternative Claim is how the investments were generated. The *BayWa* Claimants invested in two wind farm projects during the years 2003-2012 and 2009-2012, respectively, increasing their ownership significantly in 2011,¹⁰¹ which date (2011) Claimants fixed as the date as of which to judge their legitimate expectations (which evidently is a date much later than that of *PV Investors'* investments).¹⁰² It should be noted as well that *BayWa's* original investment was made in 1997, when expectations for the investment pre-dated, by many years, the ORR, a point considered by the *BayWa* majority.¹⁰³ The source of expectations also differs. The *BayWa* Claimants invested in wind farms, and the *PV Investors* Claimants in photovoltaic plants. The *PV Investors* Claimants' expectations accordingly were informed by different State representations (e.g., the notorious presentation "*The Sun Can Be Yours*"), which did not factor into *BayWa's* investment-backed expectations into wind. Thus, the *BayWa* majority's determination that the Claimants had no right to the continuation of the Special Regime is not analogous to the present case.

(iv) In *RWE Innogy*, the Tribunal held that the enactment of the NRR breached Article 10(1) of the ECT twice in that: (i) its claw-back provision unduly required Claimants to pay back certain sums received between the adoption of RDL 9/2013 and Order IET 1025/2014 (the "clawback" provision), and (ii) it placed an excessive and disproportionate financial burden on certain of the Claimants' plants. Regarding the second breach, the Tribunal clarified, relying on *RREEF*, that Claimants were entitled only to an RRR of 7.398%, an assessment prompted by a number of factors that are not present as regards *PV Investors*. First, *RWE* started investing in Spain as early as 2001. Therefore, in a reasoning analogous to *BayWa*, the Tribunal held that at that time the investors could not rely on representations made by the Spanish Government in RD 436/2004 or RD 661/2007. In fact, *RWE* had invested under the legal framework of RD 2818/98, whose language, the

¹⁰¹ *Ibid.*, paras. 73-74.

¹⁰² *Ibid.*, para. 350.

¹⁰³ *Ibid.*, para. 473.

Tribunal determined, could not have been intended as a statement that incentives would not be changed at some point in the future, and therefore could not reasonably have been relied upon as such.¹⁰⁴ Concerning the second tranche of investments made in June 2008 with the acquisition of the *Urvasco* plants, Claimants were found not to have carried out due diligence on the regulatory risk appropriate to the size of their investment.¹⁰⁵ With respect to investments made from 2010 onwards, the Tribunal considered that at that point in time the investors had been alerted to the prospect that changes were on the horizon.¹⁰⁶ In the present case, however, it is undisputed that the *PV Investors* Claimants relied on the ORR in making their investments in Spain, having met the 29 September 2008 RAIPRE deadline. Second, the *RWE* investments were in hydro and wind, not in solar energy, hence, unlike the *PV Investors*, the *RWE* Claimants could not rely on the representations made by the Spanish Government in respect of the solar and photovoltaic sector. As a result of these factors, the Tribunal rejected *in toto* Claimants' case for a breach of legitimate expectations and resorted to the principle of proportionality to set compensation at an RRR.

7. Cases in which the Kingdom of Spain has prevailed:

- (i) In *Charanne*, the scope of the dispute was limited to the 2010 measures. The Tribunal first acknowledged that "*a State cannot induce an investor to make an investment, hereby generating legitimate expectations, to later ignore the commitments that had generated such expectations.*"¹⁰⁷ Ultimately, the Tribunal determined that "*the Claimants could have easily foreseen possible adjustments to the regulatory framework as those introduced by the rules of 2010.*"¹⁰⁸ It must be stressed that the analysis in this case was truncated in that the measures taken from 2013 onwards were not considered. This decisional framework readily distinguishes *Charanne* from *PV Investors*.

¹⁰⁴ *RWE Innogy*, para. 488.

¹⁰⁵ *Ibid.*, paras. 510, 513.

¹⁰⁶ *Ibid.*, para. 504.

¹⁰⁷ *Charanne*, para. 486.

¹⁰⁸ *Ibid.*, para. 505.

- (ii) In *Isolux*, Claimant invested on 29 October 2012. The Tribunal noted that as of October 2012, the FiT regime was already the object of various studies that made its modification inevitable. In particular, the Tribunal recalled that in March 2012 the National Energy Commission issued a report indicating that the Special Regime was under review, recommending various changes to the regulatory regime. In September of the same year the Spanish Supreme Court stated that "[t]he reasonable remuneration for investments established by Law 54/1997 does not imply, we repeat, that the remuneration must necessarily be received through the regulated tariff."¹⁰⁹ Thus, the context of the *Isolux* investment was markedly different from that of the *PV Investors*, which had invested in Spain up to five years before *Isolux*.
- (iii) A 2-1 majority in *Stadtwerke* held that the Spanish measures were proportionate and reasonable and that Claimants could not have any expectation that the ORR would have been maintained as it was at the time they invested, relying substantially on Spanish law (which it determined to be relevant in the ECT context).¹¹⁰ Professor Kaj Hobér dissented, opining that the Claimants' reasonable expectations at the time of their investment included an expectation that there would not be any fundamental and radical changes to the RD 661/2007 regime¹¹¹ (and that Spain's contention that Claimants were only entitled to an RRR was incorrect).¹¹² Timing was a significant factor in this case. The majority evidently was influenced by the fact that while Claimants had invested in Spain in October 2009, their CSP plants were registered in the RAIPRE only in April 2012.¹¹³ *PV Investors* is distinguishable in that all of their investments had been registered with RAIPRE by the 29 September 2008 deadline, thus justifying their legitimate expectations under the ORR.¹¹⁴

¹⁰⁹ *Isolux*, para. 797 (unofficial English translation from Spanish original available at https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/Case-38-Isolux_v._Spain_-_award_dis._opinionEN.pdf, accessed on 7 February 2020).

¹¹⁰ See *Stadtwerke*, paras. 181, 308.

¹¹¹ *Ibid.*, *Dissenting Opinion of Professor Kaj Hobér*, para. 14.

¹¹² *Ibid.*, para. 15.

¹¹³ *Ibid.*, Section VI(B)(2)(iii)(b)(ii)(e); see also para. 384.

¹¹⁴ See *supra* footnote 98.

8. The present award is based expressly on *jura novit arbiter*.¹¹⁵ Though we are not bound by the doctrine of *stare decisis*, I find compelling the jurisprudence formed by these other renewable energy cases involving Spain's history of regulating the field. Eleven of the eighteen Tribunals have granted the Primary Claim over the Alternative Claim, despite having the Alternative Claim presented to them, in circumstances that this Award itself describes as "*broadly similar to the Primary Claim in this arbitration*," citing *Eiser*, *Masdar* and *Novenergia*.¹¹⁶ All eleven have concluded that Spain had guaranteed that the investors were entitled to the FiT in place at the time of the investment, i.e., the Primary Claim, and could not be limited to an RRR, i.e., the Alternative Claim.¹¹⁷
9. As discussed directly above, none of the three cases (*Charanne*, *Isolux* and *Stadtwerke*) in which Spain prevailed is in any way analogous to the present case, due to the markedly different timing of their investments and the consequent difference in those investors' legitimate expectations, considering the contemporaneous state of the Spanish regulatory framework. In *Charanne*, the tribunal did not consider the Spanish measures beyond 2010. In *Isolux*, the investment came at a time when changes to the regulatory regime were evident. In *Stadtwerke*, the RAIPRE registration, which Claimants advanced as concretizing their legitimate expectations, occurred only in 2012, whereas *PV Investors'* legitimate expectations were based on RD 661/2007 inasmuch as their RAIPRE registration had been made by 29 September 2008, following Spain's 27 September 2007 announcement that RD 661/2007 would close to new investments in PV projects one year later.

¹¹⁵ Award, para. 519.

¹¹⁶ Award, para. 553.

¹¹⁷ *Eiser*, paras. 433-34, 441; *Novenergia*, paras.673-681, ; *Masdar*, paras. 533, 557; *Antin*, paras. 614, 690-91; *Greentech*, paras. 501, 530-535; *SolEs*, paras. 504, 526; *9REN*, paras. 401-412; *Cube*, paras. 296, 388; *OperaFund*, paras. 594, 604; *Infrared*, paras. 410, 451, 543; *Watkins*, para. 641. See also *NextEra*, paras. 616 and 647-50, where the *NextEra* tribunal accepted the Primary Claim but applied a reasonable rate of return to calculate damages because the *NextEra* plants had operated under the RD 661/2007 regime for only a few months. The Tribunal declared that it could not use the DCF method since Claimants could not prove what kind of cash flow they could have enjoyed in a "*but for*" scenario. Accordingly, the Tribunal had to use the method proposed by Claimants in their Alternative Claim, which was their expectation of a reasonable rate of return.

10. The Alternative Claim prevailed in four cases (*RREEF*, *NextEra*, *BayWa* and *RWE Innogy*), none of which is in any way analogous to the present case. The *NextEra* Tribunal only applied an RRR because the DCF method advanced with the Claimants' primary claim could not be applied owing to NextEra's late entry into the market. In *RWE Innogy*, the Tribunal's reliance on the principle of proportionality, resulting in an award of an RRR, is distinctly different from the present case, as each turns on legitimate expectations formed at the different times their respective investments were made. The same is true of *BayWa* and *RREEF*.

11. The type of investment also sets these four cases apart from the present case, although the Award makes no effort to reconcile this important reality with its novel, indeed unique, reading of the ORR. Investment type has been a significant factor in ascertaining the claimants' legitimate expectations, which has included review of different sets of regulations applicable to specific types of investments, as well as consideration of different representations and ancillary assurances that targeted specific types of investments. Accordingly, it is well documented in these renewable energy awards that PV facilities differ from CSP, wind and hydro facilities, each of which was governed by different regulations and was the object of different representations by the Government of Spain.¹¹⁸ None of the four awards granting the Alternative Claim involved PV

¹¹⁸ In the words of one Spanish official, "the CSP and PV sectors were different since the former produces more electricity using less subsidies than the latter, which explained the retroactive changes affecting PV facilities". *Antin*, para. 127. It was also noted in *Antin* that in 2010 CSP plants generated 0.8% of the electricity and received 3% of Special Regime subsidies, whereas PV plants generated 7% of the electricity and received 37% of the Special Regime subsidies. (*Antin*, para. 132.) The *Charanne* Tribunal observed that RD 1578/2008, 1565/2010, and 14/2010 regulated exclusively the PV industry, whereas RD 1614 2010 regulated solar, thermal and wind technologies and not PV. (*Charanne*, para. 154-155.) The *Cube* Tribunal noted that the regulation of CSP also involves "different regulatory incidents" from PV. (*Cube*, para. 508.) Similarly, a number of presentations and ancillary documents contemporaneous to the implementation of the ORR addressed specifically PV investors, e.g., the *Renewable Energy Promotion Plan 2000 – 2010* ("PER 2000 – 2010") and the notorious presentation "The Sun can be Yours."

installations.¹¹⁹ In fact, the tribunals in all cases involving PV installations invested under the ORR have granted the Primary Claim and rejected the Alternative Claim.¹²⁰

12. The most recent *Watkins* Tribunal also was critical of the *RREEF* award, particularly concerning that Tribunal's finding that Spain committed to provide an RRR to investors, which it described as "*not supported by a number of awards which have found that Spain did promise investors that it would not alter retroactively the specific tariffs of RD 661/2007 and RD 1614/2010*", instead concluding that "*the persuasive views set out in the decisions of Eiser, Novenergia, Antin and Masdar*" should be favored.¹²¹ Further, relying on Robert Volterra's dissent in *RREEF*, it criticized the conclusion of his co-arbitrators that an RRR was not fixed and could evolve depending on the cost of money in the capital market, for being "*inconsistent with the evidence that was before the RREEF tribunal especially as the cost of money in the capital markets was substantially the same in 2007 when the RD 661/2007 regime was implemented and in 2013 when the new regime was implemented.*"¹²²

13. *Errare humanum est, perseverare autem diabolicum.*

14. Clearly the timing of the respective investments has been a critical distinguishing factor in ascertaining the legitimate expectations of investors, hence further reason to view the present case in a far different light from the four cases that granted the Alternative Claim. The pre-RD 661/2007 investments of *RWE Innogy* and *BayWa* indisputably affected those Tribunals' assessment of the Claimants' legitimate expectations as not being fixed by the RD 661-2007 regime. Similarly, investments made once regulatory changes evidently were on the way, as the *BayWa* and *RREEF* Tribunals found, could not legitimately expect

¹¹⁹ *RREEF* involved CSP and wind, *BayWa* involved wind, *RWE Innogy* involved hydro and wind and *NextEra* involved CSP plants.

¹²⁰ See *Novenergia*, paras. 820-21; *Greentech*, paras. 485-86; *SolEs*, para. 526; *9Ren*, para. 407; *Cube*, para. 473; *OperaFund*, para. 604.

¹²¹ *Watkins*, para. 500.

¹²² *Ibid.*, para. 502.

statutorily fixed returns. The *PV Investors'* Primary Claim, on the contrary, is not affected adversely by either the timing of their investments or their type. They invested between 2007 and 2009, but all their investments were registered with the RAIPRE before the 29 September 2008 deadline, guaranteeing each of their PV installations full economic benefits under RD 661/2007. Indeed, the timing of the RAIPRE registration has had a significant impact in a series of these Spanish RE cases. The *Antin*,¹²³ *Masdar*,¹²⁴ *Novenergia*,¹²⁵ and *OperaFund*¹²⁶ Tribunals all found that registration in RAIPRE was not simply an administrative requirement, but actually gave rise to the legitimate expectations of investors so registered. I refer to the *Novenergia* tribunal's finding on this point:

665. The Tribunal considers that Law 54/1997 and RD 661/2007 were clearly enacted with the objective of ensuring that the Kingdom of Spain achieved its emissions and RE targets. In order to achieve that objective the Kingdom of Spain created a very favourable investment climate for RE investors, and the nucleus of such investment climate was the Special Regime. *The requirements placed on the PV plants to qualify for the Special Regime were limited to registration with the RAIPRE, a requirement which all of the PV Plants had met within the prescribed cut-off date.*

666. In the Tribunal's view, a number of relevant statements or assurances were made by the Respondent with respect to the Special Regime, as initially introduced through Law 54/1997 and further developed by RD 661/2007 and legislation in between:

(e) In Law 54/1997, it was stated that RE facilities admitted to the Special Regime would be authorized to incorporate "all the energy produced by them into the system" and would "obtain reasonable rates of return" as set by the government.

(f) RD 436/2004 was enacted as expressly aiming at "provid[ing] those who have decided or will decide in the near future to opt for the special regime with a durable, objective, and transparent framework".

¹²³ *Antin*, para. 552.

¹²⁴ *Masdar*, paras. 512-520.

¹²⁵ *Novenergia*, paras. 665-667.

¹²⁶ *OperaFund*, para. 483.

(g) Under RD 436/2004, PV plants were entitled to incorporate into the grid all of the electric energy produced in exchange for a FIT or premium for the lifespan of the PV plants.

(h) Under RD 661/2007, which replaced RD 436/2004, PV plants enrolled in the RAIPRE before the cut-off date would be entitled to (i) incorporate all of their net production into the grid; (ii) a FIT that would only be updated in accordance with the national CPI; and (iii) receive a fixed FIT for the lifespan of the PV plants.

667. These were the legal sources in force in the Kingdom of Spain when the Claimant made its investment and the Tribunal agrees with the Claimant that *the above statements and assurances were indeed aimed at incentivising companies to invest heavily in the Spanish electricity sector and that the Claimant made its investment in reliance of the terms provided in RD 661/2007. The commitment from the Kingdom of Spain could not have been clearer.* A considerable number of RE companies also invested in reliance on these statements and assurances.¹²⁷ (Citations omitted.) (Emphasis added.)

15. Similarly, the *OperaFund* Tribunal, referring to Article 44(3) of RD 661/2007,¹²⁸ explained:

In view of this provision, for the present case, the RAIPRE registration is an important additional element in order to assess the legitimate expectations of the investors

Claimants' investments were made between July 2008 and July 2009, in reliance upon the fact that the PV plants were finally registered in the RAIPRE under RD 661/2007 and granted the RD 661/2007 FIT economic rights. Thus, *the formal registration led to the investors' entitlement to receive the benefits under RD 661/2007 (including not being subject to regulatory change).*

The Tribunal, therefore, has no doubt that the stabilization assurance given in Article 44(3) is applicable for the investments by Claimants. Indeed, it is hard to imagine a more explicit stabilization assurance than the one mentioned in Article 44(3): "revisions [...] shall not affect facilities for which the functioning certificate had been granted." As put by the

¹²⁷ *Novenergia*, paras. 665-667.

¹²⁸ Article 44(3) of RD 661/2007 provides: "The revisions of the regulated tariff and the upper and lower limits indicated in this section shall not affect facilities for which the commissioning certificate had been granted prior to January 1 of the second year following the year in which the revision had been performed."

Novenergia tribunal, “RD 661/2007 was so adamantly clear that its understanding by common readers did not require a particularly sophisticated analysis.”¹²⁹ (Citations omitted.) (Emphasis added.)

16. I accordingly see no reason to depart from such sound reasoning, repeatedly applied without exception by eleven predecessor tribunals confronting the same problem, as my esteemed colleagues have done. Against such a record it is intellectually disingenuous to say, as the Award does in paragraph 555, that “[i]t is not entirely unsurprising, and indeed to some extent to be expected in a system based on *ad hoc* adjudication, that arbitral tribunals may assess relevant circumstances in different ways.” One would not expect a tribunal that declaredly¹³⁰ operates on the principle of “*jura novit arbiter*” to diverge from, indeed utterly reject, eleven predecessor tribunals’ unanimous awards that addressed the same issue. Focusing even more narrowly on the sub-category of those eleven cases to which the present case belongs, in every one of the four of them that, like the *PV Investors*, specifically involved PV installations and timely RAIPRE registration (i.e., before 29 September 2008), the Primary Claim has prevailed over the Alternative Claim.¹³¹ In other words, *PV Investors*, *Novenergia*, *Cube*, *9Ren*, and *OperaFund* all have involved the same technology, close timing of investments, the same incentives, the same compliance with RAIPRE registration deadline, the same assurances, the same regulations, the same investment treaty, the same host State, and the same measures in dispute. Logic dictates that the *PV Investors* would harbor the same expectations and that this sub-category of the eleven cases be followed absent compelling contrary reasons. The present Award, regrettably, states no such compelling reason.

17. Although the Primary Claim itself has not been quantified in these proceedings, due to the Tribunal’s extended excursion into and concentration on the Alternative Claim, I am of the opinion that a proxy offered by the Claimants may be used at least to approximate

¹²⁹ *OperaFund*, paras. 483-485.

¹³⁰ Award, para. 519.

¹³¹ See *Novenergia*, paras. 820-21; *9Ren*, para. 407; *Cube*, para. 473; *OperaFund*, para. 604.

the Primary Claim damages of which this Award deprives the *PV Investors*.¹³² The *Novenergia* Tribunal awarded damages on a €/MW of PV capacity basis. The damages awarded in *Novenergia* were €53.3 million (excluding interest) and corresponded to an installed capacity of 18.8 MW.¹³³ This leads to €2.84 million in damages for each MW of capacity. If one assumes that *PV Investors* have 222.4 MW of capacity, and that each MW is valued at €2.84 million, Claimants would receive approximately €632 million in damages instead of €91.1 million, a difference of €540.9 million from the sum provided under the Alternative Claim in this Award, representing a mere recovery of less than seven percent of what Claimants' legitimate expectations should have generated in damages.

28 February 2020

Date

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¹³² *Claimants' Second PO 12 Post-Hearing Brief dated 29 November 2018*, paras. 10-11, n. 31.

¹³³ *Novenergia*, para. 483.