SEVILLA BEHEER B.V. et al v The Kingdom of Spain
ICSID Case No ARB/16/27

Partial Dissenting Opinion

By Professor Peter D Cameron

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Summary

1. It has been an honour to serve on this Tribunal alongside two arbitrators of the highest standing, and from whom I have learned much. I am not however entirely in agreement with the views set out in the Decision on Jurisdiction, Liability and the Principles of Quantum (the 'Decision') and set out below in summary form the points on which I agree and those where I differ with my colleagues. My reasons for differing are set out in extended form in this Partial Dissenting Opinion.

2. The Tribunal has taken a view on jurisdiction with which I am in agreement, including its assessment of the relevance of the *Komstroy* Judgment[1]. This Tribunal does, in my view, have jurisdiction over the claims brought before it. Further, I agree with the Tribunal on its finding on the TVPEE: it lacks jurisdiction to hear this element of the claim.

3. I also agree that the Respondent is in breach of the ECT and specifically Article 10(1). This finding of liability is in line with almost all the cases that have been brought under the ECT that concern the Respondent's Disputed Measures. Specifically, I agree that the retroactive application of the New Regime to the remuneration already received by the Claimants' PV plants under RD 661/2007 and RD 1578/2008 is in breach of Article 10(1) of the ECT, for which compensation is due.

4. However, I do not agree with several of the Tribunal's conclusions on liability (Section VII) and the reasoning adopted to reach those conclusions. As a result, I also differ from the Tribunal on the principles applicable to quantum (Section VIII).

5. In summary form, the differences are:
   (i) our understanding of 'stability' in relation to Article 10(1) of the ECT, sentences one and two (Section VII.A and B of the Decision).
   (ii) our assessment of the legitimate expectations of Sevilla Beheer B.V. et al. in relation to Claimants' investments and the protection they deserved under the ECT (Section VII.B).
   (iii) our assessment of the significance of the registration requirement (Section VII.B).
   (iv) our assessment of the reasonableness and proportionality of the Disputed Measures (Section VII.B.2).

[1] Case C-741/19 *Republic of Moldova v Komstroy*, 2 September 2021.

(v) our assessment of the RRR in the 1997 Act, its relation to subsequent legislation and the majority's conclusion that the RRR was around 7% post-tax (Section VIII).

6. Given the above, my views on the principles governing damages to be awarded to Claimants (Section VIII of the Decision) differ from those of the majority. These views will however only be noted in the dissent since I do not consider their elaboration to be necessary in the light of the majority's findings.

7. Despite the above noted differences, I acknowledge and accept my duty to work with the Tribunal in the following stages of the process after this Decision.

A. What Stability means in relation to Article 10(1) of the ECT

The meaning of stability in relation to the ECT and in the context of investments in low carbon sources of energy.

(i) The Meaning of Stability

8. The basic legal instrument that the Tribunal is bound to apply in this dispute is the ECT, in accordance with the ICSID Convention, taking into account other applicable rules and principles of international law[2]. Given the centrality of Article 10(1) of the ECT to the claims, the Tribunal begins its discussion of liability with an analysis of the relationship between sentences one and two. In sentence one, Article 10(1) of the ECT requires contracting parties "to encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments…". It continues in the second sentence to add 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". Interpretation of these two

[2] Decision, ¶ 538.

sentences has provoked much discussion among arbitral tribunals[3]. The ECT's requirement that contracting parties "encourage and create" stable and other conditions for investors in sentence one is expressly linked to the FET standard in sentence two ("Such conditions…" in sentence two). Following the practice of "a large number of authorities", the Tribunal decides to analyse the two sentences together in the context of the Claimants' legitimate expectations claim[4].

9. In my view, this choice is more than a worthy demonstration of pragmatism to a task of treaty interpretation. The ECT's requirement that contracting parties "encourage and create" stable conditions for investors has its corollary in the investor's legitimate expectation to a stable legal and business framework in the host State. This is usually understood as part of the FET standard. Both the requirement and the expectation are provided for in the first and second sentences of the ECT. This double-sided protection of stability in Article 10(1) post-dates the drafting of the ECT since the emphasis upon the stability aspect in the FET standard emerged in arbitral jurisprudence several years after the ECT was concluded. Whatever weight one gives to each side of the protection it offers to investors, the drafters of the ECT considered the notion of stability sufficiently important to long-term investments in the energy sector (defined broadly in the ECT[5]) to include it as an express term in the treaty itself, rather than in the recitals, as some treaties do. The fact that the wording implies a looser arrangement than the notion of 'stabilization' often found in investor-state contracts does not detract from this conclusion. Subsequent arbitral jurisprudence has

[3] For example, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v The Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, ¶¶ 457-463; The *PV Investors v The Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, ¶¶ 566-571; *Novenergia II Energy and Environment (SCA)(Grand Duchy of Luxembourg) v The Kingdom of Spain*, SICAR, SCC Case No. 2015/063, Final Award, 15 February 2018, ¶¶ 642-646; *Infrastructure Services Luxembourg S.a.r.l. and Energia Termosolar B.V.* v The Kingdom of Spain (formerly Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V.), ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶¶ 529-530; *Blusun S.A. Jean-Pierre Lecorcier and Michael Stein v The Italian Republic,* ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶¶ 315, 319; contrast with *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 163.

[4] Decision, ¶ 714.

[5] Renewable forms of energy are expressly mentioned in (b) of the Understanding with respect to Article 1(5).

done much to incorporate the protection of investors' legal stability in the FET standard since the 1990s[6].

10. It is worth probing a little into what 'stability' means in the ECT context. The wording is not precise enough to suggest it means that a legal order or a special regulatory regime within it is *immutable* or that a State is giving an undertaking to prospective investors never in any circumstances to change it. Rather, it seems that a different conception of stability is implied here.

11. Article 10(1) contains important words that supplement its express reference to stable conditions. The contracting party must "encourage and create stable … conditions for Investors of other Contracting Parties to make Investments in its Area". The conditions are established for a purpose and such conditions are, in the words of the second sentence, to include a commitment to always accord FET to investments made. This notion of inducement of investment is therefore a central element in what we might call the stability paradigm of the ECT. The overriding purpose of stability under the ECT is to induce foreign investors to make commitments in the territories of contracting States. We may recall the stated purpose of the ECT in Article 2: it establishes 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".

12. The Tribunal's reading of Article 10(1) is rather different, sketching out in a preliminary way a relationship between the stability requirement (in sentences one and two), the right to regulate and the scope of an investor's legitimate expectation, in which two propositions seem to me to be evident. First, in its view the stability obligation in

[6] The most pertinent awards to mention the protections espoused in the FET standard include *Occidental Exploration & Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004: "[A]n obligation not to alter the legal and business environment in which the investment has been made", and to guarantee "the stability and predictability of the governing legal framework", ¶¶183, 191; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 274-276; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB/(AF)/97/1, Award, 30 August 2000, ¶ 199; *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 29 May 2003, ¶ 113; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 124–126.

sentence one is not only linked to the FET obligation in sentence two but is *subsumed* by it. Second, the FET standard does not prevent a sovereign State from exercising its regulatory power in a manner consistent with international law. The latter proposition is prima facie uncontroversial, but the quotation which follows from *PV Investors* v *Spain* adds the additional nuance that this limitation on the FET standard includes a State's right "to adapt the regulatory framework to changed circumstances". This is expressly designed to support the notion that stability of the investment framework "is not absolute". Rather, stability is, on the *PV Investors'* view, a principle that needs to be balanced against principles directly derived from State sovereignty. The result of this initial interpretation of the applicable law is to *reduce* the stability requirement to that of one consideration among several associated with State sovereignty that must be considered by the Tribunal in a balancing exercise when assessing the compatibility of State actions under international law. The linkage between stability and the promotion of long-term cooperation (the ECT's purpose) and by implication inward investment, recedes into the background. On this view, at least by implication (and expressly in the *PV Investors* quotation), there is no difference between the ECT and any other investment treaty in the way it balances investor protection and the State's right to regulate. Yet, if economic activity in the energy sector were not in some way different from other economic activities, why would so many States have agreed to draft, sign and ratify an international treaty instrument dedicated specifically to it? And, if there *are* differences between such economic activities and non-energy ones, would we not expect to find them reflected in the treaty text in some ways? In my view, the emphasis on stable conditions is one such example of legal recognition of a sector-specific investment feature, acting as a constraint on contracting parties' right to regulate, and relevant to achieving the purpose of the ECT in Article 2 of "promot[ing] long-term cooperation in the energy field".[7] As a matter of international law, and contrary to the view in *PV Investors* on this point, the treaty protection of stability is stronger under the ECT than under any other international investment treaty that I am aware of.

[7] A view supported by the Energy Charter Secretariat's publication, *The Energy Charter Treaty – A Reader's Guide*, p. 6 (https://is.muni.cz/el/1422/jaro2017/MVV2368K/um/ECT_Guide_ENG.pdf).

(ii) Stability in relation to Low Carbon Energy Investments

13. Even if we were not to accept the proposition that the origin of this unique treaty emphasis lies in an assessment by the ECT drafters that the political risk in this sector was unusually significant, a number of the documents provided to the Tribunal[8] and analyses of tribunals' findings in similar cases[9] suggest that with respect to the class of investments in *renewable* forms of energy the State plays an unusually important role in encouraging, creating and supporting the context for inward investment on a large scale. In a nutshell, the market alone cannot deliver these investments, so the State steps in to improve the benefits to investors, enhancing their long-term prospects, and simultaneously generating advantages in social welfare and meeting commitments under EU and international climate change law and policy. As a result, the triangular relationship between the regulatory State, investor expectations and stability takes on a more specific aspect in this area of energy investment than in conventional, well-established energy sectors. These are – especially in the PV sector – investments in 'new' rather than 'old' energy.

14. Investments of the kind that the Respondent was seeking through the regime set up by Law 54/1997[10] were being sought by governments in States across the EU and

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[8] Claimants' Request for Arbitration, ¶ 5; Cl. Memorial, ¶¶ 16-17, 45-49; Counter-Memorial, para 285; Claimants' Reply, ¶ 48.

[9] See, for example: *Antin Infrastructure Services Luxembourg S.a.r.l and Antin Energia Termosolar S.A. v The Kingdom of Spain*, ICSID Case No ARB/13/31, Award, 15 June 2018, ¶¶ 540-544, 548, 553-554; *Watkins Holding S.a.r.l, Watkins (NED) B.V., Watkins Spain S.L., Redpier S.L., Northsea Spain S.L., Parque Eolico Marmellar S.L. and Parque Eolico La Boga S.L. v. The Kingdom of Spain, ICSID Case No. ARB/15/44, Award, 21 January 2020, ¶ 451; Ioan Micula et al. v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶; 515, 516; Sunreserve Luxco Holdings S.a.r.l. v The Italian Republic, SCC Arbitration V (2016/32), Award, 25 March 2020, ¶¶ 684, 685; Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.77. In SolEs Badajoz GmbH v The Kingdom of Spain,* ICSID Case No. ARB/15/38, Award, 31 July 2019, the tribunal found that "Spain has provided public aid to the renewable energy sector in order to meet its objectives for renewable energy, which it has set against the backdrop of EU targets. This aid has included large subsidies to PV plants… Within the Special Regime that was established pursuant to the 1997 LSE, the key instrument for subsidizing investment in PV facilities was a premium in the form of a FiT", ¶¶ 420, 519.

[10] For an overview of the policy reasons for evolution in Spain's Renewable Energy legal framework from 1994-2008, see *Cube Infrastructure Fund SICAV et al v Kingdom of Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, ¶¶ 234-272; *Novenergia II v. Spain*, SCC Arbitration (2015/063), Award, 15 February 2018, ¶¶ 663 – 669; *Foresight Luxembourg Solar 1 S.a.r.l. et al v. Kingdom of Spain*, SCC Arbitration (2015/150), Final Award, 14 November 2018, ¶¶ 62 – 93.

indeed in other parts of the world. Within the EU the policy goals were usually to reduce emissions and to meet targets for renewable energy as a generator of electricity as part of a wider climate change action policy. Often the resulting schemes depended upon the attraction of private capital, foreign and domestic, for them to take off. Yet there were barriers. Common problems encountered were higher cost and significantly higher risk than were present in energy investment in the conventional electricity market, which generated power by drawing on relatively cheap but highly polluting supplies of fossil fuels. Often such investments were project financed, with the lender requiring long-term guarantees of tariffs since this feature was the single source of repayment of costs and return. To address this and particularly to incentivise investment, a common solution among the EU States was the adoption of the so-called Feed-in Tariff mechanism (FiT), designed to offer a premium to investors in renewable energies and over time to guarantee repayment of investment costs and offer a return to the investor over the operational life of the installations, secure against periodic reviews and competitive relative to opportunities that investors may have elsewhere.[11] To combat fluctuations in demand for electricity from these sources, they were often given priority of despatch. While each government within the EU, encouraged by its legislation and institutions, designed a bespoke regulatory regime to suit its circumstances and policy choices with respect to low carbon energy, a set of common regulatory conditions emerged and proved effective. From the record of this case, such commonality in regulatory behaviour among EU States permitted an early comparison by the owner of the Claimant entities, Mr Bouman, between the FiT mechanisms in Germany and Spain prior to making an investment and is also evident as a technique in the data collections assembled and analysed in the expert reports of both parties.[12]

[11] For an analysis of the FiT regime, and why it is there: *9REN Holding S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶¶ 70 – 95, 99-102; *SolEs Badajoz GmbH v Spain*, ¶¶ 414-425. In the context of this case, the observation of the Spanish regulatory body, the CNE, may be noted: "(i)t should be remembered that the reason for the existence of the economic incentives for production from renewable energy sources, cogeneration and waste is to correct one of the so-called 'market flaws' by compensating for the long-term environmental, social and supply costs which other forms of generation do not fully internalise": C-0117, Report 18/2013 of the Spanish National Energy Commission on the Royal Decree Proposal regulating the activity of electricity production from renewable energy sources, cogeneration and waste.

[12] Expert Report of Econ One Research Inc., 24 November 2017, ¶¶ 132-136, and Table 5; KPMG, Regulatory Expert Witness Report, 30 June 2017, ¶¶ 129-132, 160-161.

15. The Respondent joined with other EU States that were seeking to attract investment into this new sector by designing a national regime, driven in part by international policy commitments on climate change and targets in EU legislation. As a first step, the Respondent established a Special Regime by Law 54/1997 to distinguish the renewable energy sector from the conventional electricity sector, emphasising the centrality of a premium to the market price as an incentive to investment in it. Yet, for the regime to achieve its goals, it needed to attract foreign investment, and subsequent legal measures addressed the need for solutions to the three problems outlined above: lack of commerciality; tariff-based revenue dependence over the long term and novelty. By ensuring financial support and reducing risk exposure, the FiT mechanism addressed the core problems faced by any PV regulatory regime and played a major part in offering investors signals that drove investment on the desired scale. It lay at the core of an inter-related system of regulation that when offered to investors provided them with significant incentives. Such mechanisms were not unique to Spain or any other State seeking to expand its renewables sector but were a readily recognizable set of legal and regulatory conditions with a proven track record that had a good chance of inducing a class of investors to commit capital to a host State that offered them, while addressing the high risk-profile specific to these new forms of energy.

16. In taking this already well-trodden path, the Respondent faced a common concern rooted in the novelty of some of the newer forms of energy, especially PV. If investments were to be forthcoming on the desired scale, in the face of heavy front-end capital costs, then constraints (along the above lines) on the State's right to regulate were required, along with guarantees about the remuneration over the long term. However, the evolution of the sector could be expected to be rapid and therefore some adjustment of the regulatory regime was likely to be required in the near future[13]. The result is that guarantees of stable conditions have tended to be

[13] As the Tribunal in *Antin Infrastructure v Spain* put it: "(t)he purpose of subsidization in this context is to allow the technologies to be developed in the hope that over time the costs associated therewith will decline, thus making RE technologies more competitive": ¶ 540.

limited in scope to distinct waves of investments, allowing States to review progress to date and adapt the terms of future investments if necessary. Arguably, however, another consequence is that scrutiny of State behaviour in this sector has to be greater than usual to ensure that a State's response to sector evolution is proportionate and reasonable.

17. In the language of the ECT's Article 10(1), this approach to remuneration was central to the encouragement and creation of 'stable conditions' that many EU States were offering in order to attract foreign (and domestic) investment. It did not require a petrification of the regulatory regime, which could be expected to evolve with the impact of lower costs, a phenomenon expected in the PV segment of the renewable energy market[14]. Indeed, in Spain's case, investors seeking to benefit from RD 2007 were faced with a timetable and a clear message that if they wished to benefit from a specific group of incentives, they would have to register by a certain date in the RAIPRE, after which this 'round' of FiT benefits might no longer be available. It was therefore consciously designed as an evolving regime to ensure that the balance of benefits between *new* investors and the State could be recalibrated to reflect a different risk profile from that of investors who had already made commitments but on more demanding business conditions. In conclusion, the fragility of the renewables sector and its especially high dependence upon the assurances of stability from the host State for its very viability suggests that the guarantees of the ECT in Article 10(1) have a particular importance for this class of investments and require a scrutiny of any State measures that may have a potentially adverse effect on investments made in a still-evolving segment of the energy economy.

[14] This point has been noted by several tribunals in cases involving Spain such as *Antin Infrastructure v. Spain*, ibid., ¶¶ 530-532, 540-54, 548 and 553-554; *OperaFund Eco-Invest SICAV PLC & Schwab Holding AG v The Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, ¶¶ 508-53; *AES Summit Generation Limited v Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, ¶ 9.3.25. See also: *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 261.

B. Expectations of Stability vs The Assumption of Risk

A central question for determination is whether the Disputed Measures introduced by the Respondent in its energy law breached the Claimants' legitimate expectations and therefore were in breach of Article 10(1) of the Energy Charter Treaty (ECT).

18. The Tribunal has carried out a detailed and comprehensive analysis of the legitimate expectations claim, guided by the non-controversial assumption that for an expectation to be legitimate, it must be based on objective criteria[15]. Where such expectations are found to be unjustified, the Tribunal's analysis draws upon the notion of 'assumption of investor risk', which leads to its conclusion that the Claimant entities and their owner, Mr Bouman, in proceeding with their series of investments, took upon themselves a considerable risk of future changes in law. As a result, the Tribunal concludes that the primary claim of the Claimants, based on the non-alteration of the FiT regime in RD 661/2007 and RD 1578/2009, cannot be upheld[16]. The replacement of the FiT regime did not, in its view, amount to a modification so drastic or unexpected "as to constitute a violation of the FET obligation under the ECT and the stability obligation it subsumes"[17]. I do not agree with this conclusion or the reasoning which leads to it. In the following paragraphs I explain why.

(i) The Legal Standard

19. The building block in the Tribunal's analysis of legitimate expectations is the 'legal standard' that it sets out in paragraphs 793 to 799. Essentially, this is a view about the kind of specificity required in the representation by a host State to the investor for an expectation to be legitimate. A legitimate expectation can arise, it argues, from a specific guarantee in legislation but not necessarily one that is addressed specifically

[15] A view summarized by the late Professor Rudolf Dolzer thus: "(i)t is generally recognized today that legitimate expectations arise out of the objective conduct of the host state and not out of subjective postulates of the investor… A point that remains to be decided concerns *the manner in which the investor must show* that the state's objective conduct gave rise to expectations on the part of the investor" (my emphasis), 12 *Santa Clara J of Int'l L* 7 (2013), 16.
[16] Decision, ¶ 875.
[17] Decision, ¶ 875.

to the investor concerned[18]. Where the latter is lacking, the Tribunal believes it must carry out an objective examination of the legislation and the facts relevant to the making of the investment to assess whether, in the words of the *Stadtwerke v Spain* tribunal, "a prudent and experienced investor could have reasonably formed a legitimate and justifiable expectation of the *immutability* of such legislation" (my emphasis)[19].

20. In my view, this approach is unsatisfactory because of its characterisation of both the specific commitments and the object of the expectation. With respect to the first, the Tribunal's view is that a legitimate expectation need not require a specific representation to each individual claimant, but, following the tribunals in *Philip Morris v Uruguay*, and *Antaris v Czech Republic*, it finds that provisions of general legislation applicable to a plurality of persons cannot create a legitimate expectation that *no change in law will take place,* thereby imposing limits on the scope of the expectation that may arise from legislation. Such views are contested[20] and seem particularly vulnerable with respect to a highly regulated industry with a bespoke legal regime, as outlined above. In such cases, of which the regime established in Spain by Law 54/1997 and subsequent decrees is surely a good example, the views of the tribunal in *Cube Infrastructure v Spain* are on point:

> "… it is enough that a regulatory regime be established with the overt aim of attracting investments by holding out to potential investors the prospect that the investments will be subject to a set of specific regulatory principles that will, as a matter of deliberate policy, be maintained in force for a finite length of time. Such regimes are plainly intended to create expectations upon which investors will rely; and to the extent that those expectations are objectively

[18] Decision, ¶ 796.
[19] Decision, ¶ 798.
[20] For several tribunals, what constitutes a specific commitment will depend on the circumstances in each case: *9REN Holding v Spain*, ¶¶ 292-297; *Novenergia II v Spain*, Award, ¶¶ 665-667 (especially at 666) and *Cube Infrastructure Fund SICAV et al v Spain*, ¶ 388. Note, too, that in *Electrabel v Hungary*, Award, 30 November 2012, the tribunal observed that while specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable: see ¶ 7.78.

reasonable, they give rise to legitimate expectations when investments are in fact made in reliance upon them."[21]

21. The regime in question here is one that may not contain specific commitments to individual investors but is specific regarding its object and purpose and applies to prospective investors with capital that may be attracted by the FiT mechanism in that regulatory regime.[22]

22. I note that among the specific provisions in the regulatory regime that were included to incentivize investors to make commitments to the sector in Spain include the following:
    (1) In Law 54/1997 renewable energy facilities in the Special Regime were to be authorized to incorporate all the energy produced by them into the system, obtaining "reasonable rates of return" set by the government[23].
    (2) Under Royal Decree 436/2004 an express aim was to "provide those who have decided or will decide in the near future to opt for the special regime with a durable, objective, and transparent framework"[24].
    (3) Under Royal Decree 661/2007, PV plants that were registered in the RAIPRE before the cut-off date were entitled to incorporate all their net production into the grid; to benefit from a FiT that would be updated only in line with the CPI and receive the fixed FiT for the duration of the operational life of the plants[25].

23. All these provisions were in force when the Claimants made their series of investments. They are representations to a category of investors with respect to certain features of

[21] *Cube Infrastructure Fund SICAR et al. v Spain*, ¶ 388; *Charanne B.V. v The Kingdom of Spain*: Dissenting Opinion of Prof. Guido Santiago Tawil, SCC 062/2012, 21 January 2016, ¶¶ 5-8.
[22] *El Paso Energy International Company v The Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, ¶ 375.
[23] Law 54/1997, 27 November 1997, Article 30(4).
[24] RD 436/2004, 12 March 2004, p.10.
[25] RD 661/2007, 25 May 2007, Arts 9-15, 17, 24-30, 37, 44.

the regulatory regime that had as their goal the encouragement of investments in the renewable energy sector.[26] I have more to say on this below.

24. With respect to the *object* of the expectation, my disagreement with the Tribunal's approach is different. For the *Stadtwerke v Spain* tribunal, the object of an investor's expectation of the host State's legislation is *immutability.* In this case, however, the Tribunal understands the parties to be in agreement that legitimate expectations cannot be held unless there is some specific commitment on which to base them, and that the expectations are "that the regulatory framework will remain unchanged ("frozen")". Yet this interpretation of the expectation sought does not fit a simple reading of the language of the ECT or at least some of the statements by the parties in the record of this case[27].

25. If we review the language in Article 10(1) of the ECT, it is about encouraging and creating *stable conditions* for investors to invest. Under FET in the second sentence, it is, by inference and following a line of cases, about meeting an investor's expectation of a stable legal and business environment[28]. Neither of these requirements appear to be framed in such strict or precise language as to prohibit a contracting party from making *any and every* change in the regulatory framework applicable to an investment. Rather, they appear to require that a State provide and subsequently respect the kind of legislative framework that would underpin continuity and predictability in the host State's business environment for investments made by a foreign investor. If stability is offered, we would expect to find evidence of factors such as: benefit, duration, specificity, mutuality and consistency over time. On this view, investors could expect

[26] I note that this insight has already been present in several cases involving the same disputed measures: for example, *Novenergia II v Spain*, ¶ ¶ 666-667; *Antin Infrastructure v Spain*, ¶ 538, and *SolEs Badajoz v Spain*, ¶ 313: "(a)s has been widely recognized, 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".

[27] For example, Claimants' Memorial, ¶ 329: "…it is not the Claimants' position that the obligation to accord "*stable*" and "*transparent*" conditions in the ECT means that a host State must completely freeze its regulatory regime"; Claimants' Reply, ¶ 310.

[28] *Novenergia II v Spain,* ¶ 654; *Antin Infrastructure v. Spain*, ¶¶ 530-533; *Ioan Micula, Viorel Micula, European Food S.A, Starmill S.R.L.and Multipack S.R.L v. Romania*, (Micula I), ICSID Case No. ARB/05/20, Award, 11 December 2013), ¶ 529; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.77.

a limited rather than an absolute form of 'stability' from a contracting party to the ECT. The corollary of this is that the host State would refrain from taking legislative measures that would undermine or abolish such stable conditions or the stability of the legal and business framework on which investors had based their decisions when making their investments. With respect to the PV sector in Spain, this meant that the investor would base its expectations on information provided by the State about – among other things - the level of the incentive or premium offered, the duration of such incentive and the frequency and terms of any review. Unless it was clear that the State was in fact making this offer, such expectations would be unreasonable, and not benefit from the protection of Article 10(1) of the ECT.

26. The Tribunal's emphasis upon immutability in relation to stability does not fit with the statements of the parties in the case itself, not least the statements about expectations made by the Claimants[29]. There is therefore a risk of divergence in the way the Tribunal has chosen to define the expectation of a reasonable investor. Essentially, the investor in this case expected something other than immutability from the legal order.

27. These considerations about the character and scope of stability need to be borne in mind when examining the features of the Special Regime, especially Decrees 2004, 2007 and 2008, and the effects of the disputed measures in relation to the legitimate expectations claim. They play a role in the way the Tribunal responds to the three questions it identifies as central to the potential success of that claim: given the content of the relevant regulatory framework in place at the time the Claimants' investments were made, were their expectations legitimate and reasonable; were the disputed regulatory changes 'drastic' and 'unexpected' so as to violate the Claimants' "general expectation of stability", and if so, to what extent; did the regulatory framework at the time of the Claimants' investments contain signs of future unfavourable changes or regulatory risk and if so, to what extent.

[29] See Note 27.

(ii) The Timing of the Investment

28. In this case, the Claimants' investments were made over a period of several years, from 2006 to 2009, and covered five PV plants, involving several dozen corporate vehicles. The Tribunal recognizes that a legitimate expectation should be based on the time when an investment was made at which the decision to invest became irreversible[30]. The key dates here are therefore those on which the EPC contracts were signed for the construction of each of the five plants between 10 August 2006 and 25 November 2009. At each of these points, the decision to invest in each of the five plants constituted a point of no return. However, the Tribunal adds that "it is not convinced that the events preceding the signing of the first EPC contract… should be ignored when analysing the Claimants' investment process"[31]. This is surely a reasonable approach, as would be the argument that actions occurring *after* these dates could not inform the investor's expectations. I note therefore that not even one of the 'disputed measures' had been adopted at the time that these investments were made, a feature which distinguishes this case from several others involving the Respondent's measures.[32]

29. The Tribunal's interpretation of events at this pre-investment stage is guided not only by a search for evidence of the expectations that the investor relied upon when making the investment, but also for evidence that the regulatory framework at this time "contained signs of future unfavourable changes or regulatory risk."[33] If so, the investor's decision to proceed would suggest an assumption of risk that is relevant in the Tribunal's assessment of the claim under Article 10(1) of the ECT. In this instance,

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[30] Decision, ¶ 809. It follows a line of authorities: see *9REN Holding v Spain*, ¶¶ 289, 290, 297; *Novenergia II v Spain*, ¶¶ 531, 532, 536-539; *SolEs Badajoz v Spain*, ¶ 418; *Ulysseas v Ecuador*, Award, 12 June 2012, ¶ 252; *Crystallex v Venezuela*, Award, 4 April 2016, ¶ 557; *AES Summit Generation v Hungary*, Award, 23 September 2010, ¶¶ 9.3.12 to 9.3.17.

[31] Decision, ¶ 809.

[32] For example, *Infracapital F1 S.a.r.l. and Infracapital Solar B.V v Kingdom of Spain*, ICSID Case No ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, and *Cube Infrastructure v Spain*. In the former case, the final decision on the PV investments was made in 2011, while in the latter, the hydro investments were made in 2011 and 2012; in both cases, *after* the initial disputed measures were introduced by the Respondent. Clearly, this timing has relevance to an assessment of the investor's legitimate expectations.

[33] Decision, ¶ 799.

the Tribunal concludes that due to the restructuring of business entities to make the investment in construction of solar plants and the date of the first investment, "the Claimants' investment process had started under RD 436/2004"[34]. I will discuss the Tribunal's comments on the due diligence carried out by the Claimants in section (vi) below.

(iii) The Content of the Expectations

30. In its assessment of Claimants' expectations, the Tribunal examines the provisions of each of the Royal Decrees relevant to the Claimants' investments "to verify whether a stabilization commitment could be derived from their texts".[35] It is unclear what exactly such a commitment means to the Tribunal, however. In my view, some changes in the overall regulatory regime are likely to be compatible with the ECT requirements so long as core elements such as – in this case - the FiT remuneration mechanism remain in place as one of the conditions of stability offered to and therefore expected by foreign investors.[36] I shall examine the Tribunal's views below in relation to each of these Decrees.

a) Decree RD 436/2004

31. In RD 436/2004 a FiT was provided for that would have a duration lasting the entire operating life of the facilities, with a formula for an annual update of the incentives linked to a reference electricity price. The key provision in RD 436/2004 that, according to the Claimants, provides an undertaking not to modify the FiT regime for plants that had been commissioned under that Decree is Article 40(3). It states:

> "The 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

[34] Decision, ¶ 815.
[35] Decision, ¶ 817.
[36] See *Cube Infrastructure v Spain,* ¶¶ 408-409; *Foresight v Spain,* ¶ 356; *AES v Hungary,* ¶¶ 9.3.29-9.3.30; *Micula v Romania,* ¶ 666, and *Electrabel v Hungary* ¶ 7.77.

to in the paragraph above (i.e., Article 40(1)) and shall not have a backdated effect on any previous tariffs and premiums". [37]

32. Separately, in its Preamble, RD 436/2004 stated that its purpose was to establish a "durable, objective, and transparent framework" to promote investment in the renewable energy sector, and in doing so, to provide "security and stability" to investors, since "this new methodology to calculate the special regime remuneration should help it to foster investment in this kind of plants".[38]

33. In the Tribunal's view, the provisions of RD 436/2004 and particularly Article 40(3) "did not give rise to the type of expectations the Claimants are invoking in this case".[39] It sees the limitation on revisions as applying only to revisions provided for in Article 40. Its reasons are rooted not so much in the text of the Decree itself as in the relationship the Decree has to the *overall* regulatory scheme and the operation of 'the principle of hierarchy of laws'. In reaching this conclusion, the Tribunal attaches some weight to the jurisprudence of the Spanish Supreme Court which has asserted the existence of a right to modify any specific system of remuneration under Spanish law, especially in a Supreme Court decision of 2005. I do not agree with this conclusion or the reasoning by which it is reached.

34. If we take first the relationship between RD 436/2004 and the regulatory regime, there appears to be agreement that Article 40(3) required that any revisions to tariffs, premiums, incentives and supplements as envisaged in Article 40(1) are not to have a backdated effect on previous tariffs and premiums. The logic of this in relation to the overall goal of attracting long-term investment into the renewable energy sector is clear enough. The prospective investor needed to be able to calculate its costs and how the Special Regime rates were to be established. The limitation on the scope of subsequent revisions to tariffs for existing investors would greatly facilitate their

[37] Quoted in Decision, ¶ 820.
[38] RD 436/2004, 12 March 2004, p.10; Decision, ¶ 831. See *Foresight v Spain*, ¶ 73: "The purpose of RD 436/2004 as articulated in its preamble was to provide "security and stability" and to establish a "long-lasting, objective, transparent regulatory framework" in order to promote investment in renewable electricity generation".
[39] Decision, ¶ 838.

forward calculations about remuneration and could be relied upon when deciding whether to invest in this sector in Spain rather than elsewhere.

35. Indeed, this provision was contained in the legal form of a Royal Decree, a regulatory measure in contrast to a legislative one, such as Law 54/1997. It was also clearly a subsidiary and more specific part of a regulatory structure with Law 54/1997 at its base and aimed at encouraging foreign investors to make significant capital commitments into the renewable energy sector in line with Spain's energy policy at the time. As such, it seems entirely reasonable that a prospective investor should seek to rely upon its content and should form expectations about the regulation of any future investment. In my view, it contained the factors to be expected in a functioning notion of stability (see para 25 above): there was a benefit to the investor, limited in time, specific in character, with mutual advantages and to be applied consistently over the 25-year period. Provision for review was constrained and retroactivity was prohibited.

36. The second aspect of the Tribunal's reasoning which I am unable to agree with is the weight it accords to the principle of the hierarchy of laws within the Spanish domestic legal regime, and statements by the higher courts on this characterisation of laws in that system. Such statements are certainly relevant as a source of fact, as several tribunals have noted[40]. However, the Tribunal acknowledges the limits of the various Supreme Court judgments it refers to even in this respect. The judgments examined in paragraphs 833 to 835 did not specifically address Article 40(3) of RD 436/2004, which undermines the Tribunal's claim that the judgments "issued either before or during the very first stages of the Claimants' investment processes … should have been considered as 'red flags' by a diligent investor".[41] The judgments also addressed fact patterns different from the present dispute and challenges to regulations that are not at issue in the present dispute, differences that are noted by the Tribunal. Indeed, the claimants in these cases were owners of facilities based on *non*-renewable energy

[40] *SolEs Badajoz v. Spain*, ¶¶ 428-433; *Foresight v. Spain*, ¶¶ 370-375.
[41] Decision, ¶ 838.

technologies, such as cogeneration plants[42]. I do not see such fact patterns as likely to give signals to a reasonable investor that a possible regulatory overhaul of this regime was imminent or probable. Their relevance however is said to lie in "the purposes of proper legal characterization of the state of Spanish law and the expectations the investors could form thereunder". However, the applicable law in this dispute is international law and the relationship between certain legal measures taken in Spain and that body of law, especially the ECT.

37. In the Tribunal's view, the line of judgments by the Spanish Supreme Court has "confirmed that RD 436/2004 did not establish an intangible legal framework"[43]. By this it presumably means a regime that could not be modified. However, the issue is not what the Supreme Court held but rather how the provisions in that Decree concerning the stability of the remuneration regime relate to the requirements of international law, and specifically Article 10(1) of the ECT. Indeed, in these paragraphs 833 to 845, there is a surprising lack of reference to the applicable law in this case, the ECT and international law. I note with approval the remarks by the tribunal in *9REN Holding v Spain* that the jurisprudence of the Spanish Supreme Court is entitled to great respect in relation to Spain's domestic law but "the judgments relied upon by the Respondent address a different issue than the issue before this Tribunal, which is concerned only with *international law* obligations"[44]. It added perceptively:

> "It is not surprising that the Spanish Supreme Court should affirm that regulatory measures under domestic Spanish law may be modified in the exercise of Spanish sovereignty. The question before the Tribunal however is whether such changes can be made by Spain **without financial consequences** under the ECT.
>
> The views of the Spanish Supreme Court concerning legal certainty or legitimate expectation may dispose of the issue of government liability at

[42] Some of the claims challenged the application of new requirements linked to the technical management of the electricity system. None of them concerned the loss of an entitlement by a renewable energy facility (or a PV one) to a regulated incentive: KPMG Asesores, Rebuttal Regulatory Expert Witness Report, 12 July 2018, ¶ 113.

[43] Decision, ¶ 836. Intangibility is a form of freezing. Typically, it is used to describe a prohibition of unilateral changes to an investment agreement and requires the consent of both parties before changes may be made.

[44] *9 REN Holding v Spain*, ¶ 242. The emphasis is in the original.

domestic law, but the Claimant does not rely on Spanish domestic law. It relies on Article 26(6) of the *Energy Charter Treaty* which mandates this Tribunal, not the Spanish Supreme Court, to determine whether the Claimant had a legitimate expectation of irrevocability, and if so, whether that legitimate expectation was violated, and if so the legal consequences as a matter of international law. This is clear from Article 27 of the Vienna Convention which states that a "party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty"".[45]

38. There is another aspect to the Tribunal's analysis that relies upon the principle of the hierarchy of laws. It appears to suggest that the host State can introduce a law of a kind higher than that of a Royal Decree in the hierarchy and modify the lower kind of law if it so chooses. Theoretically, this is of course correct, as is the proposition that such a change could also be made by the State in Law 54/1997, even though it is a legislative instrument and therefore located higher than a Royal Decree in the hierarchy of laws (which did in fact occur). That a host State has a power to amend or repeal a legal norm in its domestic system is hardly in question. In his analysis of this feature in *Eurus Energy Holdings v Spain*, Mr Oscar Garibaldi made what seems to me a correct statement of the issue which arises here:

   "whether as a matter of application of the standards of the ECT, the mere existence of that general power under domestic law is enough to foreclose any objectively reasonable expectations based on a state commitment that such power will not be exercised in certain respects and for a certain period".[46]

39. I agree entirely that the answer must be negative. On the assumption that the Respondent acted in good faith (and there is no suggestion that it did not), it surely made these commitments with the intention of complying with them on their terms. A reasonable investor would surely conclude that the host State had every intention of honouring its commitments and refraining from exercising its power to revoke them.

[45] *9 REN Holding v Spain*, ¶ ¶ 243-244.
[46] *Eurus Energy Holdings Corporation v The Kingdom of Spain*, ICSID Case No ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021: Partial Dissent by Mr Oscar M. Garibaldi, ¶ ¶ 88-92 at 90.

The alternative would seem to invite the investor to treat with suspicion the legal acts made by a State that contain incentives, a sort of *caveat investor* atmosphere. If such a context prevailed in international investment, commitments such as those in RD 436/2004 and other Royal Decrees would have failed to achieve their purpose of attracting large-scale inward investment into the renewable energy sector in Spain. As Mr Garibaldi wisely notes, "(a)n incentive on which no investor can rely is not an incentive".[47]

40. Of course, the Tribunal is also arguing that RD 436/2004 did not contain any promise of long-term stability for the remuneration regime. In my view, however, on a plain reading the text insulates *existing* installations from the impacts of later reviews of tariffs, premiums and incentives. A prospective investor must also have found further assurance in the words in the Preamble of the text. Even if such wording were deemed insufficiently specific or explicit, I recall and support the view of the tribunal in *Cube Infrastructure v Spain,* that there is "no reason to view (that) representation as being subject to the implied qualification that it would remain effective only until the State exercises its undoubted legislative power to override it. If it were otherwise, it would be practically impossible for a State ever to give an undertaking upon which anyone could rely, or for legitimate expectations ever to arise."[48]

b) Decree RD 661/2007

41. The Tribunal notes that RD 661/2007 was also "extensively relied upon by the Claimants… to demonstrate an alleged undertaking not to modify the FiT"[49]. It states that one of the Decree's aims was to provide "corrective mechanisms" relating to the regulatory regime set up by RD 436/2004, and the transitory regime of RDL 9/2006. Nothing in the text of this Decree, however, changes the conclusions the Tribunal reached with respect to RD 436/2004, that there is no "guarantee that the subsidy

[47] *Eurus Energy Holdings Corporation v The Kingdom of Spain*: Partial Dissent, ¶ 90(d).
[48] *Cube Infrastructure v Spain*, ¶ 289 (the remarks are addressed to RD 661/2007).
[49] Decision, ¶ 839.

scheme would remain unmodified"[50]. Further, the manner of its adoption should in its view have given concern to the Claimants: its immediate application to PV installations already commissioned under Decree 436/2004 was "indicative of potential adverse regulatory changes in the future"[51].

42. This interpretation of RD 661/2007 overlooks the clear statement in the Preamble that "a system which is analogous to that provided in Royal Decree 436/2004 … is maintained", with commitments to remuneration that offered investors a choice of a regulated tariff (a fixed payment) or a premium payment over the market price, permitted investors a long duration of 25 years and, on my reading of Article 44.3, made it clear that such changes in law as were contemplated ("revisions") "shall not affect" certain classes of facility that have already received a certificate: that is, they shall not apply to power plants that were already in operation or were commissioned shortly after the revision. The Tribunal's view takes a different basis than the text however and is justified largely by reference to the hierarchy of laws principle which I have already discussed above, and refrain from revisiting. In my view, following the *Novenergia II* tribunal, the wording of RD 661/2007 is "adamantly clear"[52], containing an express commitment to offer 'stable conditions' to a prospective investor. It could be relied upon to base an expectation that there would be no radical or fundamental changes to the Special Regime as set out in this Decree.[53]

43. With respect to the specificity of the commitments in RD 661/2007, I agree with the summary provided by Mr Oscar Garibaldi in *Eurus Energy v Spain*, when he concludes that they

> "are highly specific in respect of the content of the commitments: the *quantum* of the remuneration to which the producers were entitled, the *duration* of the

[50] Decision, ¶ 846.
[51] Decision, ¶ 847. However, the tribunal in *Cube Infrastructure Fund SICAR et al v Spain* characterized the changes quite differently: "The new regulations will not be of a retroactive nature. *The installations that are operational by January 1, 2008, may continue to adopt the previous regulations under the fixed tariff option throughout their operating life.* When they take part in the market, they may maintain their prior regulation until December 31, 2012. These installations may voluntarily opt to abide by this new Royal Decree as from its publication" (my emphasis), ¶¶ 262-264, 282.
[52] *Novenergia II v Spain,* ¶ 874.
[53] Ibid., ¶ 878. Similarly, see *OperaFund v Spain*, Award, ¶ 485; *Antin Infrastructure v Spain*, ¶¶ 552-553.

specified quantum, and the *exemption* of existing plants from future revisions to certain key components of the specified remuneration. Those commitments were also highly specific in respect of the *beneficiaries* of the commitment, i.e. the class of producers validly registered in the RAIPRE as beneficiaries of the special regime".[54]

44. The idea that RD 661/2007 prefigured a sweeping away of the FiT regime or other adverse regulatory changes in the future is contradicted by the facts. Consider, first, the overall context in which RD 661/2007 was introduced. As the tribunal in *9REN Holding* observed:

    "The terms of Article 44 of RD 661/2007 must be read not only with a close regard to its text but also the broader context in which it was made and its clear and obvious paramount purpose which was (in the Tribunal's view) the inducement of investment in renewable energy that Spain's earlier incentives had failed to attract."[55]

45. The earlier measure, RD 436/2004, had enjoyed less success in attracting inward investment into renewable energy than Spain was seeking, so one of the goals of RD 661/2007 was to address that shortcoming. Insufficient stability was deemed to be one of the reasons for this limited success (but not failure) to meet the ambitious policy targets for expansion of renewable energy, so RD 661/2007 was aimed at enhancing that stability in the legal framework as part of its general attractiveness.[56] To prospective investors it would be entirely reasonable to rely upon this improved offer of stable conditions, especially given the way in which the PV sector was highlighted in RD 661/2007 as comprising facilities of particular note[57]. These representations as to the stability of RD 661/2007 are ultimately not a matter of

[54] *Eurus Energy Holdings Corporation v Kingdom of Spain*, Partial Dissent of Mr. Oscar M. Garibaldi, ¶ 76. The emphasis is in the original.
[55] *9 REN Holding v Spain*, ¶ 266.
[56] See National Renewable Energy Action Plan 2005-2010 (NREAP), IDAE, August 2005, p.171; see also *Foresight v Spain*, ¶ 79. The NREAP also contained updated and more ambitious targets for 2010 which required greater stimulus if they were to be met.
[57] The designation of Group b.1 and Sub-group b.1.1, is noted in the Decision, ¶ 842.

domestic law but of international law, operating in the context of Article 10(1) of the ECT.[58]

c) *Decree RD 1578/2008*

46. The last two plants among the Claimants' investments were regulated by RD 1578/2008. For the Tribunal, "the text of RD 1578/2008 does not contain any representation of irrevocability of the FiTs granted under this Decree"[59]. The Decree introduced several changes to the regulatory regime available to investors: among other things, it offered a lower FiT for PV plants than under RD 661/2007, but this applied to new plants only and did not affect existing installations that had obtained final registration in the RAIPRE by the deadline under RD 661/2007. The change in the FiT made sense since new investors could benefit from reductions in the price of solar panels and hence the subsidy offered could be reduced accordingly. An emphasis on continuity and forward planning was evident throughout the text. The Preamble, for example, noted that the Decree's provisions helped "to ensure the continuity of the support system". The Preamble also refers to the need "to provide the necessary legal certainty for promoters in relation to the remuneration to be obtained by the facility, once commissioned". The context of this reassurance to investors is notable. In a press release issued at the same time as RD 1578/2008, the Government announced that Spain had a target of installed PV capacity of 10,000 MW by 2020[60]. This would require continued investment by foreign investors to be achievable.

47. The kind of express language of stability in RD 436/2004 and RD 661/2007 was indeed absent in RD 1578/2008, although such language was already deemed by the Tribunal to be insufficient to provide a basis for the Claimants' expectations[61]. This lacuna was largely in response to a shift in the method of deploying installed capacity according to quarterly calls: once installations were registered, the right they enjoyed to a

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[58] *9REN Holding v Spain*, ¶¶ 242-244; *SolEs Badajoz v Spain*, ¶¶ 161-162.
[59] Decision, ¶ 850.
[60] Ministry of Industry, Tourism and Commerce: Announcement of RD 1578/2008, 'The Government approves the new economic regime for PV installations', 26 September 2008, p.1.
[61] Decision, ¶ 854.

specific FiT was locked-in for up to 25 years, subject to updates in line with the consumer price index.[62]

48. With respect to future revisions of the tariff, the Fifth Additional Provision of RD 1578/2008 provides that in 2012 "payment for the activity of electricity production using solar photovoltaic technology may be modified", according to technological development in the sector and market and the operation of the payment regime. On my reading, this reference to technological development applies to possible declines in costs to investors but that cannot apply to investors who have already made commitments to the sector and whose costs are sunk for their projects. The wording therefore must apply to future plants and not existing ones. The explanatory memorandum (*Memoria Justificativa*) that accompanied the Decree also makes it clear that this planned review was to have a limited scope, affecting only the percentage variation rate of the tariff adjustment mechanism.[63] For the Tribunal, however, neither this provision nor any other part of the text of RD 1578/2008 contains "any representation of irrevocability of the FITs granted under this Decree"[64]. In the light of the foregoing comments on RD 1578/2008, this is a puzzling conclusion to draw. RD 1578/2008 sets out a more sophisticated approach to FiTs than in RD 436/2004 and RD 661/2007; it emphasises in its text and supporting government statements that there is continuity between that text and the preceding Decrees; and it tries to clarify the differences in the operation of the regulatory regime between various FiTs, according to the date on which they were granted. Throughout, Spain was taking care to adapt the benefits for each generation of FiTs granted to a set of changing circumstances that lowered costs and risks to the investor. In this respect, the progressive reductions in the FiT followed the example of other EU states such as Germany, another signal to investors that Spain was following an established pattern in its approach to regulatory design.

[62] The FiT under RD 1578/2008 was a more complex instrument than under its predecessor. Using 'tariff degression', the level of FiTs would gradually be reduced for new PV installations. RD 1578/2008 only included the rates applicable to the first quarterly call. The next call would include remuneration calculated on the results of the previous quarterly call: depending on those results (capacity registered in relation to capacity targeted), the FiT level could be lowered, maintained or raised, at the Government's discretion.
[63] C-164, p.7. See Decision, ¶ 310.
[64] Decision, ¶ 850.

49. Not surprisingly, as the Tribunal notes, the CNE made several statements in which it clarified the text of the new Decree, such as CNE Report 30/2008, and a written response to a query about the Fifth Additional Provision, which applied to modification of the compensation for generation in the PV sector. The Tribunal's response to this documentation is that none of it "is capable of modifying the express terms of the Fifth additional provision of RD 1578/2008 (and the absence of any express stabilization guarantee)" [65]. My understanding of the documentation's significance is different. The statements by government bodies helped to assure prospective investors about the continuity of the regulatory regime. These statements, as the tribunal in *Cube Infrastructure v Spain* observed, have value: "…because all legislation is necessarily open to the possibility of change, such statements can give assurances that transcend assurances that are set out or are implicit in legislation".[66] Further, the Claimants legitimately relied upon CNE's clarification or interpretation of the law, given that it is (or was) an entity affiliated to the Respondent with responsibility for certain energy policy matters. This is legitimate and reasonable since it is objective. The risk of ambiguity with respect to the competence of the CNE or the correctness of its opinions lies with the Respondent rather than the foreign investor who is hardly able to understand in detail the inner workings of the different governmental entities and their official relationship to each other.[67]

d) Conclusions

50. From the above, irrespective of their differences, each of the Decrees contained specific commitments to investors, so that this was a regulatory regime characterized by the kind of stability common to renewable energy investments in the rest of Europe,

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[65] Decision, ¶ 854.

[66] *Cube Infrastructure Fund v Spain*, Award, ¶ 275.

[67] This point was eloquently explained and elaborated by Professor Thomas W. Wälde in his Separate Opinion in *International Thunderbird Gaming Corporation v The United Mexican States,* UNCITRAL, Award, 1 December 2005: "If official communications cause, visibly and clearly, confusion or misunderstanding with the foreign investor, then the government is responsible for pro-actively clarifying its position. The government cannot rely on its own ambiguous communications, which the foreign investor could and did justifiably rely on, in order to later retract and reverse them…", ¶ 4.

recognizable to experienced investors. Based on the plain and ordinary meaning of their provisions, the expectations of stability – not immutability – of the regulatory regime were in my view objectively based, legitimate and reasonable. Claimants were therefore induced to invest in reliance upon the Respondent's offer.

(iv) The Evolution of the Three Royal Decrees

51. The regulatory regime based on the Royal Decrees examined above is one that in the Tribunal's view demonstrated signs of the kind of sweeping change that the Respondent introduced in 2013-14[68]. The Claimants, on this view, chose to ignore these warnings and proceed regardless, taking thereby a *deliberate* risk.[69] I cannot agree with this interpretation of the evolution of the regulatory regime. In my opinion, it exaggerates the significance of minor changes in the regulatory regime that were *evolutionary* in character (that is, changes which respected the fundamentals or core of the regime itself), thereby eroding the difference between such changes in law and those changes that would modify or replace core features with the effect of creating a new kind of regulatory regime. The former may in some circumstances prove compatible with Article 10(1) of the ECT since they respect the expectations on which investors have relied. The latter are highly unlikely to do so. In this case, the investments were made under the regime applicable between 2006 and 2009, before any of the 'Disputed Measures' were introduced and during a period when the only changes made were positive in character for investors, or relatively minor in effect, demonstrating an awareness of mutual interest on the part of the Respondent. The risk to a prudent investor could only appear to be low.

52. Indeed, there *is* evidence of change in the regulatory regime, demonstrating that it was not immutable. RD 1578/2008 set regulated tariffs that were lower than those offered under RD 661/2007 and provided that the tariff would be maintained for a maximum of 25 years, instead of the entire operational life of the plant. This was for

[68] Decision, ¶¶ 847, 891.
[69] Decision, ¶¶ 882, 889, 895.

new investments however and was not applicable to those already made. The only measure that had effects that were retroactive (RD 661/2007) was one with effects that were beneficial and not adverse in their impact on the value of existing investments. It did not reduce the PV tariffs. Similarly, in the Fifth Additional Provision of RD 1578/2008, a review was anticipated of tariff adjustment in the light of PV investment costs and their trend. This was likely to be limited in its effects however and did not extend to existing investments: the change respected the terms on which the investments had been made. The overall planning and timetable were clear: once the projected capacity objective of 85% for PV had been achieved in August 2007, a further Royal Decree (RD 1578/2008) was developed to address the needs of the next stage in renewable energy expansion.

53. If the question were to be asked - why is an evolution in the regulatory regime likely in this case - the answer lies in the specific features of this new kind of energy (outlined earlier). A 'special regime' was always going to develop differently from a conventional one. As knowledge of the regulation of renewable energy grew, it was logical that the Respondent should review its elements and if necessary, introduce changes to their operation. For that reason, it was important to assure prospective investors that any such changes would be forward-looking so that the up-front costs incurred in plant construction would be recovered based on the regime under which the initial investment was made. For future investments, the economic consequences were a different matter, since such investments could be expected to benefit from lower costs. In that context, the assurances contained in Article 40.3 of RD 436/2004, Article 44.3 of RD 661/2007 and the Fifth Additional Provision of RD 1578/2008 had great significance in the attraction of foreign investment. Revisions could indeed be expected – and a mechanism for making changes through reviews at regular intervals was expressly provided for in Article 44.3 of RD 661/2007 - but these were accompanied by wording that emphasised that such future changes in law would not adversely affect investments already made, thereby guaranteeing stability to the

investor. Such future revisions were also intended to improve the attractiveness of the regulatory regime to prospective investors rather than act as a warning to them.[70]

54. Taken together, these changes respected the obligation of the Respondent to provide 'stable conditions'. There was no negative measure taken vis-à-vis foreign investors and no warning of the kind of measures that were taken by Respondent from 2010 onwards. To recall what such subsequent measures entailed: the entire regulatory regime was replaced with one based on quite different economic assumptions that had no parallel with any remuneration schemes for renewable energy elsewhere in the EU and was therefore utterly unfamiliar to foreign investors in its design, its operation and its business consequences. I can find no evidence whatsoever that a warning of such sweeping measures was made in the years when the Claimants made their investments.

55. None of the above detracts from the Respondent's capacity as a sovereign State to introduce measures that contradict expectations based on the regulatory regime established between 2004 and 2008 on Law 54/1997. It merely supports the argument that such actions, if taken, engage the provisions of the ECT and particularly Article 10(1).

(v) Non-normative Acts

56. The relevance of various documents that are not normative in character is the subject of analysis of the Claimants' legitimate expectations by the Tribunal, which concludes that such documents cannot impact on its conclusions about the expectations that can arise from the three Decrees.[71] The introduction of these documents has a supportive character but no more than that, with a view to confirming an interpretation of the three Decrees. Their origin is hardly in doubt, emanating from government agencies with competence over energy matters, such as the CNE and

[70] My interpretation of PER 2005-2010 is the opposite to that preferred by the Tribunal: Decision, ¶ 893.
[71] Decision, ¶¶ 863-871.

IDAE. They are among many that were issued by the Respondent to encourage and promote foreign investment in pursuit of its policy goals, and included reports, press releases and presentations, as is well known[72]. They refer to principles which were included in the texts of the Decrees themselves and shed light on the Respondent's intentions at the time. The effects on prospective investors of such reiteration of language about guarantees would have been cumulative and reinforcing, playing a significant role in the creation of expectations about the regulatory regime.

57. I acknowledge that such material could include remarks that note the State's sovereign power to make changes to its laws, including the Decrees that set out the detail of the regulatory regime. However, such remarks not only stated the obvious – that no regulatory regime can be regarded as 'immutable'[73] - but also were not at all the driver behind publication of the various documents.

58. There are striking examples of how documents such as the CNE Report 3/2007 sought to convey to investors a different message from that which the Tribunal finds in the same report. I note only one example:

> "5.3. On the criteria that inform regulation of the special regime.
>
> [...]
>
> (b) Minimise regulatory uncertainty. The [CNE] understands that transparency and predictability in the future of economic incentives reduces regulatory uncertainty, incentivising investments in new capacity and minimizing the cost of financing projects, thus reducing the final cost to the consumer. The regulation must offer sufficient guarantees *to ensure that the economic incentives are stable and predictable throughout the service life of the facility...*" (emphasis added by the relevant tribunal)).[74]

[72] Among many examples of discussions in cases that address Respondent's measures, see *Foresight v Spain*, Award, ¶¶ 89 and 90, on the significance of the public relations campaigns in inducing foreign investors.
[73] Decision, ¶ 864, where the immutability conception of stability appears again.
[74] Cited in *Antin Infrastructure v Spain*, Award, 15 June 2018, ¶ 541; see generally in this respect ¶¶ 544, 548, 553-554.

(vi) Due Diligence/Assumption of Risk

59. The Tribunal's analysis of due diligence essentially addresses the question of whether a deliberate assumption of risk was made by the Claimants in making their investment. It concludes that "the investors' conduct was not deterred by the signs of regulatory risk apparent between 2005 and 2006, when Mr Bouman started to consider investing in the Spanish market" [75], and so the Claimants "must be found to have made their investment without displaying a specific preoccupation about investment risk"[76]. Indeed, "no specific attention was paid to the fact that the Spanish legal framework has been in constant evolution and displayed signs of regulatory risk. The alleged expectations therefore cannot be regarded as legitimate, reasonable or objective".[77]

60. Yet, a review of the record suggests a very different interpretation. When we examine the pre-investment actions that might have contributed to the formation of the Claimants' expectations, several appear notable. Mr. Reinier Bouman, a Dutch entrepreneur in clean energy and sustainable business, and the majority owner of the various Claimant entities, was interested in making an investment in the EU solar energy sector and sought information on the various regulatory regimes in operation and potential investment partners[78]. Eventually, he relied upon a report from an expert on solar energy, whom he had engaged with this investment in mind, which compared the FiT regimes in Spain and in Germany and concluded that the guarantee of a high fixed tariff and absence of a limit on production offered by Spain for the operational life of the PV plant gave it a comparative advantage to a foreign investor like himself. During a business tour of Spain that followed in 2005, this positive view of the regulatory framework and the FiT mechanism in RD 436/2004 was confirmed to him, not least by two government bodies, the IDAE and the CIEMAT. Advice on the specifics of investment into the PV sector in Spain, and administrative and local requirements, was given to him by two Dutch nationals resident in Spain, with whom

[75] Decision, ¶ 894.
[76] Decision, ¶ 898.
[77] Decision, ¶ 881.
[78] Witness Statement of Reinier Bouman, ¶¶ 17-19.

he formed a business association, and an external lawyer, who advised on regulatory matters. Further, he sought financing of at least eighty percent of the investment costs post-construction: the lender was a specialist in sustainable banking and had its own legal advisers, as did the EPC contractor. None of the legal advisers, including the Spanish law firms advising the bank and the contractor, respectively Gomez Azebo y Pombo and Ramon y Cajal, signalled that there were regulatory risks such as a possible withdrawal of RD 661/2007 or RD 1578/2008. [79] Moreover, as the tribunal in *Novenergia v Spain* has noted:

> "In any event, the Tribunal remains unconvinced that the type of legal due diligence into the stability of the Spanish renewables regime called for by the Respondent would have revealed t*he kind of changes which were later implemented by the Respondent through its introduction of the Specific Regime*" (emphasis added).[80]

61. In its analysis of the Claimants' due diligence, the Tribunal notes that when the Claimants were considering their initial investment under RD 436/2004 the existing remuneration model "was considered as offering PV investors an "insufficient return""[81]. This characterization of the remuneration model under RD 436/2004 did in fact originate from a government document, the Plan for the Promotion of Renewable Energies in Spain (PER) 2005-2010, prepared by the IDAE, an advisory body in the Spanish government located inside the Ministry of Industry, Tourism and Commerce. 'Sufficiency' is of course a relational term and so it is worth considering to what the return was insufficient. After noting the "unquestionable advantages in energy, manufacturing, environmental, and social terms, etc" of solar energy, the PER 2005-2010 – a body with no regulatory powers but with power to make recommendations – states that the implementation of solar power "on as wide a scale as possible will contribute to the future development of the technology", leading to

[79] Second Witness Statement of Mr Reinier Bouman, ¶ 8: since the lenders had no recourse to the shareholder, "it is difficult to imagine how any bank would have agreed to finance the plants unless they also believed that the FIT regime would apply during the term of financing".
[80] *Novenergia v Spain*, ¶ 679.
[81] Decision, ¶ 893.

greater competitiveness in relation to alternatives[82]. Yet, the development of solar power "has fallen a long way short of the target initially set for the current decade", a fact that may be reversed[83]. This is the context in which the same document referred to an "insufficient return"[84]. What was in place was not attractive enough to foreign investors to achieve the levels of inward investment that the Respondent was seeking, and which were in the view of the IDAE, entirely within their grasp if the regime was further incentivised. In my view, this puts the Claimants' initial (and at that stage it was an initial) interest in investment in a more positive light.

62. As noted above, the record indicates that the Claimants consulted directly and indirectly a range of investment specialists and took note of what statements were emerging from government bodies, directed at foreign investors. Yet the Tribunal finds that the Claimants proceeded to invest "without asking for legal or other advice regarding the prospects of the regulatory framework's evolution"[85]. The point here is not so much one of different interpretations of the record, but rather in the level of specificity that a tribunal should be expecting with respect to due diligence of a regulatory regime prior to making a commercial investment. In his Witness Statements, Mr Bouman is clear: at no point did any of the diverse parties above give him any signal that there was anything wrong about the FiT that formed the basis for the remuneration of any investments he might make in this sector in Spain[86]. This applied to the FiT in RD 661/2007 as well as that in RD 436/2004. I note that his decision-making style reflected the fact that investors come in different shapes and sizes: in this case, as the sole investor with no management board to report to, the style had a simplicity that was in his view appropriate to that kind of ownership structure. In taking a positive view of the due diligence carried out here, as I do, I am comforted by the approach of the majority of the tribunal in *Cube Infrastructure v Spain* when it examined a similar issue. Where investors have reached an understanding of the significance of representations about regulatory stability, "their

[82] Summary of the PER 2005-2010, August 2005, p.27.
[83] Ibid.
[84] Ibid., Sections 3.5.3 and 3.5.4, pp. 175-177.
[85] Decision, ¶ 893.
[86] Second Witness Statement of Reinier Bouman, ¶ 14.

entitlement to rely upon that understanding does not depend upon evidence that their understanding was provided or confirmed on every point by external counsel, nor does it depend upon evidence of a detailed written legal due diligence report upon the revocability of the regulatory regime".[87]

63. Finally, on this subject, there is much in the record of this case that suggests the relationship between the investor and the host State in a prospective long-term investment in renewable energy development is one that is highly cooperative in character, driven on both sides not solely by commercial goals in which both parties seek to secure advantages for themselves, but also by a common interest in promoting certain kinds of energy that offer or are thought to offer the population of the host State greater benefits than conventional forms of power generation, and more widely a public good in terms of climate change mitigation. Here, the Respondent was acting to create a new market for solar powered generation where none had existed before, and where conventional market incentives would prove insufficient, and do so by inviting foreign investors to bring it to life. A similar awareness of the 'public good' aspect of these investments is also evident in the record on the part of Mr Bouman and the various specialist advisers that he approached to assist him. It seems inappropriate then to require such investors in newer forms of energy to adopt a sceptical stance vis-à-vis the Respondent's integrity, and in the event of subsequent adverse events, to conclude in effect: 'caveat investor'.

(vii) RAIPRE

64. The legal effect of RAIPRE is briefly considered by the Tribunal, at the end of which it agrees with the Respondent that RAIPRE is merely "an administrative requirement

[87] *Cube Infrastructure v Spain*, ¶ 396; see also *OperaFund v Spain*, when, following *Novenergia*, it accepted that the requirement of "an adequate due diligence prior to making its investment" was met when it held that the investor did "carry out a reasonable analysis of the Spanish regulatory framework prior to its investment": ¶¶ 486, 487. In approaching this issue of adequate due diligence, the tribunal in *Antin v Spain* cautioned: "tribunals must attempt to place themselves at the time of the investment and consider the information and conditions available at such time, and to refrain from appraising the investor's expectations with the benefit of hindsight": *Antin Infrastructure. v Spain*, ¶ 537.

that did not generate any vested rights for the investors".[88] It cites five legal authorities for this view, but I note that there are other cases involving the Disputed Measures in which the tribunals have reached a different assessment of the significance of RAIPRE in the regulatory regime.[89] I incline to their view that registration in the RAIPRE had legal significance and was more than a mere administrative step.

65. From a review of the operation of the regulatory regime and its evolution (see Section B (iii) above), the registration requirement appears to have had a key role in certifying that certain generations of installations had met the necessary requirements and were eligible for a specific FiT. RD 661/2007, for example, contained a deadline by which PV installations had to be registered to qualify for the FiT (that is, 28 September 2008). It also played a role in characterizing the Special Regime under Law 54/1997 as one that was aimed at a special category of investors, rather than 'all investors' such as would typically be addressed by a Foreign Investment Act. This is implicit from the analysis of the relevant Decrees by several tribunals.[90] Registration was required to obtain the benefits of this Special Regime, within a time frame and after completion of several investment conditions. It was not automatic in the sense that obtaining a permit in administrative law might normally be and carried with its grant a special significance within the regulatory regime.

66. In the regulatory design, a failure to comply with the registration requirements would mean that the Claimants' expectation to receive what had been promised would fail, and it would be unable to benefit from a FiT regime. I therefore agree with the interpretation of Mr David R. Haigh, when he argues that its significance went beyond that of an administrative measure, and "changed the relationship from one that was

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[88] Decision, ¶ 858.

[89] In *Antin Infrastructure v Spain*, *Masdar v Spain*, *Novenergia v Spain*, and *OperaFund v Spain*, the tribunals found that registration gave the claimant a specific right to claim regulated payments from Spain. I note also the Dissenting Opinion by David R. Haigh in *Cavalum SGPS, S.A. v Spain, ICSID Case No ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020*.

[90] *Cube Infrastructure v. Spain*, ibid., ¶¶ 241-283, especially at ¶ 275**;** *R9 Holding v. Spain*, ¶¶ 257 and 294-296; Dissenting Opinion of Guido Tawil in *Charanne,* ¶¶ 6-8; see also the Preamble of RD 6/2009 (C-0082).

executory to one that had become executed".[91] Once registered, the necessary pre-conditions in terms of planning, financing, constructing, and commissioning within a specific time-period were fulfilled, and Spain's duty to carry out the promised inducements was activated. Registration, at this point, initiated Spain's obligations under Article 10(1) of the ECT and made them binding on the Respondent. This is the correct assessment of the registration requirement.

C. The Effect of 'drastic' and 'unexpected' Changes on the Expectation of Stability

The Disputed Measures had deep and wide-ranging impacts on the Claimants' investments with implications for the calculations used in making those investments.

67. The Respondent's replacement of the FiT mechanism in its regulatory regime was not, in the Tribunal's view, a "drastic" or "unexpected" modification to the extent that it amounted to a violation of the ECT. In its view, there were signs of regulatory risk as early as 2005 and 2006.[92]

68. As is clear from this partial dissent, I do not share my colleagues' conclusion. Specifically, I disagree with three propositions in their argument:

    (1) It relies on a notion of stability ('stability equals immutability'), not present in the ECT itself, with the effect that minor, even inconsequential changes are elevated to ones of legal and commercial significance, when they may in fact respect the requirement to preserve the stability of the business environment.

    (2) It takes a view of the evolution of the Royal Decrees between 2005 and 2009 such that minor changes are not distinguished from major ones ('evidence of changes in their content demonstrates the risk of major changes that had a negative character and effect'). Such minor changes as occurred did not

[91] *Cavalum*, ibid.: Dissenting Opinion of David R. Haigh Q.C., ¶ 52; see also *Masdar v Spain*, ¶ 512.
[92] Decision, ¶ 894.

appear to question the policy assumptions on which the Special Regime was based and especially its commitment to build up a robust renewable energy sector by relying upon inward investment.

(3) In relation to early signs of regulatory risk, it accords considerable weight to the relationship of the regulatory regime established by the Respondent with the wider Spanish legal order and judicial interpretations thereof in the context of inducements to foreign investment. Beyond matters of fact, these interpretations have no relevance in this matter and cannot in my view be interpreted as an early indicator of future risk to investments by foreign investors in the Respondent's renewable energy sector.

(i) The Changes and their Effects

69. What then was 'drastic' about the modification to the regulatory regime and in what way was this conduct so 'unexpected' as to frustrate the Claimants' expectations and lead to a breach of Article 10(1) of the ECT? The Disputed Measures are described by the Tribunal in detail and therefore my comments address only five features of particular relevance to the above question.[93] Among the various 'Disputed Measures', those adopted from 2013 such as RDL 9/2013 and Law 24/2013 had particularly negative consequences for the regulatory regime under which the Claimants' investments were made. Notably, the New Regime they introduced had effects that contrasted with those of its predecessor with respect to:

(1) *Benefits*. The new remuneration scheme abolished the FiT, replacing it with a Special Payment, or remuneration paid on top of the market price, granted at the Respondent's discretion and calculated by reference to a 'standard installation' instead of the actual investment made, and applied to existing as well as new installations over a six-year regulatory period. Linked to the costs of a standard installation, a 'reasonable rate of return'

[93] Decision, ¶¶ 375-523.

would be set by the Respondent as a cap on the amount of the Special Payment, limiting profitability, and a new feature. In effect, the investors' benefit was no longer based on financial support wholly linked to the amount of electricity generated by the investor, but instead to imputed rather than actual costs and capped by a designated pre-tax target rate of return based on those costs.

(2) *Duration*. The remuneration scheme was liable to change every three or six years with effects on existing installations. In contrast to the previous link of remuneration to the entire useful life of the facility or a maximum of 25 years, the New Regime linked it to the 'regulatory life' of the facility, which was set at 20 years.

(3) *Predictability*. The Special Payment is subject to various reviews, removing the predictable revenue stream that had been a feature of the Special Regime. The New Regime introduced variables *ex post* that are unilaterally set by the Respondent at its discretion and refers to a standardised model that is removed from the specific conditions of the Claimants' investments and operations. Its effect is to prevent the Claimants from predicting future costs and investment standards, and ultimately from making calculations of rates of return in the future. So, the investment, remuneration and cost criteria on which investors had relied to calculate their liabilities and their profits were removed and a limit set on investor returns, creating an unpredictable revenue stream for the Claimants. By contrast, the success of the Special Regime was predicated on the predictability of long-term revenue streams.

(4) *Transparency*. The manner of introducing the New Regime was lacking in transparency with a transitory regime lasting more than eleven months. In this period investors had no notion of the precise remuneration to which qualifying facilities would be entitled. The underlying criteria or

calculations behind the Special Payment or those that would support future updates of the New Regime were not explained.

(5) *Retroactivity*. The New Regime applies to the start of the regulatory life of the facilities and not the entry into force of RDL 9/2013. So, if under the Special Regime a plant earned a rate of return higher than the one deemed to be reasonable by the Respondent under the New Regime, the cumulative return that exceeds the new target would be offset against the financial incentives that the plant would be entitled to under the New Regime. The benefits of efficiencies achieved by a generator under the Special Regime would therefore be 'clawed back' and the actual rate of return would be capped at the level the regulator now deemed reasonable.

70. In the light of the foregoing, it can hardly be correct to describe the New Regime as a 'modification' of the Special Regime, with the implication that stability in some form is being preserved. The scale and the sweep of the changes are better understood as a wholesale replacement of the Special Regime by another, premised on different principles. Taking the above features into account, we may conclude that remuneration ceases to be output-based and instead becomes a sum given to the generator on top of the market price which represents a unilaterally decided 'reasonable return' on the standard investment costs of a model installation (linked to the ten-year Spanish sovereign bond yield plus a differential). Moreover, the New Regime is likely to be unfamiliar to an international investor, and untested. As the CNE noted in a report in 2013,

> "… there is no record of a remuneration model similar to that reflected in the Proposal in any jurisdiction of the European Union, or in other countries whose support systems are known through our international associations of

regulatory bodies … (It) completely changes the remuneration mechanism applicable to date".[94]

71. While the applicable law, the ECT, rightly allows some flexibility to States in the way they provide stable conditions to investors, this cannot accommodate a wholesale rejection of the conditions on which investors have been persuaded to invest. That regime, I have argued, contained specific commitments to provide stability in a certain manner and over a defined period from which the Claimants could derive objectively reasonable expectations. It is the removal of that Special Regime and the specific commitments on which investors relied when making their investments rather than the deprivation of a specific rate of return that is a breach of the Respondent's obligations under the first and second sentences of Article 10(1) of the ECT and requires full compensation.

(ii) Reasonableness and Proportionality

72. The Tribunal's approach to the claim based on the unreasonableness and disproportionality of the Disputed Measures is in two parts. To the extent that the claim is based on the expectation that the Special Regime would remain in place, the claim is rejected. [95] To the extent that the claim turns on the relationship between the economic impact of the Disputed Measures on the Claimants' investments and the expectation of a reasonable return, the Tribunal reserves its judgment on the question of whether the Disputed Measures were unreasonable and disproportionate.[96]

73. Given my views on the legitimate expectations aspect of the claim and the stability guarantees in the Special Regime, my view of the 'policy-measure correlation' test is also different from that of my colleagues. Irrespective of the rationale presented by the Respondent for the Disputed Measures, it should be recalled that the rationale for the entire Special Regime set up in Law 54/1997 was to promote renewable energy in

[94] C-0117, Report 18/2013 of the Spanish National Energy Commission on the Royal Decree Proposal Regulating the Activity of Electricity Production from Renewable Energy Sources, Cogeneration and Waste, pp. 4, 8.
[95] Decision, ¶ 933.
[96] Decision, ¶¶ 934-935.

Spain and achieve a variety of benefits, environmental, strategic and social. None of the core elements in this regime (such as the FiT) would make sense if that were not the case. As the record of this case abundantly demonstrates, this specific legal order was represented to foreign investors as being driven by one paramount policy objective, a common one among the member states of the EU at the time. The rationale offered by the Respondent – in terms of the Tariff Deficit – needs to be understood in that light.

74. In considering the reasonableness or not of the Disputed Measures, it is striking that there is little or no environmental concern evident in their motivation. Indeed, the overall effect of the New Regime is *not to maximize the production of renewable energy but to reduce costs*, in contrast to the design of the original regulatory regime and the policies behind it. To an objective observer, it would seem unreasonable to dismantle a regulatory regime expressly designed to achieve one policy objective and replace it with another that appears to be based on principles yet untested in relation to that policy objective in any location in Europe or indeed elsewhere. With respect to the problems arising from the Tariff Deficit, the primary justification offered by the Respondent for the Disputed Measures, there is no serious suggestion that those problems can be resolved by the effects of the Disputed Measures on the nascent PV sector (that is, by requiring PV installations to bear a proportion of the lack of revenues in the electricity system as a whole).

75. With respect to the allegation of disproportionality in relation to the Disputed Measures, the Respondent's attempt to justify these measures by reference to the Tariff Deficit is unconvincing since the Deficit had its origins in events both outside the development of the PV sector and predated that development. Essentially, the Respondent chose to set end-user electricity prices at levels that did not cover regulated costs. Based on the CNE Report of 2012 and proposals from the European Commission at the time, alternative instruments were available to the Respondent to tackle the Tariff Deficit, and ones that would have honoured commitments to existing

investors in the PV sector without shifting a proportion of the costs to foreign investors.

76. I therefore agree with the tribunal in *Watkins v Spain* that the Respondent's conduct in adopting the Disputed Measures "does not bear a reasonable relationship to Spain's policy"[97], and was therefore harmful to the Claimants' investments. Further, by removing the core elements of the regulatory regime on which Claimants' investments were made, and imposing significant burdens on them, the Disputed Measures are not proportionate in relation to the problem they seek to address.

(iii) The Expectation of Stability

77. In my view, the Respondent's conduct created expectations of a stable legal and business environment, that were legitimate and reasonable, and that the Claimants relied upon that conduct and the representations accompanying it when making their investments. More specifically, the Respondent created a special legal order that was aimed at attracting large-scale foreign investment from a specific class of investor into a form of energy that was well-known to have a high-risk profile and required guarantees of stability in a specific form that foreign investors would recognize (with the FiT at its core). This was bolstered by the supporting statements by Respondent's officials who represented to investors that the entire legal edifice was a response to a policy of promoting renewable energy to shift the energy mix in Spain in ways that met its international and EU obligations. An investment in this sector therefore appeared to be mutually beneficial in design and effect.

78. Given my views on the legitimate expectations claim on the breach of the requirement to provide stable conditions and fair and equitable treatment, which would lead to the finding of full compensation for the Claimants, there is no need for me to examine

[97] *Watkins Holding et al v Kingdom of Spain*, ICSID Case No ARB/15/44, Award, 21 January 2020, ¶ 604.

the claims based on the transparency guarantee[98] and on the fourth sentence of Article 10(1) ECT (the umbrella clause)[99], and I shall not do so.

D. The Identification of an RRR

The absence of any specific rate of return in Law 54/1997 points to important features in the design of the Special Regime.

79. For the Tribunal, "the basis for the Claimants' expectations is set out in Law 54/1997" which "provided for the right to a reasonable rate of return"[100]. It then asserts that the reasonable rate of return (RRR) is the "relevant benchmark" for measuring any alleged harm caused by the disputed measures and should be "based on the analysis of the laws and regulations as well as other contemporaneous documents that were publicly available during the Claimants' investment process (February 2005-November 2009)"[101]. This exercise leads the Tribunal to conclude that the Claimants were only entitled to a reasonable return of 7%. I do not agree with this conclusion.

80. The open-ended character of Law 54/1997 appears to me to be significant. It does not specify any actual rate of return, only a principle in Article 30(4) that links an eventual return to the cost of money on the capital markets. Nor does it include a mechanism that would allow for the calculation of any such return. Reliance upon the Law itself to calculate a reasonable rate of return would therefore seem likely to encounter serious difficulties. Even more challenging is the fact that, as the Tribunal notes, the relevant subordinate legislation, the three Royal Decrees, does not provide a value for a benchmark rate of return. These are important lacunae in the primary and secondary legislation that suggest that a different understanding of the provisions of Law 54/1997 is appropriate.

[98] Decision, ¶¶ 936-943.
[99] Decision, ¶¶ 944-958.
[100] Decision, ¶ 872.
[101] Decision, ¶ 984.

81. The answer to the puzzle of the missing rate of return is that the core element of a feed-in tariff scheme is the fixed payment per unit of electricity fed into the grid (i.e., sold). The way in which the value of these payments is defined is critical since the payment (or tariff) is the only economic signal given to investors. As the preamble to RD 661/2007 states:

> "The economic framework set out in this royal decree develops the principles established in Act 54/1997, of 27 November, on the Electricity Sector, guaranteeing owners of facilities under the Special Regime a reasonable remuneration to their investments".

82. This remuneration, not limited by any threshold on annual generation, was not dependent on the level of return the investor would obtain or on demand for the electricity it generated. Taking the fixed payment in c€/KWh as a starting point, investors could design their own financial model based on assumptions appropriate to their specific project and take investment decisions accordingly. The regulatory scheme left investors to take the risk of building and operating specific projects that would deliver the maximum electricity output to achieve their own target rate of return on which they had made their decision to invest.

83. The effect of the Special Regime was that the more electricity the investor generated, the greater the remuneration received and ultimately the higher the return for the investors. This gave the investor an incentive to generate more electricity to feed into the grid and supply the market. In this way, more renewable energy would supplant electricity from conventional, less environmentally-friendly sources.

84. In seeking to put a value on the RRR, the Tribunal considers the publicly available sources that the Respondent notes and concludes that a figure of "around 7%" is supported by various – but not all [102] - of these sources. This is the amount "contemplated in Law 54/1997", and "given effect by the various regulatory acts

[102] A higher figure was given in an EC document, a CNE report and IDAE: Decision, ¶¶ 988-989.

which Spain adopted between 1998 and 2009".[103] This figure is to be used by the Tribunal as a benchmark against the Claimants' IRR to determine whether there is liability or not.[104]

85. In my view, this is not a satisfactory solution. Indeed, there are documents in the record in which specific figures were used, and some of these do refer to a value or range of around 7%. Investors may have been aware of some of the documents that the Tribunal refers to, but these were not legally binding documents, and were motivated rather by requirements of energy planning and making recommendations to government.[105] Any figures they included were not capped rates of return or specific target values. Indeed, since this technology was quite new, and the investment hardly a typical commercial one, the achievement of a higher-than-average rate of return would have been unsurprising. For example, the IDAE source cited by the Tribunal considered a return at 9% as adequate, indicating the range of figures that were under consideration, no doubt influenced by the range of different technologies involved, and their different state of development.[106]

86. The wider significance of the Tribunal's analysis of the expected RRR is that in suggesting that a violation of Article 10(1) might lie in or be linked to the deprivation of a specific, expected rate of return[107], it sets to one side what in my view is the real source of the violation: the removal of the Special Regime on which the investor relied to make its investments. Indeed, for the reasons set out above about the character of the regulatory regime, I share the concerns of Mr David R. Haigh, in his Dissenting Opinion in *Cavalum v Spain*, when he predicts that when a tribunal sets itself the task of determining what a RRR in such cases, this will "lead us far afield from assessing what the state explicitly promised and the investor relied upon."[108] I agree with his conclusion that the damages to which an investor is entitled "are shown in the

[103] Decision, ¶¶ 874, 875.
[104] Decision, ¶ 995.
[105] Decision, ¶¶ 983-995.
[106] Decision, ¶ 992.
[107] Although each investor will have had an expectation based on its understanding of how the remuneration offered would translate into a return in a specific instance.
[108] *Cavalum v Spain*: Dissenting Opinion of David R. Haigh, ¶ 77.

difference between what was promised and what was ultimately done by the state in relation to Claimant's plants".[109]

87. For the reasons set out in this Opinion, I believe the system of renewable energy regulation was deliberately described as a 'special regime' since its rules were distinct in Spanish electricity law and established to offer a certain category of investors the specific incentives for defined periods that they needed if they were to commit to a new sector that was not otherwise commercially viable. The fact that many of those investors were foreign and relied upon Respondent's commitments activates the protections of Article 10(1) of the ECT. Given that prospective investors such as the Claimants in this case would have considered the regime as a whole, and that the regulatory regime itself was targeted at a specific class of investors capable of understanding the core elements such as the FiT, there is a plausible argument that the Claimants' expectation of stability derives not only from the particular Decrees but from the special regime itself, a bespoke legal order created by the Respondent for the purpose of inducing investment.

88. I nonetheless do not disagree with the Tribunal that there was a legitimate expectation to an RRR based on the Law 54/1997, even if the same Law did not provide any details as to what that expectation might mean or how it is to be calculated. In my view, however, the Claimants were offered and relied upon incentives that were expressly contained in RD 436/2004, 661/2007, and RD 1578/2008. Further, I agree with the Tribunal that the so-called 'clawback' measure, by subtracting past remuneration due under the previous regime from future remuneration, constituted a breach of Article 10(1), and requires compensation for the damage caused to the Claimants.

[109] Ibid.

E. Conclusions

89. The ECT allows a state to evolve its regulatory regime for energy investments without being in breach of the requirement to offer 'stable conditions'. However, a complete replacement of that regime by another that is different, unfamiliar and contains adverse economic effects on the Claimants' investments is a different matter. It is particularly serious when the investment concerns one of the newer forms of energy, characterised by a higher than usual risk profile for the investor after the initial capital commitment.

90. In my view, Spain breached Article 10(1), first and second sentences, when in 2013 it imposed an entirely new legal regime on the Claimants' PV investments, which had been made over several years based on expectations that any changes in law would be made within the framework of the Special Regime, thereby preserving stable conditions for those investments and upholding the treatment standard. Spain is therefore liable for full compensation to the Claimants.

Date: 11 February 2022

Peter D. Cameron