FINAL AWARD

Issued on 21 January 2016

Based on the Energy Charter Treaty of 17 December 1994

Seat of Arbitration: Madrid, Spain

Arbitration No.: 062/2012

Claimants:	**Charanne B.V.**
	Construction Investments S.A.R.L.
Represented by:	Hermenegildo Altozano, Coral Yánez, Paloma Belascoain, *Bird & Bird*, Madrid, Spain.
	Fernando Mantilla Serrano, John Adam, *Latham Watkins*, Paris, France.
Respondent:	**Kingdom of Spain**
Represented by:	José Luis Gomara, Fernando Irurzun, José Ramón Mourenza, *State Legal Service*
	Eduardo Soler Tappa, Christian Leathley, Florencia Villaggi, Beverly Timmins, Pilar Colomes, *Herbert Smith Freehills*, Madrid, Spain.
Arbitration Tribunal:	Alexis Mourre, President
	Guido Santiago Tawil,
	Arbitrator; Claus Von
	Wobeser, Arbitrator
Administrative Secretary:	Bingen Amezaga

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GLOSSARY OF TERMS AND ABBREVIATIONS

***Amicus EC Brief*:** The *Amicus Curiae* brief submitted in the arbitration by the European Commission on 19 January 2015.

Charanne: Charanne B.V. (one of the Claimants).

EC: European Commission.

NEC: National Energy Commission [*Comisión Nacional de Energía*]

Construction: Construction Investment S.A.R.L. (one of the Claimants).

Court of Arbitration of Madrid: Court of Arbitration of the Madrid Chamber of Commerce, Industry and Services.

VCLT: Vienna Convention on the Law of Treaties of 23 May 1969.

Directive 2001/77/EC: Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

Member State: Each European Union Member State.

FIT: Feed-in tariff.

ICO: Official Credit Institute [*Instituto de Crédito Oficial*].

IDAE: Institute for Energy Saving and Diversification [*Instituto para la Diversificación y Ahorro de la Energía*].

Report 3/2007: NEC report dated 14 February 2007 regarding the proposal for a Royal Decree to regulate electricity generation, under a special regime, using certain installations based on technologies that could be assimilated into the ordinary regime.

Report 30/2008: NEC report dated 29 July 2008 regarding the proposal for a Royal Decree on remuneration for electricity generation using photovoltaic solar technology, for installations subsequent to the deadline for maintaining the remuneration set forth in RD 661/2007

Institute: Institute of Arbitration of the Chamber of Commerce of Stockholm.

The 2010 provisions: Refers jointly to RD 1565/2010 and RDL 14/2010.

Act 2/2011: Act 2/2011 of 4 March, on the Sustainable Economy.

LSE: Act 54/1997 of 27 November, on the Electricity Sector

(Electricity Sector Act).

New LSE: Act 24/2013 of 26 December, on the Electricity Sector.

Minetur: Ministry of Industry, Energy and Tourism of Spain.

MWp: Peak megawatt.

IET Ministerial Order 1045/2014: Minetur Ministerial Order IET/1045/2014 of 16 June, approving the remuneration parameters for standard facilities, applicable to certain electricity generation facilities using renewable energy sources.

REIO: Regional Economic Integration Organization, as defined under ECT Article 1(3).

Contracting Party: Contracting Parties bound by the Energy Charter Treaty of 17 December 1994.

PER 2005-2010: Renewable Energy Plan [*Plan de Energías Renovables*] for 2005-2010, approved by the Council of Ministers of Spain on 26 August 2005.

RAIPRE: Administrative Register of Generation Facilities under the Special Regime [*Registro Administrativo de Instalaciones de Producción en Régimen Especial*].

RD: Royal Decree.

RDL: Royal Decree-Law.

RD 436/2004: Royal Decree 436/2004 of 12 March, establishing the methodology for the updating and systematization of the legal and economic regime for electricity generation under the special regime.

RD 661/2007: Royal Decree 661/2007 of 25 May, regulating electricity generation under the special regime.

RD 1578/2008: Royal Decree 1578/2008 of 26 September, on the remuneration of electricity production using solar photovoltaic technology for facilities registered after the deadline for maintaining the remuneration under RD 661/2007.

RD 1565/2010: Royal Decree 1565/2010 of 19 November, which regulates and modifies certain aspects pertaining to the electrical energy production activity under a special regime.

RD 1614/2010: Royal Decree 1614/2010 of 7 December, regulating and amending certain aspects regarding electricity generation using solar thermoelectric and wind technologies.

RDL 14/2010: Royal Decree 14/2010 of 23 December, establishing urgent measures for correcting the tariff deficit of the electricity sector.

RDL 1/2012: Royal Decree 1/2012 of 27 January, suspending the procedures for the pre-allocation of remuneration and the elimination of the economic incentives for new electricity generation facilities using cogeneration, renewable energy sources and waste.

RDL 2/2013: Royal Decree 2/2013 of 1 February, concerning urgent measures in the electricity system and the financial sector.

RDL 9/2013: Royal Decree 9/2013 of 12 July, adopting urgent measures to guarantee the financial stability of the electricity system.

Special Regime: Refers to electricity generation using sustainable sources.

Rules: Arbitration Rules of the Stockholm Chamber of Commerce.

RPR: Register for Pre-allocation of Remuneration.

ECT: Energy Charter Treaty of 17 December 1994.

ECHR: European Court of Human Rights.

TFEU: Treaty on the Functioning of the European Union.

T-SOLAR: Grupo T-Solar Global S.A.

CJEU: Court of Justice of the European Union**.**

2014 Transcript: Transcript of the hearings held on 17, 18 and 19 November 2014.

2015 Transcript: Transcript of the hearing held on 29 July 2015.

EU: European Union.

I. THE PARTIES

A. The Claimants

1. Charanne B.V. ("**Charanne**") is a Dutch incorporated company, domiciled at Luna Arena, Herikerberbergweg 238, Amsterdam Zuidoost, The Netherlands, registered under the registration number (K.v.K.) no. 20.114.560, with tax I.D. no. 810474347.[1]
2. Construction Investment S.A.R.L. ("**Construction**") is a Luxembourgian incorporated company, domiciled at 13-15 Avenue de la Liberté, L-1931, Luxembourg, registered under the number (R.C.S.) B 87.926, with tax I.D. no. 20022408845.[2]
3. Charanne and Construction shall be jointly referred to as the "**Claimants**".
4. The Claimants are shareholders of Grupo T-Solar Global S.A. ("**T-Solar**"), is a joint-stock company constituted in 2007, previously called Tuin Zonne S.A. T-Solar's activities include generating and selling electricity from photovoltaic solar plants.[3]
5. At the time of being notified of this dispute, T-Solar was the owner, through ad-hoc special-purpose companies, of 34 photovoltaic solar plants operating under the special regime.[4]
6. At the date of entry into force of RD 1565/2010, as well as the entry into force of RDL 14/2010, Charanne owned 18.6583% of T-Solar, and Construction owned 2.8876%.[5]
7. On 30 June 2011, T-Solar merged with the company Grupo GTS de Sociedades Solares, S.A.U.,[6] maintaining the name T-Solar.

[1] C-102.
[2] C-103.
[3] C-31, Article 2.
[4] PHB1 Claimants, footnote on page 130; Memorial, para. 6-8.
[5] Response, para. 378; C-40 and C-41.
[6] C-30.

8. On 28 December 2012, Charanne and Construction transferred their shares in T-Solar to an entity called Grupo Isolux Corsán Concesiones S.L. as a non-monetary capital increase for this company, at the same time that they acquired a stake in that company and its parent company Grupo Isolux Corsán S.A.[7]
9. Charanne and Construction currently maintain their stake in T-Solar through their shares of Grupo Isolux Corsán S.A. (Charanne with 2.43% and Construction with 52.02%) and of Grupo Isolux Corsán Concesiones S.A. (Charanne with 1.756% and Construction with 0.44765%).[8]

B. The Respondent

10. The Respondent in this arbitration is the Kingdom of Spain ("**Spain"** or the "**Respondent**").
    (The Tribunal shall refer jointly to the Claimants and the Respondent as the "**Parties**").

II. CONSENT TO ARBITRATION

11. Spain is a party to the Energy Charter Treaty of 17 December 1994 ("**ECT**").
12. Pursuant to Article 26 ECT:

    "*SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY*

    1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

    2. If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested

[7] C-108; C-2.
[8] See diagram in C-104
.

amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

a)(a) to the courts or administrative tribunals of the Contracting Party to the dispute;

b)(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

c)(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

b)(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).[9]

[...]

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

[...]

c) [...] *an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce* [...]

[...]

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law. [...]

[...]

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party

[9] Spain is one of the Contracting Parties on the list in Annex ID of the ECT.

may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

13. On 28 April 2011, the Claimants notified the Respondent of the dispute in order to initiate the negotiations period set forth in Article 26 ECT (**"Notification"**).

14. The Claimants filed their request for arbitration ("**Request for Arbitration**"[10]) before the Institute of Arbitration of the Chamber of Commerce of Stockholm ("**Institute**") on 7 May 2012.

III. APPLICABLE LAW

15. Under Article 26(6) ECT, *"A tribunal [...] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."*

16. Article 22 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force since 1 January 2010 (*"**Rules**"),* sets forth that the Tribunal *"shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties."*

IV. PROCEDURAL BACKGROUND

17. On 28 April 2011, the Claimants sent the Notification of the dispute to the Kingdom of Spain, thus starting the three-month negotiations period in accordance with Article 26 ECT.[11]

18. On 7 May 2012, the Claimants presented their Request for Arbitration to the Institute, pursuant to the provisions of Article 2 of the Rules.

19. On 26 September 2012, the Arbitration Tribunal formed by Mr Guido Tawil, appointed by the Claimants, Mr

[10] "Request for Arbitration" in English in the original document.
[11] Memorial, para. 5, 171 and 241; Response, para. 306.

Claus Von Wobeser, appointed by the Respondent, and Mr Alexis Mourre, named jointly by the Parties in consultation with the co-arbitrators.

20. On 11 October 2012, the Arbitration Tribunal proposed to the Parties a draft Procedural Order no. 1, asking them to make their comments and to notify the Tribunal of their agreements regarding the procedural calendar.

21. On 26 October 2012, when discussing the content of Procedural Order no. 1, the Respondent raised the possibility of requesting a bifurcation of the proceedings in order to treat jurisdictional objections separately. That same day, the Tribunal asked the Parties to present their positions on the matter, granting the Respondent until 5 November 2012, and the Claimants a time limit of 12 November 2012 to respond.

22. On 5 November 2012, the Respondent filed a submission indicating the reasons due to which it considered it advisable to split the proceedings into a jurisdictional phase and a merits phase, but without expressly requesting the bifurcation of the proceedings.

23. On 12 November 2012, the Claimants filed their response to the Respondent's submission on bifurcation.

24. Also on 12 November 2012, the Arbitration Tribunal, after having considered the Parties' observations, noted that the Respondent had not presented a formal request to split the proceedings, and decided that the allegations regarding this possibility could be set forth and decided upon subsequently.

25. On 23 November 2012, a procedural meeting was held in Madrid, during which the final version of Procedural Order no. 1 was established, and the specific procedural rules for the arbitration were fixed. The Parties also discussed the establishment of a provisional procedural calendar.

26. On 27 November 2012, the Arbitration Tribunal handed down Procedural Order no. 2, setting forth the Parties' agreements regarding the provisional procedural calendar, including a Redfern schedule template to present the requests for disclosure of documents at appropriate times.

27. On 15 March 2013, the Claimants presented their Memorial on the Merits ("**Memorial**"), together with factual exhibits C-1 to C-25, legal exhibits CL-1 to CL-54, and the expert report by Messrs. Javier Acevedo Jiménez de Castro and Jesús Mota Robledo, of the firm Deloitte ("**CT-1**").

28. On 20 March 2013, having obtained the approval of the Parties, the Arbitration Tribunal presented a request to the Institute to obtain an extension of the time limit for handing down the award until 31 December 2013, in accordance with Article 37 of the Rules. This extension was approved by the Institute on 21 March 2013.

29. On 26 March 2013, the Claimants submitted a document titled "C-15", and upon being questioned by the Tribunal regarding the presence of two references to exhibit C-15 in the Memorial which seemed to refer to different documents, the Claimants pointed out that the document sent was the correct exhibit C-15, to which reference was made in footnote 3 of the Memorial, whereas footnote 44 on page 64 should really have been a reference to exhibit C-16.

30. On 15 April 2013, the Respondent submitted a request for bifurcation ("**Request for Bifurcation**"), accompanied by documentary exhibit R-1 and legal exhibits RL-1 to RL-19.

31. On 30 April 2013, the Claimants presented their Response to the Respondent's Request for Bifurcation, along with exhibits C-26 to C-28 and legal exhibits CL-55 to CL-64. On the same date, the Claimants informed the Arbitration Tribunal that, together with the law firm Bird & Bird, they would be assisted in the proceeding by Shearman & Sterling LLP.

32. On 16 May 2013, the Arbitration Tribunal, after considering the elements submitted by the Parties, decided that it was not advisable to bifurcate the proceedings.

33. On 27 May 2013, the Arbitration Tribunal held a conference call with the Parties to establish the provisional procedural calendar in light of the Tribunal's decision against bifurcating the proceedings.

34. On 15 October 2013, the Respondent submitted its Counter-Memorial ("**Counter-Memorial**"), together with factual exhibit

R-1, legal exhibits RL-10 to RL-290 (indicating that exhibits RL-35, RL-88, RL-106, RL-122, RL-128, RL-131, RL-139, RL-175, RL-203, RL-273, RL-274, RL-275, RL-283, RL-287, RL-288 and RL-289 were left intentionally blank), and the expert report by Messrs. Grant Greatex, Carlos Montojo González, Javier García-Verdugo de Sales and João Magalhães, of the companies Altran and Mac Group ("RT-1"), along with 7 volumes of exhibits numbered EX.1 to EX.79.

35. On 8 November 2013, the Claimants and the Respondent presented their respective Requests for Document Discovery, in the form of a Redfern schedule, and each of these requests was sent to the other Party simultaneously, pursuant to the provisions of Procedural Order No. 2 and the Procedural Calendar of 28 May 2013.

36. On 22 November 2013, each Party presented before the Tribunal its objections to the Requests for Document Discovery presented by the counterparty. Moreover, the Respondent submitted documents RL-291 to RL-293. These documents were simultaneously submitted by the Tribunal to the Parties that same day, pursuant to Procedural Order No. 2.

37. On 4 December 2013, the Arbitration Tribunal handed down Procedural Order No. 3 deciding on the Requests for Document Discovery, along with appendices A and B.

38. On 5 December 2013, the Arbitration Tribunal, after obtaining the agreement of the Parties, asked the Institute to extend the time limit for the awards decision until 31 December 2014, in accordance with Article 37 of the Rules.

39. On 9 December 2013, the Arbitration Tribunal informed the Parties that an impediment to holding the hearings on the scheduled dates—the week of 7 July 2014—had arisen, and proposed to the Parties the alternative date of the week of 17 November of 2014.

40. On 10 December 2013, the Parties expressed their agreement with the proposed change of dates.

41. On 17 December 2013, the Institute extended the time limit for the award decision until 30 December 2014.

42. On 20 December 2013, each of the Parties confirmed to the Arbitration Tribunal that it had complied with the orders on document discovery set forth in Procedural Order no. 3. The Claimants submitted exhibits C-29 to C-76, and the Respondent submitted exhibits RL-294, RL-296 and RL-297.

43. On 5 February 2014, the Parties proposed a change in the procedural calendar to the Tribunal, agreeing upon the following dates: Response on 9 May 2014, Rejoinder on 26 September 2014, submission of lists of witnesses to be questioned in the hearing on 3 November 2014, and the pre-hearing conference call on 11 November 2014.

44. On 6 February 2014, the Arbitration Tribunal accepted the amendment of the procedural calendar according to the Parties' proposal.

45. On 2 May 2014, Fernando Mantilla Serrano, attorney representing the Claimants, indicated that from then on Shearman & Sterling would not be representing the Claimants any more, being replaced by the law firm Latham & Watkins, along with the firm Bird & Bird.

46. On 9 May 2014, the Claimants filed their Response ("**Response**"), together with document exhibits C-77 to C-293, legal exhibits CL-65 to CL-140, and the additional report by Messrs. Javier Acevedo Jiménez de Castro and Jesús Mota Robledo, of Deloitte ("**CT-2**").

47. On 26 September 2014, the Respondent filed their Rejoinder ("**Rejoinder"**), together with factual exhibits R-2 to R-15, legal exhibits RL-298 to RL-402 (noting that the documents RL-299, RL-330, RL-336, RL-339, RL-358, RL-372, RL-377, and RL-386 had been deliberately left blank), and the additional expert report from Messrs. Grant Greatex and Carlos Montojo González, from the companies Altran and Mac Group ("**RT-2**"), together with exhibits EX.1 to EX.19.

48. On 7 October 2014, the Arbitration Tribunal confirmed to the Parties that the conference call scheduled for 11 November 2014 to organize the hearing would be held. The Tribunal also asked the Parties to try to reach agreements regarding the practical aspects of the

hearing, and asked them about the existence of any other procedural issue that should be addressed during the conference call.

49. On 3 November of 2014, the European Commission ("**EC**") submitted a request to participate in the proceedings as an *Amicus Curiae*. The Arbitration Tribunal notified the Parties of the EC's request and granted them until 9 November 2014 to make a decision regarding the matter.

50. On 4 November 2014, the Respondent submitted a request to reject the claim for lack of purpose, and to terminate the proceedings. The Court granted the Claimants until 9 November to answer the Respondent's request.

51. On 9 November 2014, each of the Parties submitted its comments to the Tribunal regarding the EC's request to participate in the proceedings as an *Amicus Curiae*. Also on 9 November 2014, the Claimants submitted their response to the request to reject the claim for lack of purpose and to terminate the proceedings.

52. On 11 November 2014, the Arbitration Tribunal held a conference call with the Parties, during which they discussed the request submitted by the Respondent on 4 November 2014, the request submitted by EC, and aspects involving organization of the hearings. In this regard, the Tribunal decided that during the first day of the hearing they would discuss the scope of the arbitration, as well as the EC's request, and agreements were reached regarding the organization and duration of the hearings.

53. On 17, 18 and 19 November 2014, the hearings were held at the Court of Arbitration of the Official Chamber of Commerce, Industry and Service of Madrid ("**Madrid Court of Arbitration**"). The following individuals were present:

    - For the Claimants: Hermenegildo Altozano, Coral Yáñez, Fernando Mantilla-Serrano, John Adam, Natalia Cabeza, Jaime Zarzalejos, Paloma Belascoain, Laura Benedicto, Alfonso Bayona Giménez, Esther Sebastián de Diego, Rosa Espín Martí, Leticia Sitges Cavero.

- For the Respondent: Eduardo Soler-Tappa, Christian Leathley, Florencia Villaggi, Pilar Colomes, Jaime de San Martín, Beverly Timmins, José Ramón Mourenza, José Luis Gomara, Diego Santacruz, Elena Oñoro, Antolín Fernández, Irene Martínez.
- the Arbitration Tribunal: Alexis Mourre, Guido Santiago Tawil, Claus Von Wobeser.
- the Administrative Secretary of the Tribunal: Bingen Amezaga.

54. During the hearing, the EC's request to participate in the proceedings was discussed, as well as the Respondent's request to terminate the proceedings due to a supervening lack of purpose. The Parties also presented their oral arguments regarding jurisdiction and regarding the grounds for dispute. On 19 November 2014, after discussing the matter with the Parties, the Arbitration Tribunal decided to delay the questioning of the experts regarding damage.

55. The hearings were recorded and transcribed, with these recordings and transcripts being given to the Parties for their verification. The final version of the transcripts was sent by the Secretary of the Tribunal to the Parties on 6 March 2015 ("**2014 Transcript**").

56. On 20 November 2014, the Arbitration Tribunal sent a letter to the Parties confirming its decision to allow the EC to submit an *Amicus Curiae* brief, but denying it the possibility of having access to the case file and to participate in the hearings.

57. On 26 November 2014, the Arbitration Tribunal sent a letter to the European Commission informing the EC that although the Tribunal could not grant access to the case file nor allow it to participate in the hearings due to the confidentiality of the arbitration proceedings, pursuant to Article 46 of the Rules, the Tribunal would allow the EC to file an *Amicus Curiae* brief, giving a time limit of 5 January 2015 to do so.

58. On 12 December 2014, the Parties jointly presented to the Arbitration Tribunal a procedural calendar for presenting post-hearing briefs.

59. On 18 December 2014, the EC requested an extension for submitting its *Amicus* brief. After considering the observations of the

Parties regarding this matter, the Tribunal decided to grant the EC an extension for presenting its brief until 19 January 2015.

60. On 19 January 2015, the EC submitted its *Amicus Curiae* brief ("**Amicus EC**") to the Arbitration Tribunal, and the Parties were informed of said brief by the Tribunal.

61. On 12 March 2015, the Claimants presented their first post-hearing brief ("**PHB1 Claimants**"), along with the supplementary report by Messrs. Javier Acevedo Jiménez de Castro and Jesús Mota Robledo, of Deloitte ("**CT-3**").

62. On 12 May 2015, the Respondent submitted its first post-hearing brief ("**PHB1 Respondent**"), along with the supplementary report by its experts, Mac Group-Altran ("**RT-3**").

63. On 20 June 2015, the Claimants submitted their second post-hearing brief ("**PHB2 Claimants**"), along with the final report by the Deloitte experts ("**CT-4**").

64. On 20 July 2015, the Respondent submitted its second post-hearing brief ("**PHB2 Respondent**"), along with the final report by the Mac Group-Altran experts ("**RT-4**").

65. On 23 July 2015, the Arbitration Tribunal held a pre-hearing conference call with the Parties to confirm the administrative and technical preparations and to organize the order of presentations during the hearing.

66. On 29 July 2015, at the Court of Arbitration of Madrid, the evidence hearing was held for the case's expert witness presentations. The following individuals were present:

- For the Claimants: Hermenegildo Altozano, Coral Yáñez, Fernando Mantilla-Serrano, John Adam, Natalia Cabeza, Jaime Zarzalejos, Paloma Belascoain, Laura Benedicto, Alfonso Bayona Giménez, Esther Sebastián de Diego, Rosa Espín Martí, Leticia Sitges Cavero.
- For the Respondent: Eduardo Soler-Tappa, Christian Leathley, Florencia Villaggi, Pilar Colomes, Jaime de San Martín, Beverly Timmins, José Ramón Mourenza, José Luis Gomara, Diego Santacruz, Elena Oñoro, Antolín Fernández, Irene Martínez.

- The experts presented by the Claimants: Jesús Mota Robledo and Javier Acevedo.
- The experts presented by the Respondent: Grant Greatrex, Carlos Montojo and Jesús Fernández Salguero.
- The Arbitration Tribunal: Alexis Mourre, Guido Santiago Tawil, Claus Von Wobeser.
- The Administrative Secretary of the Tribunal: Bingen Amezaga.

67. The Parties confirmed that they had no complaint regarding how the Arbitration Tribunal had conducted the arbitration. The hearing was recorded and transcribed, with these recordings and transcripts being given to the Tribunal and to the Parties for their verification.

68. At the end of the hearing, the Tribunal asked the Parties to agree on the date for submitting to the Tribunal their respective briefs regarding arbitration costs, as well as a corrected version of the hearing transcript. The Parties sent a common corrected version of the transcripts to the Tribunal on 18 August 2015 ("**2015 Transcript**").

69. On 10 September 2015, the Institute extended the date for the award decision until 29 February 2016.

70. On 15 September 2015, each of the Parties sent the Tribunal its brief on arbitration costs.

71. On 16 September 2015, the Claimants presented a complementary communication regarding their declaration of arbitration costs.

72. On 22 September 2015, the Claimants sent a letter to the Tribunal regarding the Respondent's declaration of costs.

73. On 28 September 2015, within the time period granted by the Tribunal to that end, the Respondent sent a letter in reply to the Claimants' letter of 22 September 2015.

74. On 29 October 2015, the Claimants sent another letter to the Tribunal regarding the Respondent's brief on costs. Upon receiving said letter, the Tribunal granted a period of time to the Respondent to present its comments as soon as possible.

75. On 2 December 2015, the Respondent presented its comments regarding the Claimants' letter of 29 October 2015, along with two attached documents.

76. On 9 December 2015, the Respondent presented additional documentary evidence regarding its costs for the organization of the hearings.

77. On 22 December 2015, pursuant to Article 34 of the Rules, the Arbitration Tribunal declared that the proceeding was closed.

V. SUMMARY OF THE FACTS

A. Introduction

78. The present dispute refers to the regulatory regime applied by the Kingdom of Spain to the electricity generation systems based on photovoltaic solar energy. Electricity generation using photovoltaic solar energy, being a system based on renewable energy, is regulated by a special regime including incentives and subsidies.[12]

79. Spain, among other measures, established a system of premiums and regulated tariffs for remunerating photovoltaic solar electricity generation.[13]

80. In summary, the Claimants complain that after having attracted their investment to the photovoltaic generation sector, the Respondent illegally amended the special regime regulating this industry, causing a number of damages to the Claimants.

81. Below, (**B**) presents a summary of the regulatory framework in force at the time the investment was made; thereafter, (**C**) describes the Claimants' investment; and (**D**) sets forth the regulatory changes in 2010 that originated the Claimants' suit. Finally, (**E**)

[12] Pursuant to Directive 2001/77/EC, which included the "support systems" that involved direct assistance to electricity generation from renewable energy sources.
[13] Counter-Memorial, paras. 38-39.

briefly sets forth the subsequent amendments to the regulatory framework.

B. Initial regulatory framework

1. The Electricity Sector Act

82. Act 54/1997 of 27 November, the Act that regulated the electricity sector, (known by its Spanish acronym "**LSE**"), established the general regulation framework for the entire industry.

83. Article 15 LSE provides that: "*The activities involved in the supply of electric power shall be remunerated economically in the manner provided by the present Act, as charged to tariffs, rates and prices paid. To determine the tariffs or rates and prices that consumers must pay, the remuneration of activities shall be stipulated in regulations with objective, transparent and non-discriminatory criteria that act as an incentive to improve the effectiveness of management, the economic and technical efficiency of said activities and the quality of the electricity supply.*"

84. The LSE makes a distinction between the ordinary regime for energy generation and what is called the "special" regime. Chapter II of the LSE refers to the "*special regime for electricity generation"* and Article 27 defines generation under the special regime as follows:

> "*1. Electricity generation activities shall be regarded as generation under the special regime in the following cases whenever they are carried out from installations whose installed capacity is no greater than 50 MW* […]
>
> [...] *(b) Whenever non-consumable renewable energies, biomass or biofuels of any type are used as primary energy, provided their holder does not engage in generation activities under the ordinary regime.*
>
> *2. Generation under the special system shall be governed by specific provisions and, in cases not provided for in these special provisions, by the general regulations on electricity generation where applicable.*

The status of a generation installation falling under this special regime shall be granted by the relevant bodies in the Autonomous Regions with responsibilities in this area."

85. The special regime is favoured over the ordinary regime, in order to promote energy production from renewable sources.

86. Article 30 LSE refers to the rights and duties of producers under the special regime. The duties set forth in Article 30.1 include those of adopting the technical and security regulations for generation and transmission, maintaining the facilities properly, providing the public administration with the necessary information that may be determined, and complying with environmental protection rules.

87. Their rights are set forth in Article 30.2, which in particular provides for the following rights:

"a) To incorporate their electricity generated, as measured at the power station busbars, into the system, for which they will receive the remuneration determined in accordance with this Act.

For these purposes, electricity generated as measured at the power station busbars shall be considered to be the total amount of electricity generated at the installation minus the electricity generation installation's own consumption.

Whenever electricity supply conditions make it expedient, and following a report from the Autonomous Regions, the Government may limit for a certain period of time the amount of electricity that may be incorporated into the system by generators under the special regime.

b) Priority access to the transmission and distribution grids of electricity generated, while respecting the maintenance of the reliability and safety of the grids.

c) Connect their installations in parallel to the corresponding distribution or transmission company's grid.

d) Use jointly or alternatively in their installations the power they purchase through other agents.

e) Receive from the distribution company the electric power supply they need under conditions determined by regulations.".”

88. Article 30.4 LSE establishes that the remuneration system for the special regime shall be completed with the payment of a premium, indicating that in order to determine the premiums:

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

89. The LSE was subsequently developed and complemented by different legislation of a regulatory nature, including those discussed below due to their relevance to the present case.

90. Regarding this point it is worth bearing in mind—since this is an aspect on which the Parties base some of their arguments—that under the Spanish legal system, the different Acts of Parliament and Royal Decree-Laws have the status of laws, i.e. higher than that of Royal Decrees, which have the rank of regulations and are hierarchically subordinate to Acts and Royal Decree-Laws. Royal Decrees are, in turn, developed and complemented by Ministerial Orders and Resolutions, which rank below Royal Decrees.[14]

91. One distinction between a Royal Decree and a Royal Decree-Law is that the former involves a compulsory phase of hearings involving those affected by the measure,[15] which is not the case for legislation having the status of an Act. Another difference is that Royal Decrees may be challenged before and revised through bodies of the administrative courts,

[14] Memorial, para. 45; Counter-Memorial, para. 55.
[15] Memorial, para. 48, citing Article 24 of the Government Act.

[16] whereas Royal Decree-Laws are not subject to this control.

2. Royal Decree 436/2004

92. Royal Decree 436/2004 was enacted on 12 March 2004, to "*establish the methodology for updating and systematizing the legal and economic regime for electricity generation under a special regime.*" ("**RD 436/2004**").

93. As indicated in the Decree's Statement of Purpose and in Article 1, RD 436/2004 had the aim of unifying the regulations developing the LSE, in particular regarding the economic regime, insofar as generating electricity under the special regime was concerned.

94. There is no dispute between the Parties that RD 436/2004 was not applicable to the facilities owned by T-Solar, since they were built and registered after that Royal Decree was repealed by RD 661/2007.

3. The 2005 presentation *El sol puede ser suyo*

95. On 24 May 2005, the Spanish Ministry of Industry, Energy and Tourism ("**Minetur**") published a promotional presentation titled *El sol puede ser suyo* (The Sun Can Be Yours). *Answers to All Key Questions* ("***El sol puede ser suyo 2005***"),[17] which states in section 8, regarding the reasons for investing in photovoltaic facilities, that "the return on your investment is reasonable and can on occasions reach up to 15%", and "*with the IDAE-ICO facility there is substantial financing of the investment*".

4. Renewable Energy Plan 2005-2010

96. On 26 August 2005, the Spanish Government approved, by an by Agreement of the Council of Ministers, Renewable Energy Plan 2005-2010 ("**PER 2005-2010**"),[18] which set forth the government's policy regarding

[16] Article 26.3 LSE.
[17] C-86.
[18] C-9.

the renewable energy sector in order to meet the European targets established in Directive 2001/77 of 27 September 2001 ("**Directive 2001/77/EC**").

97. In particular, PER 2005-2010 provided that: "*the implementation of solar photovoltaic energy will contribute to boost technological development, making this electricity generation procedure ever more competitive against other generation procedures*."[19]

98. PER 2005-2010 pointed out some favourable factors for the growth of the photovoltaic sector, such as "*the existence of an appropriate and stable legal framework, as well as the implementation of a set of economic measures allowing to increase the target for 2010*."[20] It also stated that "*any regulation aimed at developing this type of technology must generate a solid confidence among promoters regarding its stability, which may incite them to invest in the development of the photovoltaic industry relying on the maintenance of such trend in the long term*."[21]

99. The PER also referred to certain barriers to the development of renewable energy: "*the insufficient profitability of the facilities —which is why they need a high premium— and the lack of incentives for the development of innovative solar photovoltaic installations.*" As regards regulation, the plan mentions, among others, "*the lack of regulatory harmonization at a regional level, the limitation of the remuneration beyond certain output quotas, and the absence of regulation on the access to the grid for high-voltage facilities.*"[22]

100. Figure 11 of PER 2005-2010 contains a summary of standard photovoltaic facilities, based on which the cost of generation per KW/h was calculated: "*generation costs are assessed for investments with 100% of own funds, without subsidies and tax deductions, considering for the five cases a return on own funds of 5%. The lifespan is*

[19] C-9.
[20] C-9.
[21] C-9.
[22] C-9; Memorial, paras., 39-42; Response, para. 25-26.

25 years, the same as the amortization period." In the case of standard facility II, concerning installations with fixed access to the grid and less than 100 kWp capacity, the table assumes 1,250 equivalent hours of operation.[23]

101. According to PER 2005-2010, Spain's target was to raise the installed capacity of the photovoltaic sector by 363 MWp in the 2005-2010 period.[24]

5. The 2007 presentation *El sol puede ser suyo*

102. In June 2007, Minetur published another of its *El sol puede ser suyo* presentations ("***El sol puede ser suyo 2007***"), which included some examples of photovoltaic facilities, referring to a lifespan of 25 years, an operational regime of between 1,250 and 1,664 hours per year, and an IRR of between 7.11% and 9.58%.[25]

103. This document also points out that "*for grid-connected photovoltaic installations operating aids are provided through the regulated tariff established in Royal Decree 661/2007, of 25 May, published in the Official Gazette of the Kingdom of Spain (B.O.E.) no. 126 of 26 May 2007. No investment aids are provided for this type of installations*."[26]

104. Finally, the document referred to the technical building code, and the existence of five climate zones in Spain, according to their annual solar radiation on a horizontal surface.[27]

6. Report 3/2007 of the National Energy Commission

105. On 14 February 2007, the National Energy Commission ("**NEC**") issued its Report 3/2007, "*Regarding the proposed Royal Decree regulating electricity generation in the special regime*

[23] C-9. p. 168.
[24] C-9. p. 177.
[25] C-87. 14-17.
[26] C-87. p. 18.
[27] C-87. p. 46.

and specific technological facilities equivalent to the ordinary regime" ("**Report 3/2007**").[28]

106. Section 5.3 of Report 3/2007 sets forth the criteria behind the regulation of the special regime, including this one mentioned in point (b): "*Minimize regulatory uncertainty. The NEC 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. In each case, regulation must provide both transparent annual adjustment mechanisms, associated to robust trend indexes (such as the average or reference tariff, the CPI, ten-year bonds, etc.) and regular reviews that only affect new facilities (e.g. every four years) with regard to investment costs, which could also affect the reduction of operating costs at existing facilities."*

107. Further down in the Report, in section 7.2 "*On the criteria to minimize regulatory uncertainty*", paragraph (b), concerning regulatory stability, states: "*The production facilities in the special regime are capital-intensive and have long recovery periods. Royal Decree 436/2004 minimises the regulatory risk by granting stability and predictability to the economic incentives during the service life of the facilities. This is done by establishing a transparent annual adjustment mechanism, associating incentives to trends in a robust index such as the average or reference tariff (TMR), and by exempting existing facilities from the four-year review because only new incentives affect new facilities."*

[28] C-14.

7. The Ministry of Industry, Energy and Tourism (Minetur) Report

108. On 21 March 2007, Minetur published a report on the draft Decree to regulate energy production under the special regime and for certain facilities using assimilable technologies under the ordinary regime ("**Report on RD 661/2007**").[29]

109. In particular, section 3.2.1 of this Report states that:

> "*Table 3, subgroup b.1.1, shows the remuneration for the photovoltaic sector.*
>
> *For installations up to 10 MW, these regulated tariff values provide a reasonable IRR over 25 years, approximately 7%.*
>
> *For installations over 10 MW, an IRR below 7% is considered. Photovoltaic plants of that size are unusual, and in any case they would not respond solely to profitability criteria.*
>
> *The capacity objectives considered so far are increased, establishing a reference installed capacity target eligible for remuneration of 371 MW for photovoltaic facilities.*"[30]

8. Royal Decree 661/2007

110. On 25 May 2007, Royal Decree 661/2007 was enacted, regulating energy production under the special regime ("**RD 661/2007**"). As set forth in paragraph 7 of its statement of purpose, RD 661/2007 replaced RD 436/2004, providing new regulations for electricity generation under the special regime, while maintaining the basic structure of its regulation.

111. Paragraph eight of the statement of purpose of RD 661/2007 says that the Royal Decree develops the principles set forth in the LSE, "*guaranteeing the owners of facilities under the special regime a reasonable return on their investments and the consumers*

[29] RL-95.
[30] RL-95.

of electricity an assignment of the costs attributable to the electricity system which is also reasonable, although incentives are provided to playing a part in this market since it is considered that in this manner lower government intervention will be achieved in the setting of prices, together with better, more efficient, attribution of the costs of the system, particularly in respect of the handling of diversions and the provisions of supplementary services."

112. Among the purposes of RD 661/2007 set forth in Article 1 is the establishment of a legal and economic framework for the business of the production of electrical energy under the special regime in replacement of Royal Decree 436/2004, as well as of a transitory economic regime for facilities included in regime defined under RD 436/2004.

113. The scope of application of RD 661/2007 is specified in Article 2.1, which states that facilities for the production of electrical energy that fall under Article 27.1 of the LSE may avail themselves of the special regime. Thereafter, these facilities are grouped into different categories. In particular, category **b** includes *"facilities which employ any non-consumable renewable energies, biomass, or any type of biofuel, as their primary energy, upon condition that the owner does not carry out any production activity under the ordinary regime"* and, within this category, subgroup b.1.1 refers to "*facilities which use solar radiation alone as their primary energy by means of photovoltaic technology"*.

114. RD 661/2007 sets forth a procedure for including electricity generation facilities under the special regime, with the requirements listed in Article 6:

> "*1. The status of production facility under the special regime shall be granted by the competent Authority for such authorisation. The owners or operators of facilities who wish to avail themselves of this regime should submit an application to the competent Authority for it to be included in one of the Categories, Groups, or if applicable Sub-Groups referred to in Article 2."*

115. Article 9 refers to the registration requirement, and in this regard indicates that in order to ensure appropriate monitoring of the special regime and in particular in order to ensure the management and control of the enjoyment of the regulated tariffs, the premiums and supplements, the facilities shall be subject to compulsory registration with the Administrative Register of Generation Facilities under the Special Regime ("**RAIPRE**").

116. The effects of RAIPRE registration are set forth in Article 14:

> *"1.* [...] *final registration of the facility in the Public Authority Register of production facilities under the special regime shall be a necessary requirement for the application of the economic regime regulated under this Royal Decree to such facility, with effect from the first day of the month following the date of the final deed of entry into service of the facility. Under all circumstances, the supplements and expenses for diversions provided under the said economic regime shall be applicable as appropriate as from the first day."*

117. The requirement of definitive RAIPRE registration is also mentioned in the second paragraph of Article 17.c, which states that "*The right to receive the regulated tariff, or if appropriate the premium, shall be subject to final registration of the facility in the [RAIPRE], prior to the final date set out in Article 22"*.

118. The rights of producers under the special regime are set forth in Article 17, which provides that, without prejudice to the provisions of Article 30.2 of the LSE, the proprietors of production facilities under the special regime shall enjoy the following rights:

> *"a) To connect their generating unit or units in parallel to the grid of the distribution or transport company.*
>
> *b) Transfer to the system their net production of electrical energy or energy sold, by way of the distribution or transport company upon condition that it is technically possible for it to be absorbed by the grid.*
>
> *c) Receive, for the total or partial sale of their net electrical energy generated under any of the options appearing in Article 24.1, the compensation provided in the economic regime set out by this*

Royal Decree. The right to receive the regulated tariff, or if appropriate the premium, shall be subject to final registration of the facility in the [RAIPRE], prior to the final date set out in Article 22.

d) To sell all or part of their net production by way of direct lines.

e) To enjoy priority in access and connection to the electricity grid under the terms and conditions set out in Annex XI of this Royal Decree, or in such regulations as may supersede them."

119. Article 24 refers to mechanisms for the remuneration of the electrical energy produced under the special regime, setting forth that in order to sell their net electricity production, the proprietors of the facilities have two options:

"a) Sell the electricity to the system through the transport or distribution grid, receiving for it a regulated tariff, which shall be the same for all scheduling periods expressed in Euro cents per kilowatt/hour.

b) Sell the electricity in the electrical energy production market. In this case the sale price of the electricity shall be the price obtained in the organised market or the price freely negotiated by the proprietor or the representative of the facility, supplemented where appropriate by a premium, in Euro cents per kilowatt/hour."

120. Regarding the regulated tariff, Article 25 describes it as

"a fixed sum which shall be the same for all scheduling periods and shall be determined as a function of the Category, Group, of Sub-Group to which the facility belongs, and the installed power, and where applicable the length of time since the date of commissioning under Articles 35 to 42 of the present Royal Decree."

121. In the case of photovoltaic solar energy (Sub-Group b.1.1), the regulated tariff for those facilities is set forth in Article 36, Table 3, which provides that:

a) For facilities having a capacity equal to or lower than 100 kW: 44.0381 Euro cents per kilowatt/hour ("**cent € x kW/h**") for the first 25 years. Thereafter: 35.2305 cent € x kW/h.

b) For facilities having a capacity between 100 kW and 10 mW: 41.7500 cent € x kW/h for the first 25 years. Thereafter: 33.4000 cent € x kW/h.

c) For facilities having a capacity between 10 mW and 50 mW: 22.9764 cent € x kW/h for the first 25 years. Thereafter, 18.3811 cent € x kW/h.

122. RD 661/2007 thus established three categories of tariffs, according to the Plant's installed capacity (the lower the installed capacity, the higher the remuneration), and within each category, fixed two regulated tariffs, a higher one applicable for the first 25 years of the facility's life, and another, lower one, applicable from year 26 onwards.

123. Article 44 of RD 661/2007, on the updating and review of tariffs, premiums, and supplements, particularly regarding updating, sets forth that:

"*1.* [...] *The values of the tariffs, premiums, supplements, and lower and upper limits to the hourly price of the market as defined in this Royal Decree, for Category b)* [...] *shall be updated on an annual basis using as a reference the increase in the RPI less the value set out in the Additional Provision One of the present Royal Decree."*

124. Additional Provision One provides that the reference value for the subtraction of the CPI in calculating the updates shall be twenty-five basis points up to 31 December 2012, and fifty basis points thereafter.

125. As regards revising the tariffs, Article 44, paragraph 3 states:

"*3. During the year 2010, on sight of the results of the monitoring reports on the degree of fulfilment of the Renewable Energies Plan (PER) 2005-2010, and of the Energy Efficiency and Savings Strategy in Spain (E4), together with such new targets as may be included in the subsequent Renewable Energies Plan*

2011-2020, there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to the costs associated with each of these technologies, the degree of participation of the special regime in covering the demand and its impact upon the technical and economic management of the system, and a reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets. Subsequently a further review shall be performed every four years, maintaining the same criteria as previously.

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

126. However, RD 661/2007 set a limit for facilities to benefit from the economic regime provided for therein. In this regard, Article 22, titled *"Period of maintenance of the regulated tariffs and premiums"*, established that:

"As soon as 85% of the power target for any Group or Sub-Group as established in Articles 35 to 42 of the present Royal Decree has been reached, the maximum period during which such facilities as have been registered with the Public Authority Register of production facilities under the special regime prior to the date of the termination of such period shall have the right to a premium or if applicable the regulated tariff established in the present Royal Decree for such Group or Sub-Group, which shall be no less than twelve months, shall be established by Resolution of the General Secretariat for Energy."

127. Moreover, regarding the administrative procedures for including facilities under the special regime, Article 4.3 of RD 661/2007 states that: *"Substantial modification of a pre-existing facility shall be understood to mean the replacement of the principal equipment such as boilers, engines, hydraulic, steam, wind, or gas turbines, alternators, and transformers, when it is demonstrated that the investment on the partial or total modification carried out exceeds 50% of the total investment in the plant, valued at replacement cost.*

Substantial modification shall give rise to a new date for entry into service to the effects of Chapter IV."

128. On 27 September 2007, the Secretariat-General for Energy published the Resolution specified in Article 22 of RD 661/2007,[31] in which it was affirmed that as of 31 August 2007, "*the percentage reached with regard to the target for installed solar photovoltaic technology was 91%, and would reach 100% in October 2007*."[32] In light of this and given that the completion period for a photovoltaic plant is ten months, the Secretariat-General for Energy decided to set a period of 12 months from said publication for photovoltaic generation plants to register with the RAIPRE, in accordance with Article 22 of RD 661/2007.

9. Report 30/2008 of the National Energy Commission

129. By virtue of Article 22 of RD 661/2007 and of the NEC Resolution of 27 September 2007, facilities registered after 29 September 2008 would not benefit from the regime established by RD 661/2007. A Royal Decree would establish a new regime for such facilities.

130. On 29 July 2008, the NEC published its Report 30/2008, "*concerning the draft Royal Decree on the remuneration of electricity production from solar photovoltaic technology for facilities registered after the deadline for maintaining the remuneration set forth in Royal Decree 661/2007, of 25 May, for such technology, of 29 July 2008*" ("**Report 30/2008**")[33].

131. In particular, the NEC's Report 30/2008 following stated the following:

> "*4.2.b) Legal certainty and protection of legitimate expectations. The stability and predictability of economic incentives (tariffs and premiums) reduce regulatory uncertainty, which fosters*

[31] CL-5.
[32] According to the communication agreed by the Board of Administration of the National Energy Commission during its session of 27 September 2007.
[33] C-25.

investments in new capacity to develop the projects and reduces the financing costs, thus lowering the final cost for consumers. Current regulations have established annual updates of economic incentives based on solid indices (such as CPI, 10-year bonds, etc.) and four-year periodic reviews that, in the latter case, only affect new facilities. Certainly, the principles of legal certainty and protection of legitimate expectations (Article of the Spanish Constitution, or CE) do not constitute insurmountable obstacles to legal innovation, nor can they be invoked to fossilize the legal framework in force at any given time. In this regard, such principles do not prevent dynamic innovation of regulatory frameworks or the prospective application of new regulatory provisions to situations initiated before their entry into force. But pursuant to such principles, the implementation of regulatory innovation —particularly if it is abrupt, unforeseeable or unannounced— does require certain guarantees and safeguards (transitional adaptation periods to new regimes, compensations where applicable, etc.) – in order to mitigate, cushion, and reduce as much as possible the frustration of expectations raised by previous regulation."

132. And also:

"5.2 On the criterion of minimizing regulatory uncertainty. Production facilities under the special regime are usually capital-intensive and have long payback periods. Regulation of generation facilities under the special regime provided in Royal Decree 661/2007 has tried to minimize the regulatory risk of this category, giving stability and predictability to the economic incentives during the lifespan of the plants by establishing transparent update mechanisms. It also exempted existing facilities from four-year reviews, since new incentives only affect new facilities."

10. Royal Decree 1578/2008

133. Royal Decree 1578/2008, "*on the remuneration of electricity production using solar photovoltaic technology for facilities registered after the deadline for maintaining the remuneration under Royal Decree 661/2007*" was enacted on 26 September 2008 ("**RD 1578/2008**").[34]

134. The Statement of Purpose of RD 1578/2008 stated that "*the growth of photovoltaic technology is far greater than expected* […] *in May 2008 1,000 MW of installed capacity have already been reached*." It also pointed out that the framework under RD 661/2007 should be adjusted to ensure its effectiveness, providing that "*just as insufficient remuneration made investments unviable, excessive retribution may significantly affect the costs of the electricity system, discouraging research and development, as well as lowering the excellent prospects for this technology in the medium and long term. Hence, rationalization of remuneration is considered necessary, and therefore the royal decree hereby approved revises downward the economic regime, following the expected technology's development with a long-term perspective*."

135. Therefore, the purpose of RD 1578/2008 was to maintain a feed-in scheme for photovoltaic generation facilities that could no longer benefit from RD 661/2007, but reducing the incentives provided therein.

136. As for its scope of application, Article 2 establishes that RD 1578/2008 shall apply to facilities under group b.1.1 of Article 2 RD 661/2007 (photovoltaic facilities) that obtain final registration in the RAIPRE after 29 September 2008.

[34] CL-4.

137. RD 1578/2008 also required administrative registration in order for facilities to benefit from its economic regime. In that regard, Article 4 provided the creation of a subsection of the RAIPRE, called Register for Pre-allocation of Remuneration ("**RPR**"), in which photovoltaic projects had to be registered.

138. Article 8.1 established that in order to benefit from the scheme under RD 1578/2008, facilities had to register with the RPR as well as obtain, within 16 months following such registration, final registration in the RAIPRE, and then start selling electricity.

139. Unlike the remuneration scheme under RD 661/2007, which provided a fixed remuneration, that under RD 1578/2008 established quarterly quota calls, so that there was a fixed tariff for a certain quota of MW and if such quota was not covered, the tariff could be applied to the following quota. The regulated tariff would not be fixed for the facility, but rather, it would depend on the call under which it was registered, so that the larger the call assigned, the lower the tariff.[35]

140. Article 11 set a regulated tariff for the first call (32 €/cent x kWh), and the second paragraph of Article 11 established a mathematical formula to set the subsequent tariffs, which would decrease as the calls were covered.

141. Article 11.5 provided that the regulated tariff applicable to a facility under RD 1578/2008 would be maintained for a maximum period of 25 years from the later of two dates: the date of the facility's beginning operations or the date of registration with the RPR.

142. Finally, Article 12 established that regulated tariffs for subgroup b.1.1 would also be subject to the updates provided in Article 44.1 of RD 661/2007 as from 1 January of the second year after the relevant call.

[35] Response, para.

C. The Claimants' investments

143. As indicated above,[36] the Claimants claimed to possess an investment in Spain through the company T-Solar, engaged in the generation and commercialization of electricity from solar photovoltaic plants. Charanne acquired an interest in T-Solar in February 2009,[37] and Construction did the same in December 2009.[38]

144. T-Solar was incorporated as a public limited company (*sociedad anónima*), originally under the name Tuin Zone, in 2007,[39] and now, through the companies T-Solar Global Operating Assets, S.L. and Tuin Zonne Origen, S.L.U., holds all the share capital or a majority stake in several Spanish special purpose vehicles, each of which is the owner of a solar photovoltaic plant.[40]

145. The Spanish special purpose vehicles, owners of the photovoltaic power plants, entered into a number of lease agreements regarding the grounds where the facilities are located; the average duration of those agreements was less than 30 years.[41]

146. According to the Claimants, vast majority of T-Solar's photovoltaic facilities were registered with the RAIPRE before 29 September 2008, so they were subject to the regime under RD 661/2007.[42] The rest of them were registered after that

[36] See above, paras. 4-9.

[37] Response, para. 378; C-40. Charanne acquired 3,960,091 shares in T-Solar on 19 February 2009. Subsequently, through several corporate resolutions, Charanne increased its stake in T-Solar, and ended up holding 8,593,094 shares.

[38] Response, para. 378; C-40. Construction acquired 617,317 shares in T-Solar on 21 December 2009. Subsequently, through several corporate resolutions, Construction increased its stake in T-Solar, and ended up holding 1,308,674 shares.

[39] Memorial, para. 4; Response, para. 378; C-33. Tuin Zone changed its name to "Grupo T-Solar Global" on 27 June 2008.

[40] Memorial, paras. 4-5; Response, para. 390 *et seq.*; C-140; C-119 to C-227.

[41] Memorial, para. 192; CT-1 Report, p. 50.

[42] Claimants PHB1, footnote on p. 130: "*The plants Alcolea Lancha, Almodóvar, Archidona, Arnedo, Castillo Alcolea, El Carpio Buenavista, El Carpio Quintanilla, Elduayen, Espejo, Fuentes Valdepero, La Choza, La Poza, La Puente La Piedra, La Seca, Les Trencades, Madrigal, Medina de las Torres, Mochuelos, Mogan-Bacol, Morila, Pozal de Gallinas, Pozocañada, Pozohondo, Sigüenza, Son Falconer, Talayuela, Tarifilla, and Viguilla avail themselves of the regime provided in RD 661/2007*."

date on the RAIPRE and the RPR under RD 1578/2008.[43]

147. The Claimants state that all T-Solar's photovoltaic plants were registered in the RAIPRE and such registration continues to be valid.[44]

D. Post-2010 regulations in the photovoltaic industry

1. Royal Decree 1565/2010

148. Royal Decree 1565/2010, which regulates and modifies certain aspects pertaining to the electrical energy production activity under a special regime ("**RD 1565/2010**"[45]), was enacted on 19 November 2010.

149. The Claimants based their claim on two aspects in particular of RD 1565/2010, explained below: (**a**) the elimination of regulated tariffs after the twenty-sixth year for solar photovoltaic facilities, and (**b**) the imposition of a series of additional technical requirements.

a) Elimination of the regulated tariff after the twenty-sixth year

150. Article 1.10 of RD 1565/2010 provides that: "*Table 3 of Article 36* [of RD 661/2007] *eliminates the values of regulated tariffs for b.1.1 facilities as from the twenty-sixth year of operation*." Hence, facilities would maintain the regulated tariffs under RD 661/2007 during their first 25 years of operation, but thereafter they would lose their right to receive the lower regulated tariff until the end of the facilities' lifespan.

151. The period of validity of the regulated tariffs was initially limited to 25 years; however, it was later prolonged to 28 years through

[43] Claimants PHB1, footnote 130: "*The facilities Cubierta T-Solar, Cubierta UAM, Saelices, Veguilla 2, Almodóvar 2 and Carpio 2 avail themselves of RD 1578/2008*."
[44] Response, para. 58; C-42 to C-75.
[45] CL-6.

RDL 14/2010,[46] and up to 30 years in the Sustainable Economy Act 2/2011.[47]

b) The demand for additional technical requirements

152. Article 1.5 of RD 1565/2010 amended Article 18 of RD 661/2007, paragraph (e), imposing on the facilities or groups of photovoltaic facilities with a total capacity higher than 2 MW the obligation to comply with technical requirements to deal with voltage sags, approved by the Secretariat-General for Energy's Resolution of 4 October 2006. Therefore, the plants were required to install response mechanisms to protect the electrical system in case of a loss of voltage in the network.

153. Furthermore, after this amendment, Article 18(e) of RD 661/2007 provided that compliance with the requirements for response to voltage sags in the facilities would be a necessary condition for being able to receive the regulated tariff, and noncompliance "*would involve receiving the market price instead of that tariff.*"

2. Royal Decree 1614/2010

154. Royal Decree 1614/2010, "*regulating and amending certain aspects regarding electricity generation using solar thermoelectric and wind technologies*, ("**RD 1614/2010**")[48], was enacted on 7 December 2010.

155. As indicated by its title, the purpose of RD 1614/2010 was to regulate the activity of facilities based on wind and solar thermoelectric technologies, so it did not affect the Claimants' plants, which were based on photovoltaic technology. Among other measures, RD 1614/2010 limited the hours of operation entitled to premium or equivalent premium.

[46] See below, para. 165.
[47] See below, para. 175.
[48] CL-15.

3. Royal Decree-Law 14/2010

156. Royal Decree-Law 14/2010, "*establishing urgent measures for correcting the tariff deficit of the electricity sector*" ("**RDL 14/2010**"), was enacted on 23 December 2010. As its title states, the express purpose of RDL 14/2010 is to address the tariff deficit of the electricity system. To that end, a set of measures are laid down "*so that all the sector's agents may contribute with an additional and shared effort to the reduction of the electricity system deficit.*"

157. The Statement of Purpose specifically says that "*it seems reasonable that producers under the special regime also make a contribution to mitigate the extra costs of the system; this contribution should be proportional to the characteristics of each technology, its degree of involvement in the generation of these extra costs and the existing margin in remuneration, while guaranteeing in any case a reasonable return.*"

158. The claims raised by the Claimants refer specifically to two aspects of RDL 14/2010: (**a**) the limitation of equivalent hours of operation of photovoltaic facilities; and (**b**) the establishment of an obligation to pay certain fees for the use of transmission and distribution grids.

a) The limitation of equivalent hours of operation

159. The Preamble generally provides for "*the possibility of limiting equivalent hours of operation entitled to the feed-in remuneration scheme. Hence, reference values are explicitly established in accordance with the values used to determine their remuneration under the 2005-2010 Renewable Energies Plan, as well as with those provided in Royal Decree 661/2007, of 25 May, regulating the production of electricity under the special regime, considering the solar climate zone corresponding to the facility's location pursuant to the climate zone classification according to*

average solar radiation in Spain under Royal Decree 314/2006, of 17 March (RCL 2006, 655), approving the Technical Building Code."

160. Said limitation of equivalent operating hours is established in Additional Provision One of RDL 14/2010, which provides:

"1. Solar photovoltaic technology facilities shall be entitled, as the case may be, to the enjoyment of the premium economic regime recognized for them, up to the number of reference equivalent hours, starting at 0.00 hours on 1 January of each year.

"2. The reference equivalent hours for these facilities, depending on the solar climate zone where the facility is located, pursuant to the classification of climate zones in accordance with average solar radiation in Spain set forth in Royal Decree 314/2006, of 17 March, approving the Technical Building Code, shall be the following:

Technology	**Reference equivalent hours/year**				
	Zone I	**Zone II**	**Zone III**	**Zone IV**	**Zone V**
Fixed facility	**1,232**	**1,362**	**1,492**	**1,632**	**1,753**
Facility with uniaxial tracking system	**1,602**	**1,770**	**1,940**	**2,122**	**2,279**
Facility with biaxial tracking system	**1,664**	**1,838**	**2,015**	**2,204**	**2,367**

For these purposes, the number of equivalent operating hours for a facility generating electricity is defined as the quotient between annual net production expressed in kW/h and the nominal power of the facility expressed in kW.

"3. The National Energy Commission shall apply the limitation of hours set forth in this Provision to the settlement of premiums

corresponding to solar photovoltaic technology facilities. Moreover, it shall apply the limitation set forth in Transitional Provision Two to settlements referring to solar photovoltaic technology facilities under the economic regime established in Royal Decree 661/2007, of 25 May. In both cases, it may collect any information necessary from the owners of the facilities and from the relevant authorization bodies."

161. Thus, a maximum annual quota of remunerated hours of generation is established by means of the regulated tariff, distinguishing between the solar zones where the photovoltaic facilities are located.

162. In addition, Transitional Provision Two of RDL 14/2010 sets forth:

"Notwithstanding Additional Provision One, until 31 December 2013 the reference equivalent hours for solar photovoltaic technology facilities under the economic regime established in Royal Decree 661/2007, of 25 May, regulating electricity generation under the special regime, shall be the following:"

Technology	Equivalent hours of reference/year
Fixed facility	**1,250**
Facility with uniaxial tracking system	**1,644**
Facility with biaxial tracking system	**1,707**

163. Transitional Provision Two establishes a maximum quota of remunerated hours of generation at a regulated tariff specifically for facilities under the regime established in RD 661/2007, which shall be applicable until 31 December 2013. Thereafter, these facilities shall also be subject to the general limit corresponding to them pursuant to Additional Provision One.

164. Therefore, RDL 14/2010 envisaged two maximum ceilings per year for remunerated electricity generation at a regulated tariff: an initial, transitional ceiling, in force until 31 December 2013, applicable only to

those facilities under RD 661/2007; and a second, non-transitional ceiling applicable to those facilities under RD 1578/2008, and, starting on 1 January 2014, to those facilities under RD 661/2007; in other words, applicable to the latter once the transitional ceiling no longer applies.

165. In the event that the annual production were higher than the ceiling for the year in question, the facilities could sell the remainder of their production at the market price, but not at the regulated tariff.

166. Moreover, as pointed out above,[49] Final Provision One of RDL 14/2010 extended from 25 years to 28 years the period during which photovoltaic facilities under RD 661/2007 were entitled to the enjoyment of the regulated tariff.

b) Access fees to transmission grids

167. RDL 14/2010 also required payment of a €0.5/MW fee to access transmission and distribution grids. Its Statement of Purpose declares in this regard that, *"given that generation facilities, especially those under the special regime, have undergone significant growth, an increase in investments in grids for the transmission and distribution of electricity has taken place in order to convey the energy they release into said grids. In the current context of economic crisis and tariff deficit, it is justified for generators to contribute, through the payment of access fees, to the costs attributable to the investments required by transmitters and distributors. Until there are regulations that set forth those access fees to be paid by generators of electricity, an access fee of €0.5/MWh is hereby established, taking as a reference the framework created for this purpose by current European Union regulations."*

168. The obligation to pay access fees is established in Transitional Provision One, which sets forth: *"Starting on 1 January 2011, and until there are regulations that set forth those access fees to be paid by generators of electricity, transmitters and distributors shall apply to generators connected to*

[49] See above, para. 150.

their grids an access fee of €0.5/MWh released into their grids, or the amount established by the Ministry of Industry, Tourism and Trade within the limits set forth, as the case may be, by European Union regulations."

4. Appeals against RD 1565/2010 and RDL 14/2010

169. The approval of RD 1565 and RDL 14/2010 led to the filing of **(a)** appeals on the grounds of unconstitutionality before the Constitutional Court by the Autonomous Communities of Extremadura, Murcia and Valencia; (**b**) administrative appeals before Spain's Supreme Court by T-Solar and different companies that own photovoltaic plants; and **(c)** an application before the European Court of Human Rights (ECHR), also by T-Solar and the special purpose vehicles owning the plants.

a) Appeals by Autonomous Communities against RDL 14/2010

170. In 2011, the Autonomous Communities of Extremadura, Murcia and Valencia lodged appeals on the grounds of unconstitutionality against RDL 14/2010.[50] The Autonomous Community of Murcia's appeal referred to Additional Provision One, Transitional Provision Two and Final Provision One of RDL 14/2010, and was admitted for consideration on 29 March 2011.[51] The Autonomous Community of Valencia's appeal was admitted for consideration on 12 April 2011.[52] The Autonomous Community of Extremadura's appeal against Transitional Provision Two was admitted for consideration on 18 October 2011.[53]

171. Spain's Constitutional Court dismissed, due to lack of purpose, the appeals filed by the Autonomous Communities of Murcia and Valencia, in judgments of 12 June of 2014[54] and 26 June

[50] Memorial, paras. 224-225; Response, para.187.
[51] CL-26.
[52] CL-27.
[53] CL-28.
[54] RL-347.

2014[55] respectively, because, as will be seen further on,[56] at that time the appealed provisions were no longer in force. The appeal filed by the Autonomous Community of Extremadura was not admitted on 22 July 2014 for the same reasons.[57]

b) Administrative appeals before the Supreme Court

172. In July 2011, the company Isolux Corsán, together with the Spanish companies owning the plants, filed administrative appeal no. 60/2011 before Spain's Supreme Court against RD 1565/2010, and on 4 July 2011, T-Solar, together with all its subsidiary companies owning the photovoltaic generation facilities, filed before Spain's Supreme Court direct administrative appeal no. 64/2011 against RD 1565/2010.[58]

173. Appeal no. 60/2011 was dismissed by the Supreme Court in its judgment of 24 September 2012,[59] and appeal no. 64/2011 was dismissed by the Supreme Court in its judgment of 15 October 2012.[60] In both cases the Court concluded that RD 1565/2010 was lawful and did not violate the principle of the investors' legitimate expectations pursuant to Spanish legislation.[61]

c) The application before the ECHR

174. On 4 July 2011 a number of T-Solar subsidiary companies filed applications against Spain before the ECHR, requesting that RDL 14/2010 be declared in violation of Article 1 of the Additional Protocol, and Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[62]

175. On 12 December 2013, the ECHR communicated its final decision not to admit the application, considering that it did not comply

[55] RL-348.
[56] See para. 178.
[57] PHB2 Claimants, para. 335.
[58] R-3.
[59] RL-236.
[60] RL-250.
[61] RL-236; RL-250.
[62] Counter-Memorial, paras. 419(d)-420; Response, para. 430.

with the admissibility criteria established in Articles 34 and 35 of the Convention.[63]

E. Regulations approved subsequently by Spain

1. Act 2/2011, the Sustainable Economy Act

176. Act 2/2011, the Sustainable Economy Act (**"Act 2/2011"**) was enacted on 4 March 2011. In item two of its Final Provision Forty-Four, it amended the period of time during which a photovoltaic plant could be operated while enjoying the regulated tariff. This period, which had already been increased by RDL 14/2010 to 28 years,[65] was thus extended to 30 years.

177. This increase in the operating period with entitlement to the regular tariff, as was the case of that stipulated in RDL 14/2010, referred only to those facilities under the regime set forth in RD 661/2007.[66]

2. Royal Decree-Law 1/2012

178. Royal Decree-Law 1/2012 (**"RDL 1/2012"**) was enacted on 27 January 2012. This Royal Decree-Law proceeded to suspend the procedures for the pre-allocation of remuneration and eliminate the economic incentives for new photovoltaic facilities that were not listed on the RPR set forth in Article 4.1 of RD 1578/2008.

3. Royal Decree-Law 9/2013

179. Royal Decree-Law 9/2013 (**"RDL 9/2013"**), *"adopting urgent measures to guarantee the financial stability of the electricity system"* was enacted on 12 July 2013.[67] In its Sole

[63] C-76.
[64] CL-20.
[65] See above, para. 165.
[66] Because it was based on the prior increase enacted in Final Provision One of RDL 14/2010, which referred solely to facilities under RD 661/2007.
[67] RL-279.

Repealing Provision, this legislation repealed RD 661/2007 and RD 1578/2008. However, it also set forth the transitional application of these Royal Decrees until the implementing regulations of RDL 9/2013 were finalized.[68]

180. Article 1.2 of RDL 9/2013 amended Article 30.4 of the LSE, and established the following wording:

> *"In the terms established in a Royal Decree to be adopted by the Council of Ministers, in addition to the remuneration for the sale of generated electricity valued at market price, facilities may receive a specific remuneration consisting of an amount per unit of installed power capacity covering, as the case may be, the investment costs of a standard facility that cannot be recovered through energy sales, and an amount for operations, covering, as the case may be, the shortfall between the operating costs and the income obtained by said standard facility from the market.*
>
> *For calculating the aforementioned specific remuneration, the following shall be taken into consideration, for a standard facility throughout its regulatory lifespan and with reference to the activity carried out by an efficient and well-managed company:*
>
> *a) Standard income for the sale of generated electricity valued at market production price.*
>
> *b) Standard operating costs.*
>
> *c) Standard value of the initial investment.*
>
> *For this purpose, under no circumstances shall the costs or investments determined by rules or administrative acts that are not applicable throughout the entire Spanish territory be taken into consideration. Likewise, only those costs and investments responding exclusively to electricity generation shall be taken into account.*
>
> *[...]*
>
> *This remuneration scheme shall not exceed the minimum level necessary to cover the costs that make it possible for facilities to compete in*

[68] RDL 9/2013, Transitional Provision Three.

equal conditions with other technologies on the market, and which make it possible to obtain reasonable profits with regard to the standard facility in each applicable case. Notwithstanding the above, the remuneration scheme may, on an exceptional basis, also incorporate an incentive for investment and implementation before a given deadline when the facility involves a significant reduction in costs for insular and extra-peninsular systems.

These reasonable pre-tax return shall be linked to the average yield of ten-year government bonds on the secondary market, plus the appropriate differential.

The parameters of the remuneration scheme may be revised every six years."

181. Additional Provision One of RDL 9/2013 established: "*For the purposes of the provisions of the penultimate paragraph of Article 30.4 of the* [LSE], *for facilities which, on the date of entry into force of the present Royal Decree-Law, are entitled to a premium economic regime, the reasonable pre-tax rate of return shall be linked to the average yield of ten-year government bonds on the secondary market, in the ten years prior to the entry into force of the present Royal Decree-Law, plus 300 basis points, without prejudice to the revision provided for in the last paragraph of said Article.*"

182. And Final Provision Two established, "*the Government, at the proposal of* [Minetur], *shall approve a Royal Decree regulating the legal and economic regime for electricity generation facilities using renewable energy sources, cogeneration and waste, with feed-in remuneration, amending the remuneration model of the existing facilities. This new model shall comply with the criteria set forth in Article 30 of the* [LSE] *introduced in the present Royal Decree-Law, and shall be applicable starting from the entry into force of the present Royal Decree-Law.*"

183. RDL 9/2013 set forth its immediate application starting from its entry into force, on 14 July 2013. However, it established that, on a transitional basis, until Decrees implementing the specific remuneration were approved, operators duly registered under RD 661/2007 and

RD 1578/2008 should continue to receive the remuneration corresponding to said regulations, but as payment on account of the resulting liquidation upon applying the new methodology.[69]

4. Act 24/2013

184. The new Act 24/2013, *"on the Electricity Sector"* (**"New LSE"**) was enacted on 26 December 2013.

185. The New LSE established the principle of "economic and financial sustainability of the electricity system". In this regard, its Statement of Purpose sets forth: *"The principle of economic and financial sustainability of the electricity system shall be a guiding principle for the actions of the Public Administrations and other subjects comprised in the scope of application of the Act. By virtue of this principle, any regulatory measure regarding the sector involving an increase in cost for the electricity system or a reduction in revenue must incorporate an equivalent reduction in other cost items or an equivalent increase in revenue to ensure the equilibrium of the system. Thus, any possibility of accumulating new deficits, as was the case in the past, is definitively ruled out."*

5. IET Ministerial Order 1045/2014

186. IET Ministerial Order 1045/2014*"approving the remuneration parameters for standard facilities applicable to certain electricity generation facilities using renewable energy sources"*, ("**IET Order 1045/2014**"), was issued on 16 June 2014 and entered into force on 21 June 2014.

VI. POSITION OF THE PARTIES AS REGARDS JURISDICTION

A. Position of the Respondent

187. The Kingdom of Spain has raised objections to the jurisdiction of the Arbitration Tribunal on the grounds that: (**1**) the arbitration has subsequently lost its purpose; (**2**) the

[69] RDL 9/2013, Transitional Provision Three; Response, para. 205.

electa una via clause has been activated; (**3**) the dispute, as well as the Parties, are subject to the rules governing the European Union ("**EU**") internal market, and the dispute must be resolved pursuant to the EU's jurisdictional system; (**4**) the Claimants are not investors pursuant to Article 1(7) of the ECT.

1. <u>The arbitration has been rendered devoid of purpose</u>

188. According to the Respondent, RDL 9/2013 has expressly repealed RD 661/2007, RD 1578/2008, and Article 4 of RDL 6/2009, and it must also be considered to have repealed RD 1565/2010 and RDL 14/2010, that is to say, all the rules on which the Claimants are basing their claim against Spain in this arbitration.[70]
189. RDL 9/2013 established a new remuneration system, different to the previous one, which is defined in a new regulatory framework consisting of RDL 9/2013 itself, the New LSE, RD 413/2014, and IET Order 1045/2014 of 16 June 2014.[71] Moreover, these new rules fully absorb any previous regulatory amendment or measure, because they calculate reasonable profits with regard to the entire lifespan of the plant, thus including in the calculation the initial years of operation; therefore, it is not possible to consider previous regulations in isolation.[72]
190. The Respondent states that the Claimants' claim and its calculation of damages are based on rules that have been repealed and are, therefore, meaningless.[73]
191. The Claimants have not made specific claims based on RDL 9/2013 and subsequent regulations, nor would they be able to do so, because they are already making a claim regarding said regulations before another Arbitration Tribunal, and to pursue the same claim in the present arbitration would give rise to unjust enrichment.[74] According to the Respondent, on 3 October 2013, the Isolux Corsan Infrastructure Netherlands B.V. company, which is the same company through which

[70] Rejoinder, paras. 1179-1181.
[71] Rejoinder, para. 1183.
[72] PHB1 Respondent, paras. 375, 382, 387-388; PHB 2 Respondent para. 176.
[73] Rejoinder, paras. 1185-1188.
[74] Rejoinder, paras. 1190, 1197

the Claimants' investment is structured, submitted an arbitration claim against Spain on the grounds of alleged non-compliance with the ECT, and the only difference between said proceeding and the present proceeding is that in the former the claim was, additionally, made on the grounds of the new rules in force.[75]

192. The Respondent contends that if the Tribunal were to consider the Claimants' allegations on the grounds of the new regulations that are not the object of this proceeding and regarding which Spain is not exercising its right to defence, that would constitute an abuse of due process.[76]

193. Lastly, the Respondent asserts that Spain has not approved the new legislation to avoid this arbitration, as the Claimants state. On the contrary, the subsequent lack of purpose was created by the Claimants themselves, who chose not to submit claims regarding the new rules to this Tribunal but, rather, to another Arbitration Tribunal.[77]

2. <u>The Claimants have activated the ECT's *electa una via* clause</u>

194. The Respondent refers to the *electa una via* clause contained in Article 26(3)(b)(i) of the ECT, which aims to prevent investors from unfairly resorting to two parallel dispute resolution mechanisms (one at the national level and the other at the international level).[78]

195. The Respondent contends that the activation of the *electa una via* clause took place, on the one hand, as a result of the fact that T-Solar and all the special purpose vehicles owning the photovoltaic plants, as well as Isolux Corsán, filed administrative appeals no. 64/2011 and no. 60/2011, respectively, before the Supreme Court with regard to RD 1565/2010; and on the other hand, because several T-Solar companies submitted an application to the European Court of Human Rights.[79]

196. With regard to the application submitted to the ECHR requesting that it declare RDL 14/2010 to be contrary to EU regulations and

[75] Rejoinder, paras. 1191-1196.
[76] Rejoinder, para. 1190.
[77] PHB1 Respondent, paras. 7, 390-392.
[78] Rejoinder, para. 358.
[79] Rejoinder, paras. 354-355.

requesting compensation, this application alone would have activated the *electa una via* clause, because it constitutes abuse of rights in that it uses two parallel proceedings for a single claim in order to maximize the possibilities of their claims being upheld.[80] Although here the Claimants did not resort to the Spanish courts, they did resort to an *"applicable, previously agreed dispute settlement procedure"*, pursuant to Article 26(2)(b) of the ECT.

197. Lastly, the fact that the application submitted to the ECHR was not admitted is irrelevant, because the activation of the *electa una via* clause took place at the time when the application was submitted, and said clause establishes its non-applicability only when the investor waives any other channels. In the present case, the application did not continue before the ECHR because it was rejected, but the investors never withdrew it.[81]

198. As regards appeals lodged before Spanish Courts, the Respondent rejects the Claimants' arguments regarding non-fulfilment of the triple identity requirement, because the strict and limited application of said requirements would prevent the clause from being applied in practice.[82] According to the Respondent, the conditions of the triple identity requirement have indeed been met.

a) Identity of the parties:

199. The Respondent asserts that there is identity of the parties, because the special purpose vehicles, which together with T-Solar brought the action before the Spanish Court, are the same as those comprising the Claimants' investments in this arbitration, which are formed through the direct and indirect participation of Charanne and Construction in T-Solar.[83]

[80] Rejoinder, paras. 392-394.

[81] Rejoinder, paras. 395-396.

[82] Rejoinder, para. 359, citing *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 ("***Pantechniki v. Albania***")(RL-322), paras. 60-64, and *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* ("***H&H Enterprises v. Egypt***"), unpublished Award referred to in *I.A. Reporter* on 19 May 2014 (RL-323). PHB1 Respondent, paras. 400-403, citing, moreover, the decision of the Annulment Committee in the case *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi v. Argentina II– Annulment***").

[83] Rejoinder, para. 362.

200. According to the Respondent, if Appeal 64/2011 had been upheld, the result would have been identical to that sought in the present Arbitration with regard to RD 1565/2010.[84]

201. In this regard, the Respondent contends that international precedent supports the Respondent's position that it is necessary to take into account the economic unity of the claimant entities and the economic effects in each case when analysing the requirement of identity of the parties.[85]

202. Moreover, the Respondent asserts that if it had been handed down, the Supreme Court's ruling of annulment would have had *erga omnes* effects regardless of who the claimants were in each case, because under Spanish law, rulings declaring the annulment of a provision of a general nature have a declaratory effect *erga omnes* and *ex tunc*.[86]

b) Identity of subject matter

203. There is also identity of subject matter, because the plaintiffs in the proceedings before the Spanish courts essentially made the same claim as the Claimants in the present arbitration proceeding, albeit adapting them to the specific characteristics of said proceeding.[87] Contrary to what the Claimants state, the administrative proceeding not only sought a declaration of annulment of RD 1565/2010, but also compensation for damages caused thereby, as is the case in the present arbitration proceeding.[88]

204. In addition, the Respondent contends that the claims before the Spanish Supreme Court also referred to RDL 14/2010, and in its decision, said Court also ruled with regard to said regulation.[89] In any case, the *erga omnes* ruling that would have been handed down with regard to

[84] Rejoinder, para. 366.
[85] Rejoinder, para. 367; Campbell McLachlan, Laurence Shore and Matthew Weiniger, "*International Investment Arbitration: Substantive Principles*" (Oxford International Arbitration Series, 2007), para. 4.141.
[86] Rejoinder, paras. 368-369.
[87] Rejoinder, para. 371.
[88] Rejoinder, paras. 372 *et seq.*; R-3.
[89] Rejoinder, para. 379; R-3, pp. 14, 15, 91, 132; RL-401.

RD 1565/2010 would have affected the legislative amendment system as a whole, as its justification is similar.[90]

c) Identity of cause of action

205. Lastly, the Respondent contends that it is normal for each proceeding to be based on specific regulations pertaining to each system, either internal or international; what is relevant is to analyse whether there is an essential identity between the claims and not an absolute identity.[91]

206. In this regard, the request in the arbitration proceeding for the adaptations carried out by Spain to be considered in violation of the ECT and for compensation for damages to be granted is equivalent to the request before the Spanish Supreme Court for RD 1565/2010 to be annulled and for the corresponding compensation for damages.[92] The Respondent lastly contends that the Spanish Supreme Court did indeed rule on the non-existence of any violation of the ECT in its decisions regarding appeals 60/2011 and 64/2011.[93]

3. <u>An intra-European dispute not subject to the ECT</u>

207. The Respondent asserts that the countries of which the Claimants say they are nationals, namely Luxembourg and the Netherlands, as well as Spain itself, were already members of the EU before the ECT was negotiated and ratified; therefore, the dispute in question is an intra-EU dispute.[94]

208. Intra-European investment relations are subject to the EU's specific regulatory framework, which extensively addresses all issues regulated by investment treaties, including those addressed by the ECT.[95] Therefore, the ECT is not applicable to investments made inside the EU by nationals of EU Member States (**"Member States"**), nor does it confer any entitlement to

[90] Rejoinder, para. 380.
[91] Rejoinder, paras. 383-386, citing Campbell McLachlan, Laurence Shore and Matthew Weiniger, *Op. Cit.* para. 4.76 (RL-325).
[92] Rejoinder, para. 387.
[93] PHB1 Respondent, paras. 434 and 438 (c).
[94] Counter-Memorial, paras. 215 *et seq*.; Rejoinder, para. 401.
[95] Counter-Memorial, paras. 222-225.

said nationals, including, in particular, entitlement to dispute resolution through arbitration.[96]

209. According to the Respondent, intra-European dispute resolution is governed, on a mandatory basis, by the jurisdictional system established in EU law, pursuant to which the judges of each Member State act as EU judges and apply EU law directly. Should doubts arise regarding application of EU law, these shall be resolved by the Court of Justice of the European Union (**"CJEU"**), which is also the court of last resort, to guarantee its integrity and coherence.[97] Moreover, the investors could directly lodge a claim before the European Commission for the EC to initiate a proceeding against the non-compliant State under Article 258 of the Treaty on the Functioning of the European Union (**"TFEU"**).[98]

210. As regards the Claimants' allegation that Article 258 of the TFEU refers to the case of disputes between States,[99] the Respondent asserts that said allegation is ungrounded and that most proceedings initiated by the EC against a Member State under Article 258 are initiated at the request of private parties.[100]

211. The Respondent asserts that, other than in the case of Eastern European States that have later joined the EU, there have never been bilateral investment treaties between EU Member States, because the very goal of the EU was to create an internal market including the free circulation of capital, establishing all the necessary guarantees.[101]

212. According to the Respondent, the literal interpretation made in good faith of the terms of the ECT, as well as its systematic interpretation and other complementary forms of interpretation, pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (**"VCLT**"), uphold its position.[102]

[96] Counter-Memorial, paras. 237-238.
[97] Counter-Memorial, paras. 226-229, 278-282; Rejoinder, para. 424.
[98] Rejoinder, para. 424.
[99] Response, para. 295.
[100] Rejoinder, para. 426; RL-298.
[101] Counter-Memorial, para. 250; Rejoinder, paras. 475-478; R-2.
[102] Rejoinder, paras. 409-411.

213. Article 26 of the ECT requires diversity: the investor initiating the proceedings against a contracting party to the ECT ("**Contracting Party**") must be of a State other than the Respondent Contracting Party, and the investment must be made in the territory of a Contracting Party other than the investor's State.

214. For the purposes of the ECT, investors of an EU Member State are at the same time investors of said State and of the EU, and pursuant to Article 1(10) of the ECT, the territory of the EU, considered as a Regional Economic Integration Organization ("**REIO**"), comprises the territory of Spain, as well as that of Luxembourg and the Netherlands. Therefore, the required diversity between the territory of the investor and that of the Contracting Party receiving the investment does not exist.[103] According to the Respondent, the definition of territory of the States provided in paragraphs (a) and (b) of Article 1(10) of the ECT only applies to States that are not members of the REIO.[104]

215. As regards the object and purpose of the ECT, the Respondent claims that it was designed to protect investments in countries of the former Communist bloc, but without modifying the intra-EU regime. The object and purpose of the ECT can only be to establish a special protection regime for energy investments outside the EU.[105]

216. The Respondent also contends that the interpretation of Article 26 of the ECT in the context of the other Articles of the Treaty confirms Spain's position. Hence, in the case of controversy between Member States, the arbitration clause under Article 27 of the ECT does not allow submitting intra-EU disputes to arbitration either, since they are subject to the exclusive competence of EU jurisdictional mechanisms.[106]

217. Spain submits that the prohibition of intra-EU investor-State arbitration results from the case law of the CJEU, and especially

103 Counter-Memorial, paras. 253 *et seq.*
104 PHB1, para. 464.
105 Counter-Memorial, paras. 264-266; Rejoinder, paras. 434, 435.
106 Rejoinder, paras. 443-448.

its decision in the Mox Plant case,[107] which established that under Article 344 TFEU,[108] disputes between Member States concerning EU law must be resolved in accordance with the procedures provided in the TFEU. In this sense, "mixed" international agreements, i.e., those ratified both by the Member States and the EU, are considered an integral part of EU law.[109]

218. The Respondent holds that the practice subsequent to the conclusion of the ECT also confirms its own interpretation. The Respondent refers to the positions expressed by different EU institutions,[110] and in particular by the European Commission,[111] which is the executive body of the EU that signed the ECT on behalf of the EU.[112]

219. The Respondent also claims that the instruments made by the EU upon the conclusion of the ECT do not contain any reference to

107 Rejoinder, paras. 450 *et seq.*; RL-84. CJEU Judgment in Case C-459/03 *Commission of the European Communities v. Ireland*, 30 May 2006 ("***Mox Plant***") (RL.84).

108 The CJEU referred then to Article 292 TEU, currently reflected in Article 344 TFEU.

109 Rejoinder, paras. 457 *et seq*. referring to *Mox Plant* judgment, paras. 82-85.

110 Rejoinder, paras. 436, 464 *et seq.*; Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party; Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries; Parliamentary questions, 17 April 2013: "*1.* "*190 BITs have been concluded between Member States of the European Union. These BITs have a discriminatory effect as their investment protection standards vary across treaties and they are thus in breach of Article 18 of the Treaty on European Union. Moreover, these treaties conflict with the European Court of Justice's monopoly on jurisdiction as regards EU law since they lead to parallel jurisprudence through different arbitration procedures. The Commission has taken the view that these treaties are incompatible with EU law and should be terminated*." (RL-271), RL-388.

111 Position of the European Commission in *Eureko B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 ("***Eureko v. Slovakia***") (RL-3), according to which the dispute resolution provisions of the ECT should be considered inapplicable regarding "intra-EU" disputes; and *Electrabel v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ("***Electrabel v. Hungary***") (CL-32), Part V, pp. 9-11. More generally, article on the website of IA Reporter "*Investigation: In recent briefs, European Commission casts doubts on application of Energy Charter Treaty to any intra-EU dispute*" of 8 September 2014 (RL-388).

112 Rejoinder, paras. 470-474.

EU disputes, which proves that the application of the ECT to such disputes was not even considered.[113]

220. As for the Claimants' arguments regarding the decisions in *Eastern Sugar v. Czech Republic*, [114] *Eureko v. Slovakia*, [115] and *Electrabel v. Hungary*, [116] the Respondent submits that they are not relevant precedents for this Tribunal, since they referred to completely different situations, as the States involved in such cases had concluded the bilateral investment treaty (BIT) or the ECT before acceding to the EU, whereas with Spain it was the opposite.[117] In fact, there are currently no BITs in force between States that were already members of the EU before the conclusion of the ECT.[118]

221. Spain has pointed out the importance of ensuring systemic integration and consistency, harmonization, and certainty of the rule of law. In that sense, it contends that the exclusive jurisdiction of the CJEU within the EU must be preserved in order to achieve predictability and certainty, as well as to avoid inconsistent decisions.[119]

222. The Respondent also claims that Article 16 of the ECT is not applicable because there is no incompatibility between EU law and the ECT, but even if there were a conflict between them, Article 351 TFEU establishes the precedence of EU law over any agreement concluded after the accession of the relevant State to the EU.[120]

223. In its post-hearing submissions, the Respondent assumed the argument raised by the European Commission in the

113 Rejoinder, paras. 479 *et seq.*, referring in particular to the "Statement submitted by the European Communities to the Secretariat of the Energy Charter regarding its policies, practices and conditions with respect to disputes between investors and contracting parties and their submission to international arbitration or conciliation." (RL-303), and Council and Commission Decision of 23 September 1997 on the conclusion of the ECT (RL-311).

114 *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 ("***Eastern Sugar v. Czech Republic***") (CL-57).

115 *Eureko v. Slovakia*.

116 *Electrabel v. Hungary*.

117 Rejoinder, paras. 523 *et seq*.

118 Rejoinder, paras. 475-476.

119 Rejoinder, paras. 490 *et seq*.

120 Rejoinder, paras. 542-545, citing Case 10/61 *Commission v. Italy* [1962] ECR 1, 10 (RL-318), and C-147/03 *Commission v. Austria* [2005] ECR 1-5969, I-6011 (RL-319), para. 58, referring to Case C-473/93, *Commission v. Luxembourg* [1996] ECR I-3207, para. 40; PHB1 Respondent, para. 527 (c).

Amicus EC,[121] considering that the ECT contains an implicit disconnection clause with regard to intra-EU relationships.[122]

224. Finally, the Respondent alleges that settling this dispute under the ECT instead of the EU dispute resolution mechanisms would be an infringement of public order under Spanish law,[123] and any condemnatory award issued by the Arbitration Tribunal would risk unenforceability or annulment.[124]

4. <u>The Claimants are not investors under Article 1(7) of the ECT</u>

225. The Respondent submits that, behind Charanne's and Construction's corporate shell, the true claimants in this arbitration are two natural persons of Spanish nationality, namely Mr José Gomis Cañete and Mr Luis Antonio Delso Heras.[125]

226. According to the Respondent, the legal entity making the investment shall not be protected by the ECT, regardless of its place of incorporation, if it is controlled by investors of the same State where the investment is made.[126] This is so because Article 26(1) of the ECT requires diversity of nationalities in order to submit a dispute to arbitration.[127]

227. The Respondent claims that even though there is a more formalistic line of arbitral interpretation regarding the nationality of claimant legal persons,[128] there is a more appropriate interpretation that looks at the effective nationality of the legal person,[129] since investment treaties

121 *Amicus CE*, para. 13.

122 PHB1 Respondent, paras. 466-490; PHB2 Respondent, Annex 7, paras. 8-11.

123 Counter-Memorial, para. 297; Rejoinder, para. 402.

124 Rejoinder, para. 501. In its PHB2 (para. 98), the Respondent referred in particular to the fact that on 13 February 2015, the EC decided to open a state-aid preliminary examination which, at the Commission's initiative, broadened to encompass the remuneration scheme for renewable energies prior to the one currently in force, including RD 661/2007 and RD 1578/2008.

125 Counter-Memorial, paras. 304-305; Rejoinder, para. 554.

126 Counter-Memorial, para. 310; Articles 17(1) and 26(7) of the ECT.

127 Rejoinder, paras. 557 *et seq*.

128 Counter-Memorial, para. 319, citing *Tokio Tokelés v. Ukraine*, ICSIC Case No. ARB/02/18, Decision on Jurisdiction, 26 July 2007 ("***Tokio Tokelés***") (RL-320); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondents' Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 ("***Rompetrol***") (RL-109), para. 88.

129 Counter-Memorial, para. 319, citing *Vacuum Salt Products v. The Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994 ("***Vacuum Salt Products***") (RL-34).

were designed to promote foreign investments, not domestic ones.

228. According to the latter, more reasoned line of interpretation, "foreigner" status is not a formal requirement, but an objective condition that allows tribunals to pierce the corporate veil in order to know the true controllers of corporations and deny jurisdiction when the true controllers are nationals of the respondent State.[130]

229. Spain argues that the reasoning in the decisions supporting its position is perfectly valid irrespective of whether they have been issued in arbitrations under the ICSID Convention instead of the ECT. Both instruments establish resolution mechanisms for problems arising in the context of trade relationships between States and nationals of other States.[131]

230. The Respondent also claims that, in these circumstances, affirming jurisdiction and issuing an award would violate the public order of Spain, seat of the arbitration, by granting different jurisdictional treatment to Spanish citizens in the same situation depending on the investment vehicle chosen.[132]

B. Position of the Claimants

231. The Claimants reject the objections regarding (**1**) the subsequent lack of purpose, and (**2**) the *electa una via* clause. They also (**3**) submit that the claim under the ECT is compatible with EU law; and (**4**) contend that the Claimants are legitimate investors under the ECT.

130 Counter-Memorial, para. 320, citing dissenting opinion of Prof. Prosper Weil in *Tokio Tokelés*, and in the decision in *Thales Spectrum de Argentina v. Argentine Republic*, ICSID Case No. ARB/05/5, Decision on Jurisdiction, 19 December 2008 (***"TSA v. Argentina"***) (RL-117), paras. 160-162.

131 PHB1 Respondent, paras. 546-548.

132 Counter-Memorial, paras. 331-333; Rejoinder, paras. 575-579.

1. Objection on the grounds of supervening lack of purpose should be rejected

232. The Claimants assert that the adoption of RD 1565/2010 and RDL 14/2010 has diminished the economic value of their assets and profits in T-Solar, regardless of whether such provisions have been repealed or subsequently superseded by RDL 9/2013. Therefore, damage has undoubtedly been caused.[133]

233. The measures that are the object of this arbitration are exclusively RD 1565/2010 and RDL 14/2010. However, the Claimants submit that such measures were only the first steps Spain took to fully dismantle the special regime under RD 661/2007 and RD 1578/2008.[134] The new regime established under RDL 9/2013 has not remedied Spain's conduct. Quite the contrary, it has aggravated the situation resulting from the measures that are the object of this arbitration.[135]

234. Spain cannot take advantage of its own conduct, which, in addition, has further worsened the Claimants' situation, to seek to avoid its responsibility under the ECT.[136]

235. The Claimants deny that RDL 9/2013 affects the subject matter of these proceedings, and state that even if it did, the measures considered in this arbitration, i.e., RD 1565/2010 and RD 14/2010, remained in force for almost three years, until the entry into force of RDL 9/2013, during which time they were fully applicable and effective.[137]

2. The Claimants have not invoked the ECT's *electa una via non datur* clause

236. The Claimants acknowledge that Article 26(3) of the ECT provides an *electa una via non datur* clause establishing that arbitration and recourse to ordinary courts in one Contracting Party constitute alternative and mutually exclusive remedies. However, the Respondent's objection

133 PHB2 Claimants, para. 89.
134 PHB1 Claimants, paras. 417-418.
135 PHB1 Claimants, paras. 420-421.
136 PHB1 Claimants, paras. 422-423.
137 PHB2 Claimants, paras. 95-98.

should be rejected because the universally recognized[138] triple identity test is not fulfilled. This test requires that the proceeding before domestic courts and that the proceeding before the arbitral tribunal share (**a**) the same parties, (**b**) the same subject matter or *petitum*, and (**c**) the same legal grounds.[139]

a) Lack of identity of parties

237. There is no identity of parties because Charanne and Construction are not parties to any proceedings before the Spanish courts. The companies that own the plants were the ones which initiated legal actions in Spain. These companies are not even within the subjective scope of application of the ECT.[140]

238. The ECT expressly provides that it is the investor in the arbitration who must have chosen to resort to domestic courts, and not the shareholders or subsidiaries. The legal personality of the Claimants cannot be ignored because of the corporate links between them and Grupo T-Solar and Grupo Isolux Corsán companies.[141]

239. The Respondent's argument that the Claimants would also benefit from the potential annulment as requested in the appeals filed before the Supreme Court, due to its "*erga omnes*" effect, is irrelevant for the analysis of the *electa una via* clause. In fact, said analysis would lead to the extreme of rejecting any arbitration claims brought by any third party that could benefit from a general decision.[142]

b) Lack of identity of subject matter

240. There is no identity of subject matter or *petitum*. In the administrative appeals filed before the Supreme Court, the claimant parties requested that RD 1565/2010 be rendered invalid

138 Response, para. 425; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/10, Award, 27 December 2010 ("***Total v. Argentina***") (CL-43), para. 443; 443; *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 ("***Toto Construzioni***") (CL-95), paras. 211-212.

139 Response, paras. 425-426.

140 Response, para. 427(i).

141 PHB1 Claimants, para. 26.

142 PHB1 Claimants, para. 27.

for violating the Spanish legal order,[143] whereas the Claimants in the present proceeding request that the Arbitration Tribunal declare the incompatibility of RD 1565/2010 and RD 14/2010 with the provisions of the ECT, and consequently, that it order Spain to provide compensation for the damages caused by the adoption and entry into force of said regulations.[144]

241. Although the proceedings before the Supreme Court also contain a claim for compensation for damages, the Claimants submit that there cannot be identity of subject matter between a claim based on Spanish domestic law (where the main relief sought is the annulment of a regulation) and an international claim seeking compensation for damages arising from a breach of the State's international obligations.[145]

c) Lack of identity of legal grounds

242. There is also no identity of legal grounds. The proceedings before the Spanish courts are based on the violation of the Spanish legal order, in particular Articles 9.3 and 14 of the Spanish Constitution, and Article 30.4 of the LSE, whereas the present claim is based on the ECT and international law.[146]

243. The Claimants contend that the purpose of the *electa una via* clause is precisely to prevent a party from filing the same claim for breach of an obligation under Part III of the ECT, regarding an investment, in parallel proceedings before different forums.[147] Said clause would have been activated if the Claimants had requested the application of the ECT by the Spanish courts, which is not the case.[148]

244. As regards the claim submitted to the ECHR by different companies within Grupo T-Solar, this is irrelevant to the *electa una via* clause, since it is not a proceeding sought before "courts

143 Response, para. 427(i).
144 Memorial, paras. 139-140.
145 PHB1 Claimants, para. 31.
146 Response, para. 427 (iii).
147 PHB1 Claimants, para. 37.
148 PHB1 Claimants, para. 38.

or administrative tribunals" of Spain, as provided in Article 26(2)(a), but before an international tribunal. Neither is it a procedure "previously agreed" by the Parties pursuant to Article 26(2)(b).[149] In any case, said application does not meet the triple identity test, since there is no identity of parties, subject matter or legal grounds.[150] Finally, said application was rejected by the ECHR, so no proceeding can be deemed to have been initiated.[151]

3. The ECT is applicable to the present dispute without undermining EU law

245. According to the Claimants, the TFEU and the ECT are different instruments with different scopes of application. While the TFEU governs the functioning of the EU and establishes freedoms aimed at the community of citizens of the EU, the ECT focuses on energy investments and lays down a legal framework open to any State in order to promote long-term cooperation in the field of energy.[152]

246. The specific rights and protections for investments provided in the ECT with respect to State actions are broader than those in, or simply not present in, EU law, which regulates in general economic and legal relations in the EU.[153] The Claimants refer to several decisions of arbitration tribunals that, after analysing the relationship between EU law and investment treaties, concluded that both have different scopes of application and that international treaties are applicable to intra-EU disputes.[154]

149 Response, para. 429; PHB1 Claimants, para. 16.
150 Response, para. 430.
151 Response, paras. 431 and 432; PHB2 Claimants, para. 117.
152 Response, para. 272; Article 1 TFEU; Article 2 ECT.
153 Response, para. 273.
154 Response, paras. 275 *et seq.*, citing *Eastern Sugar*, paras. 159-165 and *Eureko v. Slovakia*, para. 245.

247. Compatibility between the ECT and EU law has been endorsed by different arbitration tribunals[155] as well as by national judges in EU Member States.[156] In any case, Article 16 of the ECT would resolve any possible incompatibility with another international agreement in favour of the investor.[157]

248. The Claimants also submit that the ECT is compatible with the EU's jurisdictional system, since its claim is based on violations of the ECT, not of EU law. The Respondent's reference to Article 258 TFEU concerns a different situation, i.e., when the EC initiates an infringement procedure against a Member State for a breach of its obligations under the Treaties, which makes it legitimate to submit the issue to the CJEU. The present arbitration is not between Member States or between a Member State and the EU, but between investors of a Contracting Party to the ECT and another Contracting Party.[158] The CJEU's decisions cited by the Respondent in that regard are irrelevant, since they refer to EU acts unrelated to the present case[159] or to disputes between States.[160]

249. Even though the present dispute does not concern EU law but the ECT, the Claimants assert that, although it is up to the CJEU to provide final interpretation of EU law, arbitration tribunals and domestic courts may and should apply it when it is necessary to resolve a dispute.[161]

250. Regarding the interpretation of the ECT pursuant to Articles 31 and 32 of the VCLT, the Claimants contend that a literal interpretation of Article 26(1) of the ECT only requires that the investment be made in

155 *Eastern Sugar*, paras. 168-170; *Eureko v. Slovakia*, paras. 263, 274; *Electrabel v. Hungary*, paras. 4.146, 4.166.

156 Judgment *OLG Frankfurt* of the Higher Regional Court of Frankfurt am Main, 10 May 2012.

157 Response, paras. 286-289.

158 Response, paras. 294-296.

159 Counter-Memorial, paras. 231-232, citing judgments of the CJEU in Case 294/83 *Parti écologiste "Les Verts" v. European Parliament*, 23 April 1986, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*.

160 *Mox Plant*.

161 Response, paras. 301 *et seq*. citing *Eureko v. Slovakia*, paras. 278-283; Judgment *OLG Frankfurt*, para. 2; *Caminalaga, SAU v. DAF Vehículos Industriales, SAU*, Order of the Provincial Court of Madrid of 18 October 2013, section 28; *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 ("***Maffezini v. Spain***"), paras. 65 *et seq.*

the territory of a Contracting Party and that the latter comply with its obligations under the ECT with regard to the investors of another Contracting Party. In the present case, the investment was made in the territory of Spain, Spain violated the ECT, and the Claimants are nationals of the Netherlands and Luxembourg.

251. As for Spain's argument on the territory of the REIO, the ECT actually distinguishes between two different types of territories: the territory of the Contracting Party and the territory of the REIO. When the respondent is a Member State, its territory shall be the relevant one, and if the claim was filed against the REIO, the relevant territory would be the REIO's. Had the signatory parties to the ECT wanted to exclude internal claims between member States of a REIO, said exception would have been expressly set forth.[162]

252. Regarding the Respondent's claim[163] and the brief by the European Commission[164] on the existence of an implicit disconnection clause in the ECT between the EU Member States according to which said treaty would not be applicable to intra-EU relationships, the Claimants contend that the fact is that the ECT contains no explicit disconnection clause, even when the signatory States were aware of such a mechanism and in fact applied it with regard to less relevant issues.[165]

253. Nor are the EC's assertions relevant regarding the definition of REIO under Article 1(3) of the ECT, mentioning that the Member States of said REIO have transferred competence over certain matters, including the authority to "*take decisions binding on them*".[166] This is only a generic description of a REIO, without defining the competences that have been transferred or which decisions of the REIO are binding. Therefore, the conclusions drawn by the EC are unfounded.[167]

162 Response, paras. 313-314.
163 Rejoinder, para. 436.
164 *Amicus curiae* brief, para. 13.
165 PHB1 Claimants, paras. 52-54, citing Annex 2 of the Final Act of the European Energy Charter Conference with respect to the Svalbard Treaty.
166 *Amicus curiae* brief, para. 9.
167 PHB1 Claimants, paras. 55-57.

254. The Claimants also contend that the text of "*Transparency Document; Policies, Practices and Conditions of Contracting Parties,*"[168] cited by the EC,[169] does not in any way prevent EU Member States from initiating arbitration proceedings against another Member State under Article 26(1) of the ECT. Said document concerns claims brought against the EU under the ECT, and it even provides for the possibility of pursuing simultaneous claims against a Member State and the EU, but the EC's interpretation of it has no basis in its text.[170]

255. The Claimants also submit that the Respondent's arguments based on Article 27 of the ECT, Articles 344 and 259 TFEU, and the *Mox Plant* decision are irrelevant to the case, because this is not a dispute between States.[171] Furthermore, the Claimants argue that the Respondent's analysis of the *Mox Plant* decision is incorrect, since the CJUE did in fact take into consideration that it was a dispute between States, and it did not establish that international agreements concluded both by Member States and the EU are part of EU law, but that in that specific case, the issues governed by the United Nations Convention on the Law of the Sea were highly regulated by Community acts, and therefore part of the Community legal system.[172]

256. The Claimants assert that no arbitration tribunal or EU tribunal has established that EU law prevents arbitration tribunals from affirming jurisdiction over a dispute between an investor of a Member State and another Member State.[173]

257. With regard to the instruments formulated by the EC and invoked by the Respondent,[174] none of them fulfil the requirements of Article 31(2)(b) of the VCLT, since they were not made "*in connection with the conclusion of the treaty*", nor "*accepted by the other* [Contracting Parties

168 Document included in the Annex ID of the ECT.
169 *Amicus EC*, para. 22.
170 PHB1 Claimants, para. 60.
171 Response, para. 315; PHB1, paras. 64 *et seq.*
172 PHB1 Claimants, paras. 74-77.
173 PHB1 Claimants, para. 70.
174 Rejoinder, paras. 481 and 485.

of the ECT] *as an instrument related to the treaty*." In any case, said documents make no reference whatsoever to intra-EU disputes.[175]

258. Regarding the subsequent actions which, according to the Respondent, would support its position,[176] the Claimants submit that they cannot be considered as "*subsequent practice*" in the sense of Article 31(3)(b) of the VCLT. Articles 1(7) and 26 of the ECT cannot be interpreted in the light of such actions because they do not concern their application. Nor can they evidence the parties' consent, since they stem from EU bodies and not from the States parties to the ECT. They also lack the frequency and consistency necessary to be considered common, coherent and consistent practice.[177] Moreover, recital 5 of Regulation (EU) 1219/2012 acknowledges that "*bilateral investment agreements remain binding on the Member States under public international law and will be progressively replaced by agreements of the Union relating to the same subject matter*."[178]

259. The position of the European Commission in previous cases is not as relevant as the Respondent affirms, since the EC is not a party to the ECT but a body that has intervened in arbitration proceedings to defend its own interests. Furthermore, arbitration tribunals have consistently rejected the CE's arguments invoked by the Respondent in support of its position.[179]

260. The Claimants contest that the Arbitration Tribunal must "*make a significant effort to ensure systemic integration*" of EU law with Article 26 of the ECT or "*contribute to the harmonious development*

175 PHB1 Claimants, paras. 86-89.

176 Counter-Memorial, para. 268. Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party; Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

177 Response, para. 322, referring to the criteria established by the WTO Appellate Body in its report on "Japan - Taxes on Alcoholic Beverages" (CL-88, p. 16).

178 Response, para. 323.

179 Response, paras. 324-325, citing the decisions in *Eureko v. Slovakia* and *Electrabel v. Hungary*.

of international law," as sought by Spain.[180] The Claimants also assert that the Respondent has not proved that there is any actual risk of decisions inconsistent with EU law in this case.[181]

261. As for Spain's invocation of supplementary means of interpretation pursuant to Article 32 of the VCLT, the Claimants submit that said Article is not applicable because the meaning of Article 26 of the ECT is not ambiguous or obscure, nor does it lead to a result which is manifestly absurd or unreasonable, and the Respondent has not, in any way whatsoever, proved it to be so, either.[182] In any case, the arguments invoked with regard to the circumstances of the conclusion of the ECT[183] and the *travaux préparatoires*[184] cannot support Spain's position.[185]

262. Regarding the fact that the seat of the arbitration is Madrid, and that issues of public order cannot be subject to arbitration under Spanish arbitration law, the Claimants point out that their claims do not concern issues of public order of EU law, but, rather, the breach of obligations under the ECT.[186]

4. <u>The Claimants are investors from another ECT Contracting Party</u>

263. The Claimants submit that Charanne and Construction are companies validly established under the laws of the Netherlands and Luxembourg, which is the only requirement that the Tribunal must take into account to determine whether the Claimants are investors of another Contracting Party pursuant to Article 1(7) of the ECT.[187] The Respondent's objection would add a new requirement not set forth by the Contracting Parties to the ECT.[188]

180 Rejoinder, paras. 490 and 496.
181 PHB1 Claimants, paras. 95-97.
182 PHB1 Claimants, paras. 100-104.
183 Rejoinder, para. 506.
184 Rejoinder, paras. 511-522.
185 PHB1 Claimants, paras. 105 *et seq*.
186 Response, para. 327.
187 Response, para. 330.
188 Response, para. 333; PHB1 Claimants, paras. 120 *et seq*.

264. According to the Claimants, the arbitration tribunals that have applied Article 1(7) of the ECT support their interpretation thereof.[189] The Arbitration Tribunal should also take into account the awards that have applied investment treaties with similar provisions to Article 1(7) of the ECT, which constitute a single, sustained line of interpretation, contrary to the objection raised by Spain.[190]

265. In this regard, the Respondent relies on ICSID cases concerning the requirements of Article 25(2)(b) of the ICSID Convention, which involve entirely different criteria than those enshrined in Article 1(7) of the ECT, and are therefore irrelevant.[191]

266. As for the Respondent's request to pierce the corporate veil of the Claimants, the latter contend that it is an exceptional measure against the principle of recognition of the independent existence of companies and their shareholders. Hence, it requires certain conditions such as abuse or fraud, which do not exist in the present case, nor have they even been claimed or evidenced by the Respondent.[192]

267. Finally, the Claimants argue that the present arbitration proceeding does not imply a discrimination of Spanish citizens that is contrary to the Spanish Constitution. On the one hand, the Claimants do not have Spanish nationality, but, rather, are companies validly established

189 Response, paras. 334 *et seq.*, citing *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24 ("***Plama v. Bulgaria-Jurisdiction***") (CL-59); *Yukos Universal Limited v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Partial Award on Jurisdiction and Admissibility, 30 November 2009 ("***Yukos v. Russia***") (CL-58a), paras. 406-407; *Veteran Petroleum Limited v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Partial Award on Jurisdiction and Admissibility, 30 November 2009 ("***Veteran Petroleum v.. Russia***") (CL-58b), paras. 406-407; *Hulley Enterprises Limited v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Partial Award on Jurisdiction and Admissibility, 30 November 2009 ("***Hulley***") (CL-58c), paras. 406-407.

190 Response, paras. 347 *et seq.*, citing *KT Asia Investment Group BV v. Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 ("***KT ASIA Investment v. Kazakhstan***"), paras. 113 *et seq.*; *Tokios Tokelés*, para. 18; *Rompetrol*, para. 99; *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, PCA ("***Saluka v. Czech Republic***") (CL-44), para. 241.

191 PHB1 Claimants, paras. 127-129; PHB2 Claimants, paras. 149-151, referring to the decisions in cases *Tokios Tokeles* and *TSA v. Argentina* cited by the Respondent.

192 Response, paras. 337-341.

in the Netherlands and Luxembourg.[193] On the other, in any case, a hypothetical discrimination between investors due to access to arbitration, regarding an investment protection treaty, by some of them and not by others could lead to extending such rights to the disadvantaged investors, but in no case could it lead to a limitation of the Claimants' rights regarding arbitration or to the State being exempted from its international obligations.[194]

VII. POSITION OF THE PARTIES ON THE MERITS

A. The Claimants

268. The Claimants submit that (**1**) the modifications introduced by the Spanish Government have retroactively affected the legal and economic regime provided in the previous regulations on which the Claimants based their investment, (**2**) thus incurring in several violations of the ECT, which (**3**) have caused damage to the Claimants that must be compensated.

1. Regulatory changes

269. The Claimants refer to the following changes implemented through RD 1565/2010 and RDL 14/2010:

a) Limitation on the period for enjoyment of regulated tariffs

270. Article 1.10 of RD 1565/2010 eliminated the second tranche of regulated tariffs for facilities under RD 661/2007, that is, those applicable after the first 25 years of operation. Although the limit for enjoyment of the regulated tariffs of the first tranche was later extended to the first 30 years by Act 2/2011, the provision in Article 1.10 of RD 1565 eliminated the possibility of obtaining the regulated tariffs from then onwards.[195]

193 Response, para. 359.
194 Response, para. 360, citing Judgment OLG Frankfurt, para. 4.
195 Memorial, paras. 188-191.

271. According to the Claimants, solar photovoltaic facilities do not have a limited lifespan, provided that adequate technical maintenance is carried out,[196] without breaching Article 4.3 of RD 661/2007.[197] In any event, the regulations in force at the time did not limit the lifespan of the facilities to a certain number of years. [198]

272. The Claimants also contest the Respondent's assertion that, for facilities under RD 1578/2008, the extension to 30 years of the period entitled to a regulated tariff would compensate for the hour limitations established by RDL 14/2010,[199] since said extension would only apply to facilities under RD 661/2007, but not to those under RD 1578/2008.[200]

b) The imposition of a limit of equivalent hours of production

273. Additional Provision One of RDL 4/2010 established a limit of reference equivalent hours in which the facilities under the regimes provided in RD 661/2007 and RD 1578/2008 could enjoy the regulated tariff. Beyond that limit, electricity production could no longer benefit from the regulated tariff price.

274. The Claimants argue that said limitation was not based on the existing regulatory framework, which did not provide for any difference in treatment or for any hour limitation by geographical areas. Regarding the PER 2005-2010 cited by the Respondent to support the existence of previous implicit limits,[201] it only refers to standard cases that in no case contained upper limits to the hours of operation.[202]

196 Memorial, para. 192.
197 Response, para. 456(a).
198 Response, para. 168, according to the Minetur at the time, during the negotiations prior to the adoption of RDL 14/2010, the Minetur proposed extending the applicability of tariffs to 35 years, see C-84.
199 Counter-Memorial, para. 814.
200 Response, para. 456(c), see Final Provision One of RDL 14/2010.
201 Rejoinder, para. 257-259; PER 2005-2010 (RL-78), p. 168, fig. 11.
202 PHB1 Claimants, para. 253.

c) The obligation to comply with technical requirements to deal with voltage sags

275. Article 1.5 of RD 1565/2010 established a new obligation to comply with technical requirements to respond to voltage sags. According to the Claimants, this new obligation entailed a significant cost for producers, without providing for any financial compensation, unlike what had been done before with respect to wind technology. In the latter case, Spain had established a compensation for investors through a specific supplement of 0.38 euro cents for compliance with those technical requirements.[203]

d) The obligation to pay a grid access fee

276. Transitional Provision One of RDL 14/2010 included a new obligation for electricity producers to pay a 0.5 €/MWh fee for accessing the transmission grid from January 2011, pending regulatory implementation of the fees to be paid by electricity producers.[204] Photovoltaic facilities had to bear the entire fee, since having a feed-in remuneration scheme prevented them from passing it on to tariffs, unlike ordinary producers.[205]

2. ECT Violations

277. According to the Claimants, through the aforementioned actions Spain (**a**) expropriated the Claimants' investment, in violation of Article 13 of the ECT, and breached (**b**) its obligation to accord fair and equitable treatment to investments pursuant to Article 10(1) of the ECT, and (**c**) its duty to provide effective means for the enforcement of the investors' rights in accordance with Article 10(12).

a) Expropriation, in violation of ECT Article 13

278. The Claimants contend that Article 1(6) of the ECT includes a broad concept of investment, and therefore the protection thereof covers the Claimants' shares in T-Solar, including not only

203 Memorial, paras. 186-187; see also Additional Provision Seven of RD 661/2007.
204 CT-1, p. 9.
205 Memorial, para. 299.

their ownership but also their economic value, as well their returns.[206]

279. The Claimants also argue that protection against expropriation under Article 13(1) of the ECT only refers to expropriations in the traditional sense of the term, but also includes measures having equivalent effect, that is, measures that do not directly concern the formal ownership of an asset but affect its potential profitability, which is impaired or suppressed by the State's action.[207]

280. The Claimants submit that the measures adopted by Spain have deprived them of the economic value of their shares, as well as of the facilities' returns, and therefore these measures have equivalent effect to nationalization or expropriation, which are contrary to Article 13(1) of the ECT.[208]

281. The Claimants reject the Respondent's arguments that the expectation of future returns cannot be considered a right,[209] and assert that under Spanish law the returns from an interest in a company are essential rights of the shareholders, with an economic content that is well defined and integrated into the Claimants' assets.[210]

282. And although the Claimants find irrelevant the alleged requirement to consider them "vested" rights, which are not contained in the ECT,[211] they also argue that the facilities which complied with the registration requirements in the RAIPRE and the RPR had indeed acquired the right to enjoy the remuneration established in RD 661/2007 and RD 1578/2008.[212]

283. The severity of the impact resulting from the measures is a key element to determine the existence of an expropriation, with the investor having to be deprived

206 Memorial, para. 253. Response, para. 442 *et seq*.

207 Memorial, para. 256; Response, para. 457 *et seq*., citing *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 ("***Tecmed v. Mexico***") (RL-64); *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010 ("***Kardassopoulos v. Georgia***") (CL-113).

208 Memorial, paras. 260-271; Response, para. 437 *et seq.*; PHB1 Claimants, para. 327.

209 Counter-Memorial, paras. 445-446.

210 Response, para. 451.

211 PHB2 Claimants, paras. 295-297.

212 Response, para. 470-472.

of a significant part of the enjoyment or economic benefit of the investment.[213] The Claimants contend that arbitration case law does not require the total destruction of the investment, but that a significant or substantial interference would be enough.[214]

284. According to the Claimants, the measures adopted by RD 1565/2010 and RDL 14/2010 have caused a brutal economic impact on the profitability of T-Solar's activities, and constitute an expropriation of a substantial part of the value and returns of the Claimants' investment.[215] Spain's legislative amendments have reduced the profitability of the plants under RD/1578 by 10% (from 9.41% to 8.48%) and that of the plants under RD 661/2007 by 8.5% (from 7.36% to 6.72%), a loss which is considered serious in business circles.[216]

285. Furthermore, the Claimants argue that such measures do not serve a legitimate public purpose, that they are discriminatory, that in the case of RDL 14/2010 they were adopted without observing due process, and that they have not been accompanied by the payment of prompt, adequate and effective compensation.[217]

213 Memorial, para. 258, citing the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007 ("***Vivendi v. Argentina II*** ") (CL-31), para. 7.5.17.

214 Response, para. 461 *et seq*., citing MacLachlan, Shore and Weiniger, "*International Investment Arbitration: Substantial Principles*," Oxford International Arbitration (2008), para. 8.86, and decisions in *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 ("***Metalclad v. Mexico***") (CL-30); *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 ("***Marvin Feldman v. Mexico***") (RL-62); *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (***"CMS v. Argentina***") (RL-77), para. 262; *Middle East Cement Shipping & Handling Co. S.A. v. The Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 ("***Middle East v. Egypt"***); *SD Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 ("***SD Myers v. Canada***") (RL-54).

215 Memorial, paras. 263-265; Deloitte Report I, p. 61; Response, para. 453, 467 *et seq.*

216 PHB1 Claimant, para. 359. Although the variation in returns in absolute terms is 0.93% and 0.64% respectively, in terms of relative value Spain's measures would have entailed a 10% variation in returns for the plants under RD 1578/2008 and 8.5% for the plants under RD 661/2007, PHB2 Claimants, para. 308.

217 Response, para. 439.

286. In this regard, the Claimants assert that it is not necessary to prove the bad faith of the State, but that the essential element is the impact on the investment.[218]

287. The Claimants reject that the adaptations were justified to correct the tariff deficit caused by electricity producers under the special regime.[219] The deficit already existed long before that, and in reality the Spanish Government is responsible for this, because for economic, social or electoral policy reasons it had not taken the necessary measures to apply the principle of tariff sufficiency, and now intends to apply a principle of "economic and financial sustainability or stability."[220] The measures adopted by the Government are hasty and improvised, and they have caused serious instability.[221]

288. Moreover, the tariff deficit cannot justify Spain's violation of the ECT in failing to provide prompt, adequate and effective compensation following the expropriations, since the ECT does not contain any provision on "state of necessity" and, in any case, the Respondent has not alleged this defence.[222]

289. The Claimants contend that wealth transfer is one of the most visible elements in order to identify an expropriation, and in the present case said transfer of wealth occurred when the Spanish Government financed the electricity tariff deficit through coercive measures against the Claimants and the other photovoltaic producers.[223]

290. The Claimants add that the Respondent's actions are permanent, since it is not foreseen that Spain will correct its

218 Response, paras. 485 e*t seq.* citing *Ebrahimi Shahin Shaine v. The Islamic Republic of Iran* (1994) 30, Iran-US CTR, Award, 10 October 1994, paras. 170, 190 (CL-115); *Harold Birnbaum v. The Islamic Republic of Iran*, (1993) 29 Iran-US CTR, Award, paras. 260-270; *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran*, (1989) 21 Iran-US CTR, 79, Award, 29 June 1989 (CL-116), para. 115.

219 Response, paras. 475-476, referring to the Respondent's allegations in the Counter-Memorial, para. 478.

220 Response, paras. 476 *et seq.*

221 Response, paras. 478 *et seq.*, citing the 2010 Report of the Council of State (C-85), pp. 177-191.

222 Response, para. 480.

223 Memorial, paras. 267-268.

measures, so the Claimants' losses must be considered definitive.[224]

b) Violation of the fair and equitable treatment standard in violation of Article 10(1) of the ECT

291. According to the Claimants, the fair and equitable treatment standard provided in the ECT is flexible and provides the Tribunal with a wide margin of discretion to examine the fairness of acts of a State.[225]

292. Since it is a specific obligation provided in an international treaty, it is not necessary for the Tribunal to determine whether there was a violation of Spanish law to consider that the actions of Spain amounted to a breach of the obligation to provide a fair and equitable treatment.[226] Furthermore, bad faith is not a prerequisite to consider that the standard has been breached.[227]

293. The Claimants assert that the fair and equitable treatment standard requires a stable and predictable legal framework that stems from the wording of Article 10(1) ECT, which provides for the obligation to "*encourage and create stable conditions*"[228] for investors of other contracting parties to make investments. This requirement has also been recognized by several arbitration tribunals, [229] and is a precondition for the protection of investors' legitimate expectations, which has become a core element of the obligation to provide fair and equitable treatment.[230]

224 Memorial, para. 271.

225 Memorial, para. 284.

226 Memorial, para. 281.

227 Memorial, para. 258, citing *CMS v. Argentina*, para. 280; and *Enron Corporation and Ponderosa Assets L.P. v. Argentina*, ICSID Case no. ARB/01/03, Award, 22 May 2007 ("***Enron v. Argentina***") (CL-39), para. 268.

228 Memorial, para. 287.

229 Memorial, paras. 286-289, citing *Enron v. Argentina*, para. 260; *Sempra Energy International v. Argentina*, ICSID Case no. ARB/02/16, Award, 18 September 2007 ("***Sempra v. Argentina***") (CL-40), para. 300; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case no. ARB/02/5, Award, 19 January 2007 ("***PSEG v. Turkey***") (CL-41), para. 254; *LESI SpA et Asaldi SpA v. Republic of Algeria*, ICSID Case no. ARB (AF)/05/3, Award, 4 November 2008 ("***LESI c. Algeria***") (CL-42), para. 151.

230 Response, para. 513, citing *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case no. UN3467 ("***Occidental v. Ecuador***") (CL-105), para. 183; PHB1 Claimant, paras. 257 *et seq.* citing *El Paso Energy Company v. Republic of Argentina*, ICSID Case no. ARB/03/15, Final Award, 13 October 2011 ("***El Paso v. Argentina***") (RL-168), para. 348; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case no. ARB/08/6, Decision on pending matters related to Jurisdiction and on Liability, 12 September 2014 ("***Perenco v. Ecuador***") (RL-394), para. 560.

294. In particular, the Claimants contend that Spain violated the fair and equitable treatment standard, thus frustrating the Claimants' legitimate expectations by disrupting the stability of the regulatory framework under which they invested.

295. The Claimants assert that legitimate expectations are defeated when the host State changes its initial position after entering into commitments, making representations, or taking a course of action on which the investor relies when it comes to making the investment.[231] Even in the absence of specific commitments, the investor's expectations are frustrated when the host State acts contrary to economic rationality, the public interest or the rationality principle.[232]

296. According to the Claimants, there is no need for a stabilization clause in a contract to create legitimate expectations, and the precedents cited by the Respondent in this regard are irrelevant, since they refer to different circumstances and they have been cited only partially.[233] In fact, investors' legitimate expectations are mainly defined by the legal framework in force at the time of making the investments.[234]

297. The Claimants invested in Spain relying on the special regime provided in RD 661/2007 and RD 1578/2008, and particularly on

231 Memorial, para. 292; *National Grid Plc. v. Argentina,* (UNCITRAL), award of 3 November 2008 ("***National Grid***") (RL-116), paras. 175-180.

232 Memorial, para. 293, citing *Total v. Argentina,* para. 333.

233 Response, para. 510; PHB1 Claimants, 295 *et seq*., referring to *Perenco v. Ecuador*, *EDF v. Romania, Methanex v. United States of America Continental Casualty Company v. The Republic of Argentina,* ICSID Case no. ARB/03/9, Award of 5 September 2008, *El Paso v. Argentina, AES Summit Generation Limited & Andy AES-Tisza Erömu Kft. v. Republic of Hungary,* ICSID Case no. ARB/07/22, Award, 23 September 2010 ("***AES v. Hungary***") (CL-56); and references to the following authors: Michele Potestà, Rudolph Dolzer and Christoph Schreuer, and Thomas Wälde.

234 Response, paras. 506 *et seq.* citing Rudoph Dolzer and Christoph Schreuer *Principles of International Investment Law*, Oxford University Press, (2012) (CL-118), p. 124; PHB1 Claimants, para. 311 referring to the cases *Total v. Argentina, CMS v. Argentina, Enron v. Argentina, LG&E Energy Corp.* et al. *v. Republic of Argentina*, ICSID Case no. ARB(AF)/02/1, Decision on Liability, 3 October 2006 (CL-45), paras. 125 and 127; *BG Group Energy International v. The Republic of Argentina,* UNCITRAL, Final Award, 24 December 2007 (RL-104), paras. 298, 307, 310; *PSEG v. Turkey, National Grid v. Argentina, Sempra Energy v. Argentina, Tecmed v. Mexico, Occidental v. Ecuador, Lesi y Astaldi v. Algeria, Metalclad v. Mexico;* PHB2 Claimants citing *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador,* ICSID Case no. ARB/04/19, Award, 18 August 2008 ("***Duke Energy v. Ecuador***") (RL-112).

the right to receive specific regulated and updatable tariffs applicable to the full net amount of energy produced in the facility while in operation. This provided a high degree of legal certainty to the producer in estimating its remuneration.[235] Since these rules were addressed to a specific and limited number of investors who met the requirements within the set deadlines, they amounted to specific commitments entered into by Spain.[236]

298. The Claimants contend that the economic regime contained in RD 661/2007 and RD 1578/2008 was laid down precisely to attract investments in order to comply with the objectives set forth in the Renewable Energies Plan (REP) 2005-2010, offering investors a stable and predictable framework that prevented producers from having to resort to the market, guaranteeing a remuneration for all of their production during the entire lifespan of the facilities.[237]

299. The Claimants state that, in addition to legislation, the Spanish Government also promoted investments in the sector through several advertising materials. Moreover, they claim that the brochure *El Sol puede ser suyo 2005 [The Sun Can Be Yours 2005]* announced that the return on the investment in the photovoltaic sector could reach 15%, and that credit lines could be obtained through the Institute for Diversification and Saving of Energy (*Instituto para la Diversificación y ahorro de la Energía*, "**IDAE**") and from the Spanish Official Institute of Credit (*Instituto de Crédito Oficial*, "**ICO**").[238] The brochure *El sol puede ser suyo 2007* announced that there were two kinds of regulated tariffs, one of them applicable during the first 25 years of operation and the other one applicable from then onwards.[239]

300. Spain's strategy to attract investment succeeded, and the Government attained its objectives. However, after that the Spanish Government modified its objectives and decided to focus on reducing the tariff deficit, completely upsetting the economic balance provided by the regime and frustrating the investors' legitimate expectations.[240]

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235 Response, paras. 521 *et seq.*
236 PHB2 Claimants, paras. 159-160, 261.
237 Response, paras. 546-548.
238 Response, para. 542; C-86.
239 Response, para. 547; C-86.
240 Memorial, paras. 297-300; Response, paras. 554 *et seq.*

301. The Claimants deny that the only possible expectation for investors under Spanish legislation was to obtain a reasonable return as provided in Article 30.4 of the LSE, since such reasonableness was an indeterminate and empty notion, which could be defined by the Government at any given time. According to the Claimants, the notion of reasonable return was precisely the one defined in the applicable regulations.[241] Indeed, from the wording of Article 30.4, it cannot be inferred that obtaining reasonable returns on investment was an upper limit, nor that it was the only element of Spain's offer, nor that such criterion would restrict or invalidate subsequent conditions to be offered by the State.[242] Actually, the concept of reasonable return was only truly defined in RDL 9/2013.[243]

302. In the Claimants' view, it is not true that Spain's measures amounted to implicit limits for the regime. There were no grounds for considering that the average lifespan of the facilities would be fewer than 30 years, as established by RD 1565/2010. Conversely, according to the report by Deloitte, the average lifespan of the plants ranges between 35 and 50 years,[244] nor were the limits established by RDL 14/2010 on the number of equivalent hours of operation entitled to the tariffs included in the PER 2005-2010, which referred only to standard reference cases and not to upper limits.[245]

303. The Claimants contend that the entitlement to a regulated tariff was not simply an expectation, but a right vested in the owner's assets upon fulfilment of all requirements provided in the legislation and as soon as the facility obtained final registration with the RAIPRE.[246]

304. According to the Claimants, the tariff deficit and the complicated economic situation Spain was undergoing—in addition to being problems created by the Spanish Government itself—did not release the Spanish Government from compliance with the ECT nor from compensating for the damage caused.[247]

241 Response, paras. 528-530, referring to *CMS v. Argentina*, para. 137.
242 PHB1 Claimants, paras. 186 *et seq*.
243 PHB1 Claimants, paras. 197-199.
244 PHB2 Claimants, para. 165 citing CT-1, p. 49-50.
245 PHB2 Claimants, para. 166.
246 Response, paras. 524-526.
247 Response, paras. 479-483.

305. The Claimants consider that they acted with due diligence, and prior to making the investment they sought counsel regarding both technical and economic aspects,[248] as well as legal matters. [249] However, there was no way to foresee Spain's later actions.

306. Regarding the Supreme Court Rulings mentioned by the Respondent,[250] the Claimants allege that only eight of them were handed down prior to their investment, and thus only those eight could have been considered. Notwithstanding, those judgments are irrelevant, inapplicable, or out of context.[251]

307. The Claimants also argue that the provisions enacted by Spain are retroactive in nature. Contrary to the Respondent's claims,[252] the facilities did have a vested right to the tariff provided in RD 661/2007 and RD 1578/2008. In this connection, the Claimants contend that the Supreme Court's interpretation is irrelevant, as the Arbitration Tribunal shall determine whether those provisions are retroactive based on international law, and not on Spanish law.[253]

d) Violation of the duty to provide effective means for the assertion of claims and the exercise of rights with respect to investments, contrary to Article 10(12) ECT

308. The Claimants consider that the obligation enshrined in Article 10(12) ECT is not a mere reformulation of the prohibition of denial of justice, but rather that it entails a different and less stringent test than the latter.[254] Article 10(12) ECT requires States not only to make remedies available to investors so they can enforce their rights, but also that such remedies are useful or effective.[255]

248 Response, paras. 573-574; C-261 to C-290.
249 Response, para. 575.
250 Counter-Memorial, paras. 638 *et seq.*
251 Response, paras. 588 *et seq.*; 243 PHB1 Claimants, paras. 205-225.
252 Counter-Memorial, para. 736.
253 Response, paras. 617-618.
254 Memorial, para. 304, citing *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, UNCITRAL, Partial Award on the Merits, 30 March 2010 **("*Chevron v. Ecuador*")** (**CL**-47), paras. 241 *et seq.*
255 Response, paras. 656-657.

309. According to the Claimants, Spain breached Article 10(2) ECT when using a Royal Decree-Law (an exceptional instrument) to introduce time restrictions on the right to obtain regulated tariffs pursuant to RD 661/2007.[256]

310. The use of a Royal Decree-Law ("**RDL**"), RDL 14/2010, was not justified by a situation of extraordinary and urgent need, as is required. The alleged tariff deficit situation started well before the measure was implemented, and the content of RDL 14/2010 is very similar to that of RD 1614/2010, enacted a few days earlier, for which the Royal Decree instrument was preferred because, as opposed to what happened within the photovoltaic sector, the Government had reached a consensus agreement with the wind, CSP, and co-generation producers affected by RD 1614/2010.[257]

311. The Claimants argue that the true intention of the Respondent when using this legal instrument was to bypass the public consultation stage, which is mandatory within the drafting process of regulations, and preventing the Claimants from accessing the courts to challenge these measures.[258] In this regard, the Claimants reject the Respondent's arguments. The Respondent claimed that Royal Decrees-Law also allow for effective legal remedies, whereas the Claimants consider that the numerous restrictions inherent to such remedies do not allow for a full judicial review of RDLs, as opposed to the comprehensive judicial review enabled upon the filing of a judicial administrative appeal. Therefore, the available remedies to challenge RDLs do not comply with the fundamental right to an effective legal remedy enshrined in the Spanish Constitution and in Article 10(12) ECT.[259]

312. The Claimants cannot directly contest before the courts a rule having the force of law. Rather, they must wait until the administrative acts applying such provision are issued. It must be taken into account that the approval of the final settlement for financial year 2010 was delayed until September 2014, and it is unknown when the settlements

256 Response, para. 626.
257 PHB1 Claimants, paras. 377 *et seq*.
258 Memorial, paras. 202 *et seq*.; PHB1 Claimants, para. 378.
259 Response, paras. 635 *et seq*.; PHB1 Claimants, paras. 383-399.

for fiscal years 2011, 2012 and 2013 (relevant to this arbitration) will be issued.[260]

3. **Damages**

313. The Claimants consider they have suffered damage as a result of the following violations by Spain: (**a**) breach of Article 13 ECT, (**b**) breach of Article 10(1) and (**c**) violation of Article 10(12) ECT. The Claimants also contend: (**d**) that the methodology proposed is correct, and (**e**) that the Respondent cannot take advantage of the legal uncertainty created thereby to avoid compensating investors. Finally, the Claimants contend that (**f**) RDL 9/2013 does not affect their valuation of damage and (**g**) they also claim for interest on damage caused.

a) Damages for violation of Article 13: Expropriation

314. Regarding expropriation, the Claimants contend that based on Article 13(1) ECT, Spain must pay a prompt, appropriate and effective compensation to them, amounting to "*the fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment.*"[261]

315. Therefore, the Respondent must pay compensation to the Claimants amounting to the investment's fair market value just before the publication in the Spanish Official State Gazette (BOE) of RD 1565/2010 and of RDL 14/2010, i.e. on 24 December 2010.[262]

316. The calculation of the fair market value amounts to the existing difference between the value of expected cash flows of the Claimants' shares in T-Solar based on RD 661/2007 and RD 1578/2008 (counterfactual scenario) and the current value of cash flows from those shares (real scenario).

260 PHB2 Claimants, para. 324.
261 Memorial, para. 276.
262 Response, para. 671.

317. According to the Claimants, the fair market value of the expropriated investment would amount to €8,118,000 for Charanne and €1,236,000 for Construction, net of taxes.[263]

b) Damages for violation of Article 10(1) ECT: Fair and equitable treatment

318. The Claimants argue that, in the absence of a specific compensation standard applicable to breaches of Article 10(1) ECT, the principle of full compensation in international law shall apply. Accordingly, the compensation must remove all consequences of the wrongful act whilst restoring the damaged party to the condition which would have existed if the damage had not occurred.[264]

319. The Claimants consider that the enactment of RD 1565/2010 and RDL 14/2010 have given rise to a decrease in the cash flows of T-Solar and its subsidiaries, as well as a loss of value of the Claimants' shares in those companies.[265]

320. As in the expropriation, the Claimants estimate the amount of damage suffered as the difference between the value of the expected cash flows from the Claimants' shares in T-Solar (counterfactual scenario) under the regime provided by RD 661/2007 and RD 1578/2008, and the current value of cash flows after the approval of the currently applicable regime (real scenario).[266]

321. The Claimants add that the obligation to restore all the consequences of the wrongful act and to restore them to the condition which would have existed if the damage had not occurred would also amount to €8,118,000 for Charanne and to €1,236,000 for Construction, net of taxes.[267]

c) Damages for violation of Article 10(12) ECT: Effective means for the exercise of rights

322. In the view of the Claimants, the act that breached Article 10(12) ECT, preventing their access to effective remedies, was RDL

263 CT-1, p. 8, paras. 67-68.
264 Memorial, paras. 332-336; Response, para. 676.
265 Response, paras. 678-679.
266 Response, para. 680.
267 Response, para. 667; CT-1, p. 8, paras. 67-68.

14/2010, and thus Spain must pay compensation to the Claimants for the damage caused by RDL 14/2010. According to the Claimants' expert, damage was estimated at €7,333,000 for Charanne and €1,117,000 for Construction.[268]

d) The approach of the Claimants' expert is correct

323. The Claimants contend that the Respondent is wrong when it argues that when damages were estimated the "reasonable rate of return" was not taken into consideration, which would amount to the minimum threshold below which investors could claim damages.[269]

324. The Claimants added that the notion of "reasonable rate of return" had not been defined within the applicable legal framework, under which the return on projects would be determined by the characteristics thereof, without there being a rule setting a specific rate or percentage for the return on projects.[270]

325. The Claimants assert that the valuation of damage must therefore be performed on the basis of the loss of economic value of the investment, and the cash flow method used by Deloitte's expert is the most appropriate way to do this.[271]

326. Although the discussion on the internal rate of return (IRR) may be irrelevant, Deloitte concluded that the IRRs of the Claimants' projects were reasonable. Deloitte added that as a result of the regulatory changes, all of the IRRs of the projects have decreased, without exception.[272]

327. As regards the Respondent's criticism of the use of exaggerated values in the CAPEX and OPEX cost estimates, performed by Deloitte, in estimating the impact of the new legislation, the Claimants reject this allegation, pointing out that even if the figures on costs were wrong, that would be irrelevant for the result, since the same costs are applied to both scenarios (real and counterfactual), and thus the so-called error would have no impact whatsoever.[273]

268 Response, paras. 682-683; CT-1, p. 9.
269 Response, paras. 648 *et seq*. referring to the Counter-Memorial, para. 803.
270 Response, paras. 686, 690.
271 Response, paras. 688-689.
272 Response, paras. 691-693; CT-2, p. 6.
273 PHB2 Claimants, paras. 365-369.

e) Spain cannot benefit from the uncertainty generated by its own acts to limit compensation

328. The Claimants deem inadmissible the Respondent's argument according to which the uncertainty of the future market value of electricity prices makes it impossible to accurately estimate the damages due to the Claimants, and that, thus, such valuation must be disregarded. The Claimants oppose this argument because the Respondent would not be held liable for its violations of the ECT or for disrupting regulatory stability.[274]

329. The Claimants contend that their assessment is based on the predictions that a hypothetical purchaser and a hypothetical seller would make to determine the market value of T-Solar's shares. They add that the risk of abnormal market behaviour that could distort these predictions must be borne by the breaching State.[275]

f) RDL 9/2013 has no impact on the damage incurred by the Claimants

330. Although RDL 9/2013 repealed in full the previous regime provided in RD 661/2007 and in RD 1578/2008, and although said RDL is not the subject matter of this arbitration, the Claimants state the following: the new legislation has not repaired the damage caused by the 2010 provisions. In fact, it has made the situation even worse. Thus, RDL 9/2013 has had no impact on the Claimants' valuation of damage, as said damage was subsequently worsened in any case.[276]

331. Concerning expropriation, Article 13(1) ECT provides that the valuation must be performed "*immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment*." The expropriation was carried out in late 2010. Therefore, RDL 9/2013, approved in July 2013, does not affect the above-mentioned valuation in any way.[277]

274 Response, para. 695.
275 Response, para. 698.
276 PHB1 Claimants, paras. 416-422.
277 PHB1 Claimants, paras. 426-428.

332. As to the violation of the fair and equitable treatment standard, Article 10(1) ECT does not provide for any specific valuation date. However, in accordance with general principles of international law and with the Respondent's stance, this valuation must be done on the date of the award.[278]

333. With regard to the damage suffered by the Claimants from the entry into force of the applicable legislation until July 14, 2013 (entry into force of RDL 9/2013) (historical damage), the Claimants contend that such damage amounts to €5,311,494 for Charanne, and to €807,676 for Construction, adding up to a total of €6,119,169.[279]

334. Finally, the Claimants insist that there is no risk of double recovery, since in the present arbitration only the impact of RD 1565/2010 and RDL 14/2010 is claimed, whereas in the other ongoing arbitration there is no claim regarding these regulations. Furthermore, the Respondent has not proved the how or why of the alleged absorption of the former rules by the current regulatory framework.[280]

g) Interest

335. The Claimants claim interest on damages, on the grounds that Spain's violations of the ECT have prevented the Claimants from investing the amounts of which they have been deprived. Such interest must be calculated from the date of entry into force of the disputed measures until the date on which Spain pays the amount ordered in a potential award to the Claimants .[281]

336. The Claimants consider that they could have obtained a 7.398% return, which is equivalent to the reasonable rate of return currently guaranteed by Spain in RD 413/2014 of 6 June.[282]

278 PHB1 Claimants, paras. 429-432, referring to the *Chorzow Factory* case and to the scholarly article by Manuel A. Abdala and Pablo T. Spiller, "Chorzow's Standard Rejuvenated - Assessing Damages in Investment Treaty Arbitrations", *Journal of International Arbitration* (Kluwer Law International 2008), Vol. 25, issue 1, p. 119.

279 PHB1 Claimants, paras. 448-452.

280 PHB2 Claimants, paras. 374-375.

281 PHB2 Claimants, paras. 377-378.

282 PHB2 Claimants, para. 379.

B. The Respondent

337. The Respondent argues that the regulatory adaptations made by the Spanish Government through RD 1565/2010 and RDL 14/2010, are reasonable adaptions. According to the Respondent, these adaptations were made for the benefit of the public interest, in a non-discriminatory manner, in accordance with the interest to be protected, and in compliance with due process.[283]

338. Accordingly, the Respondents consider that Spain (**1**) did not expropriate the Claimants' investment, (**2**) did not breach the obligation to provide fair and equitable treatment, and (**3**) did not violate its duty to provide investors with effective means for the enforcement of their rights. Therefore, (**4**) the Respondent holds that no damage has been caused to the Claimants.

1. The Respondent did not expropriate the Claimants' investments

339. In the view of the Respondent, what the Claimants are actually arguing is that Spain had expropriated their "*right to perceive a regulated tariff during the entire lifespan of the facility*."[284] However, this alleged right cannot equal an investment protected under Article 1(6) ECT, since this provision defines "investment" as an asset "*owned or controlled directly or indirectly by an investor*." Under Spanish law, the Claimants cannot control or own the future returns that they expected to obtain, since such returns amount to a mere expectation, but not to a vested right included in their assets.[285]

340. In this regard, the Respondent claims that a difference must be established between legal provisions that grant mere rights and so-called "vested rights," which entail a specific acquisition title.[286] Spanish law, which is applicable in order to determine which rights can be subject to expropriation, [287] provides that the right to a tariff

283 Counter-Memorial, paras. 78-79.
284 Counter-Memorial, para. 445.
285 Counter-Memorial, paras. 446 *et seq.*; Rejoinder, paras. 600 et seq.
286 Rejoinder, paras. 602 et seq.
287 Counter-Memorial, para. 448, citing *Suez, Sociedad General de Aguas de Barcelona SA, and Inter Aguas Servicios Integrales del Agua SA v. The Republic of Argentina*("**Suez v. Argentina**"), ICSID Case no.ARB/03/17, Decision on Liability, 30 July 2010 (RL-137), the

in accordance with the regime established in a regulation is not a vested right. Thus, the modification thereof is perfectly lawful and there is no need to compensate the parties involved.[288]

341. Specifically, the Respondent claims that registration with the RAIPRE is simply an administrative requirement for operating and selling energy. Such registration does not entail an infinite right to perceive a given remuneration for the registered facilities.[289]

342. Based on various arbitration tribunal decisions,[290] the Respondent adds that the adaptations implemented by Spain are the expression of the State's sovereign power to regulate, and they do not amount to measures equivalent to an expropriation, since they fall within the normal exercise of State powers. The above-mentioned measures were not discriminatory, they were adopted in good faith, in compliance with due process requirements, and proportionately with the purpose of protecting public interests by preventing the collapse of the Spanish electricity system.[291] In this connection, the Respondent asserts that when the Claimants cite the *Santa Elena* award[292] they refer to an old interpretation, according to which only the economic effects must be considered. However, this approach is outdated, and the currently applicable interpretation advocates considering the nature, purpose, and character of the relevant measure.[293]

343. Nor do the regulatory adaptations comply with the requirements to determine whether the effects of a given measure are equivalent to an expropriation provided in various arbitral decisions:

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report *UNCTAD Series on Issues in International Investment Agreements, Expropriation,* 2012, (RL-125), p. 22; *EnCana Corporation v. The Republic of Ecuador,* LCIA Case no. UN3481, UNCITRAL, Final Award, February 3, 2006 ("***EnCana v. Ecuador***") (RL-81), para. 184.

288 Counter-Memorial, paras. 447, 451-452; Rejoinder, para. 628.

289 Rejoinder, para. 633(e).

290 *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB (AF)/02/1, Award, 17 July 2006, ("***Fireman's Fund v. Mexico***") (RL-87), para. 176; C*ME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial award, 13 September 2001 ("***CME v. The Czech Republic***") (RL-59), para. 603; *Saluka v. The Czech Republic*, paras. 255-265; *El Paso v. Argentina*, paras. 236-241; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005 ("***Methanex v. USA***") Part IV, chapter D, p. 7, para. 15.

291 Counter-Memorial, paras. 467-475; Rejoinder, paras. 671 *et seq*.; RL-215

292 Response, para. 481, citing *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (CL-114), para. 72.

Rejoinder, paras. 674 et seq.; RL-75, p. 15-16, 22.

substantial deprivation of the economic use and enjoyment of the investment, permanent or irreversible nature of the measure, and substantial economic damage.[294] The adaptations did not entail the cessation of operations, nor the takeover of T-Solar's shares or management, nor the obliteration of their value forever. In addition, they were made in the benefit of society, and they did not entail any transfer of profit or assets to the Spanish Government or to a private entity.[295]

344. Even if it were accepted that the measures actually had an impact on the investment and that the damage alleged by the Claimants is real, it is not significant enough to conclude that the measures were equivalent to an expropriation.[296]

345. Regarding the claim that merely partial interferences could amount to an expropriation, the Respondent asserts that there is neither case law nor scholarly literature supporting such claim. Additionally, in any event, the precedents on which it grounds this claim do not help the Claimants' stance.[297]

346. Finally, the Respondent claims that it is wrong to examine the potential impact on investors' expectations from the perspective of an alleged expropriation, and it contends that such analysis must be performed on the basis of the fair and equitable treatment standard.[298]

2. Nor did the Respondent violate the standard of fair and equitable treatment under Article 10(1) ECT

347. After (**a**) establishing its stance on the applicable fair and equitable treatment standard, the Respondent (**b**) contends that the measures adopted by Spain were reasonable and foreseeable, and claims that (**c**) they did not defeat the Claimants' legitimate expectations, nor (**d**) were they retroactive.

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294 Counter-Memorial, paras. 491 *et seq*.; Rejoinder, paras. 651 et seq., citing *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ("***Plama v. Bulgaria - Award***") and *Perenco v. Ecuador*, paras. 672, 685, 687.

295 Counter-Memorial, paras. 511 *et seq.*

296 Counter-Memorial, paras. 536-539; Rejoinder, para. 659.

297 Rejoinder, paras. 647-648, referring to decisions *Middle East v. Egypt* and *SD Myers v. Canada.*

298 Rejoinder, paras. 617-618.

a) The applicable standard

348. The Respondent opposes the Claimants' interpretation regarding the fair and equitable treatment standard, since it considers that this interpretation portrays an overreaching trend that could lead to imposing unrealistic conditions on the States.[299] Instead, the Respondent proposes striking a balance between the State's legitimate interest to regulate its own legal system and the interests of foreign investors with respect to their investment.[300]

349. The Respondent claims that the fair and equitable treatment standard entails reasonableness, and that it must be assessed in the context of this element. Additionally, although the standard comprises the assessment of the investor's legitimate and reasonable expectations at the time of the investment,[301] that is not all there is to this standard. In fact, this element is not even mentioned in Article 10(1) ECT.[302] We must seek a balanced approach between the investor's reasonable expectations and the State's exercise of regulatory powers, among others.[303]

b)The measures adopted by the Kingdom of Spain were reasonable and foreseeable

350. The Respondent makes the following remarks on the amendments to RD 1565/2010 and RD-L 14/2010, which are the subject of the claims submitted by the Claimants.

351. The 30-year limitation of the right to a regulated tariff matches the plant's average lifespan,[304] since in order for it to last longer, "substantial modifications" of the facility would have to be performed. Pursuant to the applicable legislation, this would make the Claimants lose their benefits under RD 661/2007 and RD 1578/2008.[305] Additionally, and for that same reason, contracts for the use of the land on which the

299 Counter-Memorial, para. 555.
300 Counter-Memorial, para. 557.
301 Counter-Memorial, para. 559, citing *El Paso v.* Argentina, paras. 339 and 375.
302 Rejoinder, paras. 701-704.
303 Rejoinder, paras. 706-709, citing *Perenco v. Ecuador*, paras. 558-560.
304 Rejoinder, paras. 315(2) *et seq*.; Report G&A, p. 172-182; RL-385, p. 26.
305 Article 4 of RD 661/2007.

Claimants' plants are located also have terms that do not exceed 30 years.[306] Thus, the 30-year limit to benefit from the regulated tariff actually has no consequences in practice.[307]

352. The requirement to be able to cover voltage sags is a clear, consistent, and reasonable rule, since it is aimed at avoiding a technical collapse of the system, thus enhancing the safety and management thereof.[308]

353. As to the limits on the number of equivalent hours of operation laid down by RDL 14/2010, such limits were based on the production predictions made in the PER 2005-2010.[309] These predictions were taken into account by RD 661/2007 and 1578/2008 in order to calculate the plants' remuneration. Thus, they are neither surprising nor unreasonable.[310] In this regard, the Respondent also claims that RD 661/2007 already provided the sun exposure geographic distribution chart.[311]

354. Finally, requiring payment of a €0.50 access tariff for the use of the distribution or transport grid was not created by Spain, but rather it was authorized by EU Regulation 774, of 2 September 2010.[312]

c) Regarding the Claimants' alleged legitimate expectations

355. The Respondent claims that, although the fair and equitable treatment standard provides that investments must be given a stable legal framework, this does not imply that the legal framework must be frozen or petrified, since the duty to provide fair and equitable treatment does not amount to a stabilization clause, and thus States can continue to legislate to address

306 CT-1, p. 50.
307 Between 25 and 30 years. Counter-Memorial, para. 590(b)(ii).
308 Counter-Memorial, para. 590(b)(v); RL-262.
309 REP 2005-2010, p. 168 (R.-78).
310 Counter-Memorial, para. 591(b)(i); Annex XII of RD 661/2007 (RL-97).
311 Annex XII of RD 661/2007; PHB1 Respondent, para. 118 referring to the Transcription 2014, day 2 p. 118.
312 Counter-Memorial, para. 591(b)(i); RL-140.

changing circumstances.[313] However, States are not allowed to act in an unfair or unreasonable manner when legislating.[314]

356. Spain holds that the adaptations of the legal framework were lawful, consistent and reasonable. They were aimed at adapting to the economic downturn and solving the tariff deficit issue. Additionally, the incentives provided for photovoltaic producers were not modified, including: the regulated tariff option and the amount thereof for 30 years, the possibility to sell all of the energy production on a priority basis, and the access to the ICO public credit facilities.[315]

357. Based on various arbitration decisions, the Respondent claims that in order to invoke the frustration of legitimate expectations there must be a specific commitment from the State, [316] and Spain never entered into specific commitments with the Claimants guaranteeing that the remuneration scheme provided in RD 661/2007 and RD 1578/2008 would remain unchanged.[317]

358. According to the Respondent, Article 40 of RD 463/2004 did not provide the immobility of the legal framework applicable to electricity production from renewable sources of energy. In fact, this law was subsequently modified by RD 661/2007, and the Spanish Supreme Court confirmed that these regulatory changes were legal. The Spanish Supreme Court added, in particular, that there is no right to have

313 Counter-Memorial, para. 571; Rejoinder, para. 718 citing *EDF (Services) Limited v. Romania*, ICSID Case no. ARB/06/13, Award, October 8, 2009 ("***EDF v. Romania***") (RL-126); *El Paso v. Argentina*; *Saluka v. Czech Republic*; *Parkerings Compagniet AS v. The Republic of Lithuania*, ICSID Case no. ARB/05/8, Award, 11 September 2007 ("***Parkerings v. Lithuania***") (RL-101); *Electrabel v. Hungary*; *Continental v. Argentina.*

314 Counter-Memorial, para. 584.

315 Rejoinder, paras. 40 and 43; RL-282.

316 Rejoinder, para. 720 citing *Methanex v. U.S., Plama v. Bulgaria, ADF Group lmc. v. The United States of America,*ICSID Case no. ARB(AF)/00/1, Award, 9 January 2003 ("***ADF v. United States of America***") (RL-63); *Biwater Gauff (Tanzania) Ltd. c. the United Republic of Tanzania*, ICSID Case no. ARB/05/22, Award, July 24, 2008 (RL-111); *Jan de Nul NV and Dredging International NV v. The Arab Republic of Egypt*, ICSID Case no. ARB/04/13, Award, 6 November 2008 (RL-317), *William Nagel v. The Czech Republic*, Case **ICC** no. 049/2002, Award, September 9, 2003 (RL-66); *Ulysseas Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 ("***Ulysseas***") (RL-204), para. 249; *Toto Costruzioni*, para. 244. The Respondent also refers to the same authors cited by the Claimants: Rudolf Dolzer and Christoph Schreuer, in *Principles of International Investment Law*, Oxford University Press (2012), p. 148.

317 Rejoinder, para. 710.

the feed-in remuneration scheme remain unchanged, and that the modifications thereof are possible within the framework provided by the LSE without undermining legal certainty or legitimate trust.[318]

359. According to the Respondent, nor can Article 44.3 of RD 661/2007 support the stability expectations claimed by the Claimants, as it does not address the matters that were modified in 2010. Article 44.3 provides that future updates of the tariff amounts shall not affect the facilities subject to said Royal Decree. However, RD 1565/2010 and RDL 14/2010 did not modify regulated tariffs. The former regulation provided for a time limit for obtaining those tariffs, and RDL 14/2010 set a limit on the number of hours during which energy could be sold under the tariff option, but the regulated tariff, as laid down in the chart of Article 36 RD 661/2007, was not modified by these subsequent regulations.[319]

360. Additionally, Article 44.3 of RD 661/2007 cannot be considered to be a specific commitment entered into by the State with a stabilizing effect. Regardless of the fact that the validity and effects of the stabilization clauses are highly questioned,[320] they must be strictly construed, and they must be limited in terms of addressee, purpose, and term.[321] Article 44.3 of RD 661/2007 could never be equated to a stabilization clause, as it is a legislative provision which is inherently subject to modifications and is general by nature.[322] In any event, the wording of this article does not include any stability guarantees or any commitments from the State to refrain from exercising its legislative powers.[323]

361. The Respondent considers that the advertising materials cannot give rise to legitimate expectations because they do not provide for any specific commitments. The Claimants take excerpts from the presentations called *El sol puede ser suyo*, dated

318 Counter-Memorial, para. 641, citing Spanish Supreme Court rulings of December 15, 2005 (RL-79), of October 25, 2006 (RL-90) and of March 20, 2007 (RL-94).

319 Counter-Memorial, paras. 605(2) et seq.

320 Counter-Memorial, para. 617; citing Thomas W. Walde and George N.D. "*Stabilizing International Investment Commitments: International Law versus Contract Interpretation*," International Law Journal (RL-38), p. 243-245.

321 Counter-Memorial, paras. 615-619, 630.

322 Counter-Memorial, paras. 617-623.

323 Counter-Memorial, paras. 627 et seq.

May 2005 and November 2008, out of context, yet they fail to address the specific presentation on RD 661/2007 that was made in June 2007. It can be seen that this presentation took as its point of departure that the plants would be in operation during 25 years, with a yearly production of 1,250 hours. Accordingly, a plant would be able to recover the investment in 10 years, whilst obtaining an internal rate of return amounting to 8.29%.[324]

362. As to the document "*Renovables made in Spain,*"[325] the Respondent points out that it is dated March 2010. Consequently, since it is dated after the investments were made, there was no way it could have had any impact on the Claimants' perception of the regulatory framework at the time of the investment.[326]

363. As regards the agreements between IDAE and ICO for financing photovoltaic projects cited by the Claimants,[327] it must be noted that none of them was signed in the context of the incentives provided by RD 661/2007 and RD 1578/2008, nor do they refer to the stability of cash flows in order to repay the funding, nor do they guarantee the petrification of the regulatory system.[328]

364. The Respondent claims that the investors' expectations must be objective, reasonable and legitimate. The Respondent adds that in order to verify whether these conditions are met, the knowledge that the investor had, or should have had, of the country's legal framework must be considered.[329]

365. According to the Respondent, any investor who is reasonably informed should know that the Spanish Government could modify the regulatory framework applicable to renewable energies, and that the benefits offered to producers under such a regime were neither unchangeable nor indefinite,

[324] Counter-Memorial, paras. 657-659.
[325] C-4.
[326] Counter-Memorial, para. 660(c).
[327] Memorial, footnote 16; C-6, C-7, C-8.
[328] Counter-Memorial, paras. 663, 665.
[329] Counter-Memorial, paras. 678 et seq., citing the following decisions: *MTD Equality Sdn Bhd. and MTD Chile S.A. v. The Republic of Chile*, ICSID Case no. ARB/01/07, Award, May 25, 2004 ("***MTD v. Chile***")(RL-73), paras. 169-170, 178, 242; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case no. ARB/99/2, Award, 25 June 2001 ("***Genin v. Estonia***") (RL-57), para. 345; *Methanex v. United States of*

America, Part IV, chapter D, para. 10; *Electrabel v. Hungary*, Part VII, p. 21, paras. 7.77-7.78; *Metalpar S.A. and Buen Aire S.A. v. The Republic of Argentina*, ICSID Case no. ARB/03/5, Award on the Merits, 6 June 2008 ("***Metalpar v. Argentina***") (RL-110).

insofar as the principle of reasonable return was complied with.[330] This was the only legitimate expectation the investors could have had, as it had been already established by the Supreme Court,[331] by the Constitutional Court,[332] by the Council of State,[333] and by the *Abogacía del Estado* (State Legal Services Authority)[334] prior to the investment, and it was subsequently confirmed at the time of entry into force of RD 661/2007,[335] and as a result several appeals subsequently filed against RD 1565/2010.[336]

366. The Respondent argues that the Claimants did not provide evidence of having conducted any due diligence analysis of the Spanish legal framework, and they only submitted to the arbitration technical reports on the plants and a consultancy report dated after the investment.[337]

367.

> The 2010 Report issued by the Council of State, which the Claimants put forward to support their stance, expressly states that RD 1565/2010 and RDL 14/2010 are perfectly legal. [338]

d) On the alleged retroactive application of the rules

368. The Respondent denies that the adaptations to the regulatory framework have been retroactive, since for that to happen the rules have to affect vested rights, and according to the Respondent, the Claimants never had a vested right to receive the regulated tariff, nor to obtain future incentives.[339] Additionally, the amendments of RD 1565/2010 and RDL 14/2010 should not be considered to be retroactive, whether from an international law standpoint [340] or from the point of view of Spanish law,[341] because they refer to future modifications, which by no means affect the electricity already sold by the plants.

3. Neither did Spain violate Article 10(12) ECT

369. The Respondent claims that Article 10(12) ECT requires the host state to provide an adequate and effective legal and institutional framework, adding that said requirement must be assessed on the basis of an objective international standard.[342] The Respondent also claims that, although said standard does not require exhausting all domestic remedies, it is necessary to use the means made available to the investor.

370. The Claimants' claim refers to the use of a Royal Decree-Law, RDL 14/2010, to regulate this matter, since using such an instrument allegedly deprived them of the possibility to enforce their rights before the Spanish courts.[343]

371. In this regard, the Respondent considers that Royal Decrees-Law are legal instruments commonly used in constitutional monarchies like Spain, and they are subject to stringent conditions, controls, and limits.[344] In the present case, the use of RDL 14/2010 was justified by the circumstances.[345]

372. In any event, the Respondent argues that the use of a Royal Decree-Law did not prevent the Claimants from resorting to the available remedies in the Spanish legal system to appeal this kind of provisions. Particularly, the Spanish legal system provides for two means to challenge a Royal Decree-Law. On the one hand, it provides for the question of unconstitutionality, an indirect appeal, which may be filed within a claim, to request the Constitutional Court to decide on the constitutionality of a given rule.[346]

340 Counter-Memorial, paras. 740-741.
341 Counter-Memorial, paras. 747-751.
342 Counter-Memorial, paras. 758-759.
343 Counter-Memorial, para. 754. Memorial, paras., 309 *et seq*.
344 Counter-Memorial, para. 765.
345 Counter-Memorial, paras. 785-789.
346 Counter-Memorial, paras. 766-767.

On the other hand, there is the possibility for anyone who has suffered damage arising out of the malfunctioning of a public service to file a government liability lawsuit. An administrative appeal must be filed first and, if necessary, a judicial appeal can be subsequently filed before the administrative courts.[347]

4. On the damages claimed

373. The Respondent claims that (**a**) the claim for damages submitted by the Claimants has become devoid of purpose, and that (**b**) the time period 2010-2013 cannot be considered in isolation. In addition, the Respondent claims that (**c**) the Claimants have not evidenced the existence of damages, nor the amount thereof.

a) The claim for damages has become devoid of purpose

374. The claim brought by the Claimants is based on RDL 14/2010 and on RD 1565/2010. However, said regulatory adaptations were rendered ineffective from the enactment of RDL 9/2013.[348]

375. RDL 9/2013 has provided a new remuneration scheme different from the previous one, and within a new legal framework.[349]

376. Thus, the Respondent asserts that the Claimants' claim and the estimation of damages make no sense, since they are based on rules that have been repealed.[350] Any estimation to be made in this regard would be theoretical, false and unfair, because the remuneration of the Claimants' facilities is now governed by RDL 9/2013.[351]

b) The time period 2010-2013 cannot be considered in isolation

377. According to the Respondent, inasmuch as RDL fully absorbed all prior regulatory amendments, it is impossible to perform any remuneration calculation for the plants under Royal Decrees

347 Counter-Memorial, paras. 768-773.
348 Rejoinder, para. 1174.
349 Rejoinder, para. 1183.
350 Rejoinder, paras. 1185-1188.
PHB2 Respondent, para. 174.

661/2007, 1578/2008, 1565/2010 or RDL 14/2010 without taking into account the new regulations.[352]

378. Regarding this matter, the Respondent cited the experts it had brought into the arbitration (Mac Group - Altran), who stated the following: "*we have concluded that the time period 2010-2013 cannot be considered in isolation insofar as the possible impact of the regulatory measures is concerned. This is due to the fact that the effect of such measures is taken into account in considering a reasonable return for all facilities during their entire lifespan, under the terms provided in RDL 9/2013, RD 413/2014 and IET Ministerial Order 1045/2014.*"[353]

c) The Claimants have not evidenced the existence of damages nor the amount thereof

379. According to the Respondent, the expert reports on which the Claimants' claims for damages are based are incomplete, inconsistent, partial and wrong. Therefore, they are not useful for determining the amount of such claims.[354]

380. In particular, the reports neither explain nor justify the occurrence of damage, but rather assume that damage as, *a priori*, a fact.[355] The existence of such damage has not been proven, since the actual damage would depend on a variable which is somewhat uncertain: the future market price of electricity.[356]

381. Moreover, the reports contain contradictory information with respect to other documents submitted by the Claimants, as well as with respect to publicly available information.[357]

382. The methodological approach used is incorrect, since it is based on absolute cash flow values, and it does not take a reasonable rate of return as a reference threshold, which would allow for claiming

352 PHB1 Respondent, para. 969; Respondent. 171 et seq.
353 RT-3, para. 29.
354 Rejoinder, para. 1216.
355 Rejoinder, paras. 1210-1213.
356 Rejoinder, para. 1215.
Rejoinder, paras. 1216(a) and (c) decisions in a of income and expenses in appendix III and and the information contained in appendices C-233 a C-259, and C-260.

damages in the event that the estimated flows fell below this rate.[358]

383. Regarding the alleged damage caused by the 30-year maximum time period provided for receiving the regulated tariff, the Respondent argues that it is impossible that this deadline could have caused damage to the Claimants, since it matches the facilities' lifespan, and in order to extend the facilities' lifespan, substantial modifications would have to be carried out, which in any case would make them lose the possibility of being subject to the regulated tariff regime.[359] Therefore, the contracts entered into by the Claimants regarding the use of land where the facilities are located have a term not exceeding 30 years.[360]

384. The Claimants contend that the change in the deadlines to perceive the regulated tariff actually benefit the Claimants, since for the facilities under RD 661/2007 the tariff previously decreased by 80% from year 26 onwards, whereas when it was extended to 30 years, the facilities were entitled to the full tariff during a longer period.[361]

385. Furthermore, notwithstanding the limits related to the facilities' lifespan, under any scenario, the loss would amount to the difference between the regulated tariff and the market price. However, it is impossible to know in advance what the market price will be in 2037.[362]

386. With respect to the limit to the number of equivalent hours of production, the Respondent contends that the calculation of alleged damage resulting from this limit is merely for the sake of argument, since once this limit has been exceeded, the plants can continue to sell their electricity production at the market price, and this latter price is variable and the future price is unknown.[363] In any event, the Respondent contends that although the time limit affected the plants, it allows for investors to continue obtaining a

358 Counter-Memorial, paras. 801-804; RT-1, paras. 489-490; Rejoinder, paras. 1217-1219.
359 Counter-Memorial, paras. 807-810; RT-1, para. 54; CT-1 Report, p. 51. Article 4 of RD 661/2007.
360 Counter-Memorial, para. 811.
361 Counter-Memorial, para. 813; RT-1, p. 26, no. 18.
362 Counter-Memorial, para. 816.
363 Counter-Memorial, para. 820.

reasonable return, which is the threshold guaranteed by the regulatory framework.[364]

387. For the foregoing reasons, the Respondent contends that the damage alleged by the Claimants is mere speculation, since it depends on the fluctuations of the electricity market price in Spain, which, due to being such a volatile parameter, cannot be forecast accurately for more than 20 years into the future; moreover, they assume a productivity level exceeding the time limits set forth in RDL 14/2010, without considering wear and tear on the facilities.[365]

388. Since the alleged damage is uncertain and totally speculative, it is not compensable, pursuant to the decisions of other international investment tribunals.[366]

389. As regards the damages alleged by the Claimants due to the increase in financing costs, the Respondent contends that there is no causal link between the actions of the State and these costs, which result from the decisions made by the project developer and by the financial entity.[367]

390. The Respondent contends that it is not appropriate to compensate the Claimants for the costs related to the modifications of technical aspects included in the regulation on facilities to address voltage sags and access to the distribution grid, since such costs are the result of technical measures foreseeable by any investor in the Spanish photovoltaic sector, which had been known since the PER 2005-2010 was issued.[368]

391. Finally, the Respondent asserts that the damages claimed by the Claimants do not match the Claimants' current shareholding interest

364 Counter-Memorial, para. 821; RT-1, para. 56.
365 Counter-Memorial, paras. 823-825; RT-1 Report, para. 56 and pp. 267 to 269.
366 Counter-Memorial, paras. 826 et seq., citing *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 ("***PSEG v. Turkey***") (CL-41), para. 315; *of Venezuela*, ***C.*** *A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, 23 of September of 2003 ("***Aucoven v. Venezuela***") (RL-67), para. 362; *Wena Hotels Ltd. v. theArab Republic of Egypt*, ICSID Case No. ARB/98/4, Award regarding the Fund, 8 December 2000 ("***Wena v. Egypt***") (RL-55), para. 123.
367 Counter-Memorial, paras. 832-833.
368 Counter-Memorial, para. 838.

in T-Solar, as such shareholding interest has been submitted to this arbitration by the Claimants themselves.[369] The CT-1 expert report takes into consideration the Claimants' shareholding interest in T-Solar as at 28 April 2011 to calculate the Claimants' alleged damages; however, said shareholding interest has varied from that time, so the estimate does not correspond to the current situation.[370]

VIII. PETITUM

A. Claimants

392. The Claimants requested that the Arbitration Tribunal:

1. Declare that Spain has violated its international obligations under Part III of the ECT; specifically, that Spain:
   a) a) Expropriated the Claimants' investments without paying a prompt, fair and effective compensation, in violation of Article 13 ECT;
   b) b) Breached its obligation to provide the Claimants' investments fair and equitable treatment, in violation of Article 10(1) ECT; and
   c) c) Breached its obligation to ensure that its domestic law provided effective means for the assertion of claims and the enforcement of rights, in violation of Article 10(12) ECT; and consequently;
2. Order Spain to pay a compensation to Charanne and to Construction in the amount of ,…… and …… respectively, plus the interest accrued at a 7.398% rate from March 4, 2011 until compensation is paid in full; or

Alternatively, if Spain is not ordered to pay a compensation to Charanne and Construction in that amounts, ordering Spain to pay to Charanne and Construction compensation in the amount of ……. and …… respectively, plus

369 Rejoinder, para. 1201; C-104.
370 Rejoinder, para. 1208(b).

the interest accrued at a 7.398% rate from March 4, 2011 until compensation is paid in full for the violation of Article 10(12) ECT;

4. Order any other relief that it may consider appropriate; and
5. Order Spain to pay the entire costs of the arbitration and all legal costs incurred in this arbitration, including all costs and fees of the Arbitration Tribunal as well as of the Arbitration Institute of the SCC; moreover, that it order Spain to repay to the Claimants all expenses incurred as a result of this arbitration, including the lawyers' and experts' fees.

B. Respondent

393. The Respondent requested that the Tribunal:

1. Dismiss the Claimants' claims as inadmissible, since the arbitration has become devoid of purpose;
2. Dismiss the Claimants' claims on the grounds of lack of jurisdiction to hear the present case;
3. Alternatively, in the event that the Tribunal decides that it has jurisdiction to hear the present dispute, that it dismiss all of the Claimants' claims on the merits, since Spain has not breached the ECT in any way;
4. Alternatively, that it dismiss all claims for relief brought by the Claimants, on the grounds that they have not suffered any damages arising out of the adaptations made by Spain; and
5. Order the Claimants to pay all costs and expenses arising out of the present arbitration, including all administrative expenses incurred by the ICC, the arbitrators' fees, and the costs for Spain's legal representation, experts and advisers, including a reasonable interest rate from the date on which such costs were incurred until the effective date of payment;

IX. REASONING OF THE TRIBUNAL A.

Jurisdiction

394. In the final point of its petitum, the Respondent requests in the first place that the Tribunal dismiss the Claimants' claims as inadmissible, since the arbitration has become devoid of purpose; and secondly, that the Tribunal to declare that it lacks jurisdiction to hear the present dispute. However, the Arbitration Tribunal considers that the Respondent's argument regarding inadmissibility on the grounds that the arbitration has become devoid of purpose must be considered an issue for the merits, and thus it must be addressed following the discussion on jurisdiction. Indeed, the Tribunal cannot begin considering whether the dispute has become devoid of purpose without having jurisdiction over it.

395. Before getting into the discussion on jurisdiction, it must be recalled that the Claimants have limited the scope of the present dispute to the allegedly unlawful nature of RD 1565/2010 and RDL 14/2010 ("**the 2010 provisions**"), and they have decided to exclude from their claims RD 9/2013 and the subsequently enacted legislation.[371] Thus, the claims have been limited to the consequences stemming from the 2010 provisions, whereas the claims with respect to subsequent rules have been submitted by other companies of their group to another arbitration tribunal.

396. The Respondent has broken up its reasoning regarding jurisdiction into three arguments that we will examined below: (**1**) that the Claimants have declined the jurisdiction of this Tribunal by activating the *electa una via*, clause; (**2**) that the Claimants, since they are wholly controlled by nationals of the Kingdom of Spain, are not investors in accordance with Article 1(7) ECT; and (**3**) that the Arbitration Tribunal lacks jurisdiction to hear a dispute between European investors against a European state that is subject to the EU legal regime. The Tribunal shall examine each of these arguments below.

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371 PHB1 Claimants, para. 405; PHB2 Claimants, para. 79.

397. Prior to analyzing these arguments, the Arbitration Tribunal would like to recall that in its Counter-Memorial,[372] the Respondent contended that the Claimants had not met their burden to prove that they were investors, nor that they had made protected investments under the terms of the ECT, since the Claimants had not submitted official certificates or official company incorporation documents certifying the existence, nationality and ownership of the companies. The Respondent has abandoned this argument, since the Claimants have submitted the requested documentation and they have proven the existence, nationality and ownership of the companies. Therefore, in its last submissions the Respondent does not object to the existence of a protected investment in its last submissions. In any event, the Arbitration Tribunal considers that the Claimants have submitted satisfactory evidence of the existence, nationality and ownership of Charanne B.V. and Construction Investment S.A.R.L., as well as of the existence of a protected investment under Article 1(6) ECT.[373]

1. <u>*Electa una via* clause:</u>

398. The Respondent claims that the Claimants had activated the *electa una via* clause from Article 26(2)(a) and (b) ECT when they filed two administrative appeals before the Supreme Court (Nos. 60-2011 and 64-2011) regarding RD 1565/2010, as well as an application to the European Court of Human Rights ("**ECHR**") with regard to RD-L 14/2010.

399. The Claimants contend that the conditions for the operation of the *electa una via* clause have not been met in the present case, since the triple identity of parties, purpose, and legal grounds between the proceedings initiated before the Supreme Court and the ECHR and this Arbitration Tribunal has not fulfilled.

400. Article 26(2) ECT allows the affected investor to submit a dispute under the ECT to (i) the courts or

372 Counter-Memorial, paras. 334 *et seq*.
373 Response, paras. 370-399.

administrative tribunals of the Contracting Party involved in the dispute, or (ii) in accordance with a previously agreed dispute settlement procedure, or (iii) in accordance with the following paragraphs of said Article 26(2), particularly to an arbitration proceeding under the Institute [Arbitration Institute of the Stockholm Chamber of Commerce].[374] However, Article 26(3)(b)(i) excludes the consent of the parties to submit their disputes to arbitration in accordance with Article 26(4) in the event that the affected investor has previously resorted to the courts or administrative tribunals of the Contracting Party involved in the dispute, or if it has submitted a dispute in accordance with a previously agreed dispute settlement procedure.

401. Based on the foregoing, in order for the "*electa una via*" clause to operate, it is required that the investor has submitted the dispute for resolution in accordance with one of the means identified in Article 26(2)(a) or (b) of the ECT.[375] From the foregoing, it is necessarily inferred that the identity-of-the-parties condition applies. Thus, it is necessary, in order for the "*electa una via*" clause of Article 26 to be of application, for the investor which has submitted the dispute to arbitration in accordance with Article 26(4) to have previously submitted that same dispute for resolution to one of the mechanisms set forth in Article 26(2)(a) or (b). The wording of the ECT is clear, and neither of the Parties has alleged that they must be interpreted.

402. Therefore, the first issue to be examined by the Tribunal is whether the Claimants have chosen to submit their dispute to one of the mechanisms set forth in Article 26(2)(a) or (b).

403. In this regard, it is undisputed that the Claimants in this arbitration are different from the claimant parties before the Spanish Supreme Court and the ECHR. Indeed, the proceedings before the Supreme Court were initiated by Grupo T-Solar and by Isolux Corsan alongside the Spanish companies owning the plants, and the applications to the ECHR were filed by several of T-Solar's subsidiary companies.

374 Article 26(4)(c) ECT.
375 Article 26(3)(b)(i) ECT.

404. The Respondent alleges, however, that the lack of identity between the parties in the various procedures should not prevent the application of the "*electa una via"* clause on the basis of a flexible interpretation of the triple identity test developed by certain recent decisions of international tribunals.[376] According to the Kingdom of Spain's thesis, the Tribunal should only examine the "substance" of the claims[377] to determine if the same dispute was submitted to both forums.

405. In the view of the Arbitration Tribunal, in order for the "*electa una via"* clause contained in Article 26(3)(b)(i) to apply, it is a prerequisite that the investor has previously resorted to the local courts or to another previously agreed dispute settlement procedure. It can be inferred from the rule that this investor must necessarily be the investor affected by the allegedly wrongful measure.

406. In this regard, the Respondent claims that in order to determine if there is identity of the parties, the Tribunal should analyse the underlying economic reality of the corporate structure of each of the entities present in the ongoing procedures. Otherwise, "*any claimant investor company could modify its corporate structure in order to justify the inapplicability of the triple identity test regarding the identity of the claimant by using intermediary companies, subsidiaries, and ultimately by restructuring their participation in the corporate chain.*"[378] The Arbitration Tribunal does not disagree with this analysis. However, in order for this proposal to be accepted by the Tribunal, it should be proved that the Claimants, on the one hand, and the T-Solar group and Isolux Corsan S.A. group companies on the other, are actually the same entity, in a way that it could be considered that the claims before the Supreme Court and the applications to the ECHR have in fact been filed by the Claimants through intermediary companies.

407. The Arbitration Tribunal considers that the Kingdom of Spain has not provided evidence of this. In their Response, the Claimants have alleged that

376 *Pantechniki v. Albania, H&H Enterprises v. Egypt, Vivendi v. Argentina II – Annulment.*
377 PHB1 Respondent, para. 401.
378 PHB1 Respondent, para. 405.

"*both on the date of entry into force of RD 1565/2010 and on the date of entry into force of RDL 14/2010, Charanne held a stake in Tuin Zonne S.A. (currently Grupo T-Solar Global S.A.) amounting to 18.6583% of its share capital*,", and that "*both on the date of the entry into force of RD 1565/2010 and on the date of entry into force of RDL 14/2010, Construction held a stake in Tuin Zonne, S.A. (currently Grupo T-Solar Global S.A.) amounting to 2.8876% of its share capital* ".[379]

408. Even if it is true that the Claimants belong to the same group of the Grupo T-Solar company and of the Grupo Isolux Corsan S.A. company, this is not enough, even under a flexible interpretation of the triple identity test, to consider that there is a substantial identity of the parties. In order to consider that the identity-of-the-parties condition is met, it would have to be proved that the Claimants hold the decision-making power within Grupo T-Solar and Grupo Isolux Corsan S.A., so that the latter companies can be truly deemed as intermediary companies. Proof of this has not been provided. Neither has it been alleged that the corporate structure of the Claimants' group has been conceived or modified with the fraudulent purpose of allowing the Claimants to disregard the "*electa una via"* clause provided in the ECT. In the absence of proof in this regard, the Arbitration Tribunal cannot consider that, under Article 26 ECT, the Claimants have chosen to submit the dispute to the Supreme Court or the ECHR .

409. Although the foregoing amounts to sufficient grounds to dismiss the objection to jurisdiction based on the "*electa una via"* clause, the Tribunal adds that, as the Claimants rightfully put forward, the ECHR cannot be considered a court of the Contracting Party in the terms of Article 26(2)(a). Indeed, the Contracting Party to which Article 26(2)(a) refers, is the Respondent Contracting Party, in this case the Kingdom of Spain. And there is no doubt that the ECHR is not a court of the Kingdom of Spain. Nor can the procedure before the ECHR be considered a "*previously agreed dispute settlement procedure*"

379 Response, para. 378.

in the terms of Article 26(2)(b) ECT, since there is no agreement between the Parties to submit the dispute to the ECHR.

410. Based on the foregoing, the Tribunal rejects the objection to jurisdiction based on the *electa una via* clause of the ECT. There is no need to further examine the Parties' arguments regarding identity of the subject matter and identity of legal grounds; given that the identity of the parties in the procedures condition is not met, such arguments would not modify the Arbitration Tribunal's decision in this regard.

2. The Claimants are not investors pursuant to Article 1(7) of the ECT

411. The Respondent contends, firstly, (**a**) that the ultimate beneficiaries of the Claimant companies are Spanish nationals, and thus the Arbitration Tribunal lacks jurisdiction; and secondly, (**b**) that the resolution of this dispute by this Arbitration Tribunal would be contrary to the Spanish Constitution.

a) The real Claimants are Spanish nationals

412. The Kingdom of Spain contends that the Claimants are two "*empty corporate shells*," by means of which two Spanish natural persons, José Gomis Cañete and Luis Antonio Delso Heras "*make their investments*," and that "*allowing the claimants to benefit from the protection granted by the ECT to foreign investors would be equal to ignoring the purpose of this legal instrument, which is to protect foreign investors, not to protect domestic investors structuring their investment in an artificially complex manner.*"[380]

413. The Respondent also alleges, based on Articles 26(1) and 1(7)(a), that "*the diversity of nationalities is a requisite under the ECT.*"[381] Although the Claimants are Dutch and Luxembourgish companies, the Respondent holds that the "'*foreign' nature of the legal person is not a formal requirement but an objective condition that allows*

380 PHB1 Respondent, para. 531.
381 PHB1 Respondent, para. 537.

the arbitration tribunals to pierce the corporate veil in order to know who really controls the company."

414. The Arbitration Tribunal does not agree with the Kingdom of Spain. The protection provided in the ECT applies to investments performed by an investor. The notion of investor is defined in Article 1(7) ECT, so it applies to legal persons "*organized in accordance with the law applicable in that Contracting Party*." It is undisputed that both Claimants fulfil this requirement, since both the Netherlands and Luxembourg are Contracting Parties to the ECT. Article 1(7)(a)(ii) ECT does not contain any other requirements: only that the investor must be organized in accordance with the law applicable in the relevant Contracting Party, in this case in the Netherlands and Luxembourg.

415. Although it is perfectly conceivable to pierce the corporate veil and ignore an investor's legal personality in the event of jurisdiction fraud, such as an instrumental transfer of the assets subject to the investment after the dispute arose, there are no grounds for including in the ECT a general rule according to which the investor's nationality has to be analysed according to an economic criterion, when the ECT itself refers to the legal criterion of the company's incorporation in accordance with the law of a Contracting Party. In the case at stake, the Respondent makes no claim nor provides any evidence of fraud in the Claimants' investment structure that could justify piercing the corporate veil.

416. Assuming the thesis of the Kingdom of Spain would amount to creating a denial-of-advantages situation every time an investor that is a legal person incorporated under the law applicable in a Contracting Party pursuant to Article 1(7)(a)(ii) was controlled by citizens or nationals of the State hosting the investment. However, those who drafted the ECT did not want to include this case in the denial-of-advantages clause contained in Article 17, which refers to a situation faced by a legal entity controlled by investors from a third country (a third country that is not a Contracting Party to the ECT). Regardless

of whether the denial of advantages under Article 17 is a substantive matter or a matter of jurisdiction—an issue that the Tribunal does not have to analyse in this award—this shows that those who drafted the ECT did not want to exclude investors, legal entities, controlled by nationals of the Contracting Party hosting the investment, from the advantages provided by the ECT.

417. In broader terms, the Arbitration Tribunal agrees with the Yukos case tribunal on its stance regarding the ECT, according to which "*the Tribunal knows of no general principle of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a contracting party.*"[382]

Based on the foregoing, the Arbitration Tribunal dismisses the objections to jurisdiction raised by the Respondent under Article 1(7) ECT.

b) On the alleged violation of the Spanish Constitution entailed by this Tribunal's decision

418. The Kingdom of Spain claims that if the Arbitration Tribunal declares it has jurisdiction over the case, the Spanish public order applicable to this arbitration, and in particular the equality principle enshrined in Article 14 of the Spanish Constitution, would be violated, since "*it would make available to Spanish citizens (those natural persons owning the claimants' shares) a dispute settlement mechanism with certain procedural features (possibility of choosing the tribunal, application of a more flexible procedural scheme) which would not be available to any other Spanish citizen.*"[383]

419. The Arbitration Tribunal disagrees with this argument.

420. Firstly, this Arbitration Tribunal's jurisdiction has to be assessed under the ECT, and not according to the Respondent's domestic law. Thus, the Spanish public order, which may be taken into consideration to solve a dispute on the merits, has little to do with

382 *Yukos v. Russia*, para. 415. Free translation: "*the Tribunal does not apply a general principle of international law requiring investigation into how a company or other organization operates when the applicable treaty simply requires that it is organized pursuant to the laws of a Contracting Party*."

383 PHB1 Respondent, para. 564.

determining the jurisdiction of this Tribunal under an international treaty to which the Kingdom of Spain is a contracting party.

422. Secondly, as the Claimants rightfully point out, this argument is a mere rewording of the argument, which has been already rejected by this Arbitration Tribunal, that the Claimants would actually be Spanish nationals acting by means of "empty corporate shells."

423. Thirdly, in any event it does not seem that access by the Claimants to arbitration provided in the ECT breaches in any way the principles of equality and of the right to effective legal protection foreseen in Articles 14 and 25 of the Spanish Constitution. Indeed, such principles only protect every Spanish citizen's right to access legal remedies in Spain on an equal basis, but in no way do they prevent a Spanish citizen from enjoying specific legal protection according to his or her specific situation.

3. <u>The Dispute is an intra-EU Dispute subject to the EU legal regime</u>

424. The Kingdom of Spain contends, based on the *Amicus EC* brief submitted by the European Commission on 19 January 2015, that "*neither Spain nor the Netherlands or Luxembourg have allowed the disputes under the ECT in an intra-EU context to be settled through international arbitration."*

425. First of all, the Arbitration Tribunal would like to clarify that it has given the most careful consideration to the *Amicus EC*, which has been very useful. The Tribunal would like to thank the European Commission for this brief. However, the Tribunal would like to recall that the EC is not a party to this proceeding and thus in this award the Tribunal shall only reply to the Parties' arguments, but of course in light of the reflections provided by the EC.

426. The jurisdictional objection raised by the Kingdom of Spain is based on three arguments: Firstly, (**a**) all the parties to these proceedings belong to the same Regional Economic Integration

Organization ("**REIO**") and thus there is no diversity of areas. (**b**) Secondly, the ECT contains an implicit disconnection clause for intra-EU relationships. (**c**) Third, EU law does not allow EU Member States to agree to submit the present dispute to a dispute settlement mechanism other than that provided by the EU. The Tribunal shall examine each of these arguments below.

a) On the nonexistence of diversity of areas

427. The Kingdom of Spain claims that this dispute does not comply with the requirement of diversity of areas between the investor and the contracting party established in Article 26 ECT. The argument is based on the idea, expressed with the utmost clarity in the *Amicus EC*, that "*the investors from an EU Member State requesting the resolution of a dispute against another Member State, cannot be considered to be investors of another contracting party in the terms of Article 26(1) ECT*," since "*the EU is a contracting party to the ECT, and investors from EU Member States are, for the purposes of the Charter, EU investors*." The European Commission also highlights that "*the second indent of Article 10(1) ECT provides that with respect to a REIO, (i.e., the EU) the term area means the areas of the member states of such organization*."[384]

428. Pursuant to Article 26 ECT, disputes between a Contracting Party and an investor of another Contracting Party relating to an investment of the latter in the area of the former can be submitted to arbitration. The conclusion to be drawn therefrom is, as rightfully stated by the Kingdom of Spain, that there must be diversity of nationality between the parties. The Arbitration Tribunal has already decided that, for the purposes of the analysis on jurisdiction, the Claimants are legal persons from the Netherlands and Luxembourg respectively, and not Spanish investors. The issue to be solved by the Arbitration Tribunal is whether or not within the present dispute the Claimants can be considered as investors from the Netherlands and Luxembourg respectively, or if they should be considered

384 *Amicus EC*, paras. 19-20.

investors from the EU. In the latter case, provided that Spain is part of the EU, the dispute would no longer be between a contracting party and an investor of another contracting party in the terms of Article 26(1) ECT, since the investment would have been made by an EU investor in the area of the EU.

429. In the view of the Arbitration Tribunal, this argument overlooks the fact that although the EU is a party to the ECT, the EU Member States also remain contracting parties to the ECT. Both the EU and Member States can have legal standing as respondents in a claim under the ECT.

430. When defining the notion of "area," Article 1(10) ECT refers both to the area of the Contracting parties (Article 1(10)(a)), and to the area of the EU (second indent of Article 1(10)). Therefore, it seems reasonable to infer that, since it refers to investments made "in the area" of a contracting party, Article 26(1) refers, in the case of an EU Member State, both to the area of a State and to the area of the EU itself. There is no provision in the ECT that could lead to a different interpretation.

431. Knowing whether the "area" refers to one or the other depends on the content of the claim and of the entity against which it is filed. An investor may very well file a claim against the EU for allegedly wrongful acts committed by the EU. In this case, for the purposes of Article 26 ECT it could be considered that the dispute relates to an investment made in the area of the EU. However, the Tribunal does not have to decide whether in said case there would be jurisdiction under the ECT, since the present situation is completely different. In the present case, the claims do not arise from EU actions, but from allegedly wrongful acts committed by the Kingdom of Spain in the exercise of its national sovereignty. Nor is the claim brought against the EU, nor does it aim in any way at holding the EU liable. Thus, the Arbitration Tribunal has no doubt that the Kingdom of Spain has legal standing to be a party to this arbitration and as a result, for jurisdictional purposes, the area mentioned by Article 26(1) ECT is the area of the Kingdom of Spain and not the area of the EU.

432. Based on the foregoing, the Arbitration Tribunal concludes that the dispute relates to an investment made by investors of the Netherlands and Luxembourg in the territory of the Kingdom of Spain. The Tribunal therefore dismisses the objection raised by the Respondent under Article 26 ECT.

b) The alleged implicit disconnection clause

433. The Kingdom of Spain, also following the reasoning of the EC in its *Amicus EC*, holds that in the ECT there is an "*implicit disconnection clause for intra-EU relationships.*"[385] The purpose of such clause would be to detach Member States from the ECT in their relationships with each other.

434. The argument is mainly based on an analogy with Article 27 ECT. This Article provides for the possibility that a dispute between Contracting Parties is submitted to an *ad hoc* arbitration tribunal. However, it is true that in accordance with Article 267 TFEU and the *Mox Plant* decision of the European Court of Justice, no disputes between EU Member States can be resolved by an *ad hoc* arbitration tribunal. According to Spain, this would amount to "*further evidence of the application of the implicit disconnection clause between EU Member States.*"[386]

435. Notwithstanding the foregoing, the Arbitration Tribunal does not consider this analogy to be relevant here. Article 27 ECT indeed makes conditional the submittal to arbitration by the Contracting Parties to the fact that it has not been "*otherwise agreed*" thereby. However, the provision applicable to this dispute is Article 26 ECT and not Article 27. Having said that, in the present case there is no agreement between the Contracting Parties to the ECT to abrogate Article 26, nor is there any other agreement of this kind between the Parties to the present dispute. As to disputes between Member States, the prohibition to resort to arbitration stems from Article 267 TFEU, and there is no other such provision applicable to a dispute between a private party and an EU Member State.

385 PHB1 Respondent, para. 466; *Amicus EC*, para. 13.
386 PHB1 Respondent, para. 471.

436. Equally unconvincing is the argument of Spain that the existence of a customs union in the EU would prove that there is an implicit disconnection clause regarding Article 7 ECT, since the notion of transit can only apply within the EU as a whole and not to transit through Member States. However, this only shows that Member States fulfil their obligations under Article 7 within the framework of the European customs union. The existence of the EU does not entail any contradiction or obstacle for Member States to comply fully with their obligations under Article 7 ECT, so there is no need for an implicit disconnection clause.

437. The issue raised by the Respondent is ultimately a matter of interpretation of the ECT. Only through an interpretative *iter* of the treaty may the Arbitration Tribunal reach the conclusion that the Contracting Parties intended to provide for an implicit disconnection clause. However, any interpretation of the ECT must be made in accordance with Article 31 of the Vienna Convention on the Law of Treaties, according to which the main rule is that the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. However, the Arbitration Tribunal considers that the terms of the treaty are clear and they do not require any additional interpretation that could lead to adding an implicit disconnection clause for intra-EU disputes to the ECT.

438. In fact, the Tribunal considers that the Contracting Parties to the ECT had no need to agree on a disconnection clause, whether implicit or explicit. The role of a disconnection clause would be to solve the conflict between the ECT and the TFEU. Nevertheless, there is no such conflict between those treaties. As has been stated above in the present Award, the jurisdiction of the Arbitration Tribunal to decide on a claim filed by an investor of an EU Member State against another EU Member State, based on allegedly wrongful acts performed in the exercise of its national sovereignty, is perfectly compatible with the EU being involved as a REIO in the ECT. As we will see below

in the present Award, there is no rule of EU law preventing EU Member States from resolving through arbitration their disputes with investors of other Member States. Neither is there any rule of EU law preventing an arbitration tribunal from applying EU law to resolve such a dispute.

439. Having determined the foregoing, the Arbitration Tribunal does not have to address the parties' arguments regarding Article 16 ECT. In fact, this provision would only be applicable in case of an inconsistency between the ECT and EU law. The Tribunal is aware of the conclusion drawn by the tribunal of the case *Electrabel v. Hungary*, according to which "*from whatever perspective the relationship between the ECT and EU Law is examined, the Tribunal concludes that EU Law would prevail over the ECT in case of any material inconsistency.*"[387] However, as will be seen below, in this case no inconsistency between the ECT and EU law has been raised.

c) On the compatibility of the ECT Dispute Settlement Mechanism with EU law

440. The Kingdom of Spain contends that Article 344 TFEU prevents Member States from settling disputes on EU law through international arbitration. In order to decide on this argument, the Tribunal has to examine (**i**) if Article 344 TFEU is applicable to an arbitration between an investor and a State and, if this rule is deemed applicable, (**ii**) whether the present dispute relates to the interpretation or application of European treaties in the terms of Article 344. Finally, (**iii**) the Arbitration Tribunal shall examine if there is any rule on EU public order preventing the settling of this dispute through arbitration.

387 *Electrabel* v. *Hungary*, para. 4.191.

(i) Application of Article 344 TFEU to arbitrations between investors and EU Member States

441. Article 344 TFEU states that "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.*" This provision literally refers to agreements concerning disputes between Member States, and not between a private party and a Member State.

442. Notwithstanding the foregoing, the Kingdom of Spain considers that "*the fact that such consent to submit to arbitration given by the Member State was accepted by another Member State or by an investor is irrelevant. The proposal to submit the dispute to arbitration would not be valid pursuant to Article 344 TFEU.*"[388]The argument is based on a literal interpretation of Article 344. According to the Respondent, "*if Article 344 was limited to disputes between States, it could have been stated in the relevant paragraph 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'* […] *However* […] *the contracting parties to TFEU did not provide for this distinction in Article 344 TFEU.*"[389] In other words, "*the object and purpose of Article 344 TFEU is that a Member State cannot be party to a dispute involving State liability.*" *If such a dispute arose, it would inherently lie in the interpretation of EU legislation and thus it should remain under the jurisdiction of European institutions.*"[390]

443. The Arbitration Tribunal deems unconvincing the interpretation of Article 344 TFEU made by the Kingdom of Spain. If the Respondent's theory were true, no domestic court would ever be able to decide on anything concerning the interpretation of EU treaties at any time that the liability of a Member State was at stake. Notwithstanding, the

388 PHB1 Respondent, para. 304.
389 PHB1 Respondent, paras. 505-506.
390 PHB1 Respondent, para. 509.

truth is that many claims have been filed against Member States before domestic courts, in which the interpretation or the application of EU treaties could be at stake. Similarly, a Member State can enter into arbitration agreements to resolve disputes that may involve issues concerning EU law. Finally, it is now universally accepted that an arbitration tribunal does not only have the power, but also the duty, to apply EU law.[391]

444. Therefore, the scope of Article 344 TFEU cannot be so broad as to prevent Member States from submitting any dispute concerning the interpretation of EU treaties to a dispute settlement procedure different from those provided in EU legislation. As rightfully stated by the tribunal of the case *Electrabel v. Hungary*, the scope of Article 344 TFEU is more limited. The purpose of this provision is to ensure that the European Court of Justice has the last word on the interpretation of EU law to ensure a uniform interpretation thereof.[392] In this regard, Article 344 TFEU cannot have the scope given to it by the Kingdom of Spain, but must be, rather, considered an additional tool which, prohibiting dispute settlement agreements between Member States, allows for attaining the goal of having EU law applied in a uniform manner.

445. This conclusion is reinforced by the fact that the tribunal of the case *Electrabel v. Hungary* also deemed relevant the fact that the EU signed the ECT, thus accepting the possibility of arbitrations between investors and Member States under Article 26.[393] In this regard, it is noteworthy that the ECT does not allow for reservations.[394]

(ii) <u>On whether the present dispute concerns the interpretation or application of the European Treaties, in the sense of Article 344</u>

446. The Kingdom of Spain also contends that this is a dispute concerning the interpretation or application of the European Treaties in the sense of

391 CJEU, case C-126/97, Rec., p. I-3055, 1 June 1999, *Eco Swiss*.
392 *Electrabel v. Hungary*, paras. 4.146-4.147.
393 *Electrabel v. Hungary*, para. 4.158.
394 Article 46 ECT.

Article 344 TFEU, since the ECT is part of EU law. In this regard the Respondent bases its argument on the decision of the *Mox Plant* case to claim that the ECT, since it is a mixed agreement, has the same status in the EU legal order as purely EU agreements do.[395]

447. However, the Arbitration Tribunal does not have to decide on this argument, since it has already decided that Article 344 TFEU does not apply to investor-State arbitrations.

(iii) <u>On whether there is any European rule of public order that prohibits the resolution of the present dispute by arbitration</u>

448. Aside from its arguments regarding Article 344 TFEU, the Kingdom of Spain does not identify in its submissions any rule of EU public order prohibiting the submittal to arbitration of a dispute between an investor and an EU Member State. In this regard, it is worth noting that this case does not entail any assessment with regard to the validity of community acts or decisions adopted by European Union bodies, nor does it concern in any way allegations by the European Union that EU law has been violated, nor claims against said organization. In this arbitration there is no argument according to which the content of the disputed regulations (particularly Royal Decrees 661/2007 and 1578/2008 and/or the 2010 regulation) is contrary to EU law. Moving beyond the arguments regarding the alleged violation of EU law by the submittal to arbitration of the dispute (which have been discussed and resolved), the Kingdom of Spain has not claimed that the decision on the merits to be made by this Tribunal (whether it upholds the claims in full or in part, or it dismisses them) could violate the EU legal order in any way.

449. It is true that, as stated by the Respondent,[396] the European Commission has recently initiated a preliminary state aid investigation procedure, which has extended to the remuneration scheme for renewable energies provided in RD 661/2007 and RD

395 PHB1 Respondent, para. 516, citing *Mox Plant*, paras. 84, 126-127.
396 PHB1 Respondent, paras. 133-134.

1578/2008. However, as the Claimants point out,[397] to date this initiative has not given rise to any decision. In any case, even if there were any issue in this regard, it would amount to a matter of public order that the Arbitration Tribunal should take into account when deciding on the merits of the dispute, obviously under the control of the judge who would eventually be responsible for assessing the validity of the award.

450. Based on the foregoing, the Arbitration Tribunal declares that it has jurisdiction to resolve the present dispute.

B. Merits

451. Firstly, the Tribunal will examine: (**1**) the Respondent's claim that the arbitration is inadmissible due to supervening loss of purpose. Subsequently, the Tribunal will examine the Claimants' allegations on the violation of (**2**) Article 13(1) ECT (expropriation); (**3**) Article 10(12) ECT (duty to provide effective means for the assertion of claims), and (**4**) Article 10(1) ECT. Then, (**5**) the Arbitration Tribunal will analyse the Parties' claims on the arbitration costs.

1. <u>On the argument of inadmissibility due to supervening loss of purpose</u>

452. It should be recalled here that the Claimants have decided to limit the scope of the present dispute to the allegedly unlawful nature of RD 1565/2010 and of RDL 14/2010, and they have decided to exclude from their claims RD 9/2013 and subsequent legislation.[398] The claims submitted to this arbitration are thus exclusively based on the 2010 regulations. The Sole Repealing Provision of RD 9/2013 provides, in paragraphs 2(a) and (b), that RD 661/2007, regulating the production of electricity under the special regime, and RD 1578/2008, on the remuneration of electricity production using solar photovoltaic technology

397 PHB2 Claimants, para. 61.
398 See above, para. 395.

for facilities registered after the deadline for maintaining the remuneration under RD 661/2007, are repealed. This Sole Repealing Provision lso provides in paragraph 1 that "*all provisions with equal or lower status than this Royal Decree-Law which are contrary to the provisions of this Royal Decree-Law must be repealed*." It is undisputed that those repealing provisions entail the repeal of the 2010 regulations being considered in the present arbitration.[399]

453. According to the Respondent, "*therefore it is clear that this arbitration has become devoid of purpose in this case*."[400]

454. However, the Arbitration Tribunal notes that although they have been repealed from the entry into force of RDL 9/2013 on 14 July 2013, the 2010 regulations did apply until that date, and subsequently they applied on a temporary basis, until the implementing regulations of RDL 9/2013 were enacted. Hence, the operators duly registered under RD 661/2007 and RD 1578/2008 continued to receive the remuneration provided by such regulations, as these were modified by the 2010 regulations, yet as a payment on account of the settlement resulting from the new methodology adopted pursuant to RDL 9/2013. Therefore, the Arbitration Tribunal considers that the 2010 regulations could have indeed affected, although only temporarily, the investors' rights, so it cannot be considered that this dispute has become devoid of purpose. The Tribunal will examine below whether the 2010 regulations violated the ECT.

2. Article 13 ECT (expropriation)

455. Article 13(1) ECT prohibits nationalization and expropriation measures, or measures having an equivalent effect, unless such measures are in the public interest, not discriminatory, carried out under due process of law, and accompanied by the payment of prompt, adequate and effective compensation.

456. The Claimants contend that RD 1565/2010 and RDL 14/2010 due to "*the brutal economic impact caused to the return on the activity*

399 PHB2 Claimants, paras. 88-89; PHB1 Respondent, para. 386(a), 611.
400 PHB1 Respondent, para. 392

carried out by T-Solar" amount to "*an expropriation of a substantial portion of the value and returns of the investment.*"[401] According to the Claimants, the damage to the economic value of the investment, although the control thereof remains unaffected, is enough to amount to an indirect expropriation.[402] Moreover, the Claimants consider that for an indirect expropriation to occur, "*neither the total destruction of the investment nor loss of control are required, but a significant interference with the enjoyment of the investment or its benefits can suffice.*"[403]

457. Pursuant to Article 1(6) ECT, a protected investment is: "*Every kind of asset, owned or controlled directly or indirectly by an Investor and includes*:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector."

458. In the present case, the investment carried out by the Claimants consists in their indirect stake in the company Grupo T-Solar S.A. The Claimants therefore invested in shares (Article 1(6)(b) ECT).

459. However, the Claimants contend that they have invested in returns (Article 1(6)(e) ECT) to support their thesis that since the disputed measures affected T-Solar's future cash flows,

401 Memorial, para. 265.
402 Response, para. 458.
403 Response, para. 461.

they amount to an indirect expropriation.[404] According to the Claimants, the 2010 measures would have expropriated the returns on the plants by reducing such returns.[405] The Arbitration Tribunal does not share this view. The subject of the investment were not the returns, but rather the company T-Solar. Moreover, the Kingdom of Spain rightfully claims that an investment protected under Article 1(6) must be owned or controlled by the investor, and that the Claimants neither own nor control the future returns on the plants, which do not constitute vested rights.[406] Therefore, the Tribunal considers that the Claimants invested in shares (Article 1(6)(b) ECT), and not in returns.

460. Article 13(1) ECT prevents expropriations as well as measures having an effect equivalent to expropriation. In order for a measure to be qualified as an indirect expropriation pursuant to the ECT, it must have an effect equivalent to expropriation. The notion of expropriation is widely understood as the "taking" of someone's property that entails a deprivation of ownership.[407] Consequently, in order to determine if there was an indirect expropriation, the Tribunal must examine if the disputed measures had the effect of depriving the investor, in full or in part, of its rights as a shareholder in T-Solar.

461. The Arbitration Tribunal agrees with many arbitration tribunals which have considered that the indirect expropriation standard under international law entails a substantial impact

404 Response, para. 452.
405 PHB1 Claimants, para. 335.
406 Rejoinder, section 4.2.1.
407 "*The term 'expropriation'* [...] *must be interpreted in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases. In general, the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the 'taking'." S. D. Myers v. Canada*, UNCITRAL, partial *Canada*, 13 November 2000, para. 280, (RL-54).

on the investor's property rights.[408] Said impact can occur in the event of an effective deprivation of all or part of the assets subject to the investment, or in the event of a loss of value that could be equivalent to a deprivation of the investment due to its magnitude.[409]

462. Notwithstanding the foregoing, it is undisputed that the Claimants still own their shares in T-Solar. Nor have there been any allegations that their rights as T-Solar shareholders have been limited or affected in any way by the measures disputed in this arbitration. Finally, it is also undisputed that the company Grupo T-Solar is still operating and producing profits, and it has not been submitted that the company has been deprived of all or part of its assets, although the disputed measures could have affected the company's profitability.

463. In fact, the Claimants are complaining about a decrease in T-Solar's profitability, and thus a decrease in their shares' value. According to the Claimants, the allegedly unlawful provisions enacted by the Kingdom of Spain "*have reduced the returns on the plants under RD 1578/2008 by 10% (from 9.41% to 8.48%) and those of the plants under RD 661/2007 by 8.5.% (from 7.36% to 6.72%).*"[410] The Claimants consider that "*such a large decrease in the returns is generally deemed as serious in business circles.*"[411]

464. The Claimants contend, and rightfully so, that an indirect expropriation can arise both from an investment's loss of value and from a loss of control over it.[412] However, for a loss of value to be equivalent to an expropriation, it has to be so large that it equals a deprivation of property. In this regard, the

408 *CMS v. Argentina*, paras. 262-264; *Marvin Feldman v. Mexico*, para. 100; *Electrabel v. Hungary*, paras. 6.53, 6.63; *Pope & Talbot inc. v. Government of Canada*, NAFTA case, UNCITRAL, partial Award, 26 June 2000, para. 102, (RL-51); *Sempra v. Argentina*, para. 285; *AES v. Hungary*, paras. 14.3.1(a), 14.3.4.

409 PHB1 Respondent, paras. 589-590, citing *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc. Mobil Cerro Negro Ltd. and Mobil Venezolana de Petróleos, Inc, v. Venezuela*, ICSID case No. ARB/07/27, Award, 9 October 2014, para. 286.

410 PHB1 Claimants, para. 359.

411 PHB1 Claimants, para. 359.

412 PHB1 Claimants, para. 363.

In this regard, the 2012 UNCTAD report on expropriation addresses precisely the case of a "*destruction of value"* of the investment.[413]

465. In the view of the Arbitration Tribunal, although T-Solar's profitability could have been severely affected, as submitted by the Claimants, such an impact would not, by itself, suffice to qualify as an expropriation. If we followed the Claimants' reasoning, we would have to conclude that any measure affecting a company's profitability could amount to an expropriation solely because it entails a decrease of the returns on the investment and thus a decrease in its value. Obviously this cannot be the case. For a measure to be considered equivalent to an expropriation, its effects have to be so significant that it can be considered that the investor has been deprived, in full or in part, of its investment. Therefore, a mere decrease in the value of the shares subject to the investment cannot qualify as an indirect expropriation, unless the loss of value is such that it could be considered equivalent to a deprivation of property.

466. In the present case, if the calculation proposed by the Claimants were to be admitted, the plants' profitability would have decreased by 10% for the plants under RD 1578/2008 and by 8.5% for the plants under RD 661/2007. Although such decrease in profitability could have entailed serious economic and financial consequences, the Arbitration Tribunal considers that it is not as significant as to conclude that the investment's value has been destroyed. The Claimants themselves admit that, although it was reduced, the returns on the plants remained positive (amounting to 8.48% for the plants under RD 1578/2008 and to 6.72% for those under RD 661/2007.)[414]

467. The Arbitration Tribunal considers, therefore, that the Claimants have not proved that the measures in dispute had effects equivalent to an expropriation.

413 RL-215.
414 PHB1 Claimants, para. 359.

3. Article 10(12) (effective means for the assertion of claims)

468. Article 10(12) ECT provides that "*Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.*"

469. The Claimants submit that the Kingdom of Spain breached said provision when enacting RDL 14/2010, since the only purpose of using a Royal Decree-Law was "*to evade the political and social debate that may be triggered by controversial legislative amendments such as the economic restrictions adopted by RDL 14/2010.*"[415] According to the Claimants, Spanish law does not allow to file administrative appeals against a RDL, and the use of this measure, with the aim of "*avoiding a myriad of administrative appeals that would have been filed by the actors of the photovoltaic sector to appeal the measures*"[416] amounts to a violation of the obligation established in Article 10(12) to provide the investor with effective means for the assertion of claims.

470. The effective means standard, as provided in Article 10(12), requires States to provide a legal framework ensuring effective remedies for investors to carry out and protect their investments.[417] When verifying whether this obligation is fulfilled, the tribunals must examine the relevant legal system as a whole. Nevertheless, the standard does not impose on the States any obligation regarding the way they must arrange their judicial system. It is enough to establish an adequate and effective legal and institutional system.[418]

471. In this case, the Kingdom of Spain contends that any citizen can appeal a Royal Decree-Law by requesting an ordinary judge to submit a question of unconstitutionality to the Constitutional Court.

415 PHB1 Claimants, para. 376.
416 PHB1 Claimants, para. 378.
417 Counter-Memorial, para. 761 and *Chevron v. Ecuador*, para. 238.
418 *White Industries Australia Limited v. Republic of India* (UNCITRAL), Final Award, 30 November 2011 (CL-48), para. 11.3.2 referring to the decision in the case of *Chevron v. Ecuador*.

An investor would also have access to the Spanish courts by filing a government liability lawsuit following the bringing of an administrative claim before the body that carried out the acts giving rise to the damage.[419]

472. In the view of the Arbitration Tribunal, these remedies are enough to fulfil the obligation to provide effective means. The Claimants complain that the question of unconstitutionality can only be submitted as a procedural issue within ordinary proceedings, thus forcing the investor to wait until the government enacts an implementing or application rule of the RDL.[420] However, the effective means standard in international law cannot entail an order to the State as to the specific ways to arrange its own system of remedies. For instance, it cannot force the State to provide for a direct constitutionality control system for its legislative acts. The Claimants also complain that the claim for government liability does not make it possible to analyse the constitutionality of the RDL. However, this latter complaint falls within the scope of the former, which regrets the lack of a direct control of constitutionality of a RDL in the Spanish legal system. Nevertheless, said complaint cannot constitute a violation of the effective means standard under international law from the moment that the Respondent has provided evidence of the existence of remedies allowing for a control of constitutionality (even if it is through an ancillary proceeding) as well as for the compensation for damage.

473. Neither can the Claimants contend that these remedies are ineffective, since it has been abundantly evidenced that the Administrative Chamber of the Supreme Court heard and decided on questions of unconstitutionality regarding RDL 14/2010.[421]

474. Based on the foregoing, the Arbitral Tribunal dismisses the Claimants' allegations regarding the violation of the effective means standard.

419 Rejoinder, paras. 1135 *et seq.*
420 PHB1 Claimants, para. 383.
421 Counter-Memorial, para. 767; RL-276, RL-277, RL-278.

4. Article 10(1) (fair and equitable treatment)

475. The Claimants mainly submit that (**a**) Spain breached the fair and equitable treatment standard by unexpectedly modifying the economic and regulatory regime applicable to them and by frustrating their legitimate expectations. They also allege that (**b**) the measures are in violation of their rights, since they are retroactive.

a) Alteration of the regulatory framework and frustration of the investor's legitimate expectations

476. Article 10(1) ECT provides that "*each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.*" Article 10(1) also provides, among those conditions, the commitment to grant those investments fair and equitable treatment.

477. From Article 10(1) it can be inferred that the duty to provide fair and equitable treatment is included within the broader obligation to create stable, equitable, favourable and transparent conditions.

478. First, the Claimants submit in their Memorial that Spain violated Article 10(1) ECT "*by unexpectedly modifying the regulatory and economic regime applicable to them, whilst frustrating the Claimants' legitimate expectations.*"[422]

479. In their Response,[423] the Claimants allege that by altering the legal framework, Spain condemned the Claimants' investment "*to a regulatory instability that remains to date.*" More precisely, the Claimants submit that "*the new regulatory offensive begun with RD 1565/2010,*" and followed with RDL 14/2010. The Claimants finally allege that "*a glance at the current legal framework (RDL 9/2013 and Act 24/2013) is enough to verify that* […] *to date, the remuneration scheme for*

422 Memorial, para. 296 *et seq.*
423 Response, paras. 562-567.

photovoltaic facilities, the main corporate purpose of Charanne and Construction, remains unknown."[424]

480. The Claimants, thus, describe the evolution of the regulatory framework since 2010 to this date in order to support their claim that the 2010 and 2013 reforms as a whole have created a context of instability which is contrary to Article 10(1) ECT. The Claimants also seem to allege that the regulatory framework is unclear.

481. However, the Arbitration Tribunal cannot, without exceeding its powers, examine whether the 2013 provisions have helped to create a lack of stability or clarity in the regulatory framework that could be considered to be contrary to the ECT. Indeed, the Claimants themselves have excluded from the scope of this arbitration the 2013 regulations. In this regard, the Claimants submit, in a very straightforward manner, that "*they do not request the Tribunal to decide on RDL 9/2013 and its implementing provisions*.""[425]

482. The 2013 provisions cannot be, therefore, regarded as an element giving rise to liability. Since they were enacted after the 2010 provisions, they can neither have any relevance as to determine if the 2010 provisions (the only subject of the arbitration) are in violation of Spain's international obligations.

483. The analysis of whether there actually was a lack of stability and clarity of the regulatory regime must be limited to the scope of the present dispute, as has been defined by the Claimants, i.e. only the 2010 provisions.

484. Within this scope, which is limited to the 2010 provisions, the Arbitration Tribunal cannot draw the conclusion that Spain breached its obligation to provide regulatory stability. Determining whether the evolution of the regulatory framework features a degree of regulatory instability contrary to Article 10(1) would imply examining the overall regulatory changes implemented to date.

485. As to the clarity of the regulatory framework, it has not been submitted that the 2010 provisions were in themselves ambiguous or hard to understand.

[424] Response, para. 567.

[425] PHB1 Claimants, para. 405.

The claim that "*the remuneration scheme for photovoltaic facilities, the main corporate purpose of Charanne and Construction, remains unknown*" refers to all of the evolutions undergone by the regulatory framework until 2013, and thus it cannot be assessed in this arbitration.[426]

486. The existence of investors' legitimate expectations is a relevant factor in order to analyse whether the 2010 provisions breached other obligations provided in Article 10(1) ECT. The Tribunal agrees with other tribunals which have concluded, based on the principle of good faith in customary international law, that a State cannot encourage an investor to make an investment (thus giving rise to legitimate expectations) and then disregard the commitments arising out of those expectations.[427]

487. The Claimants submit that, when Spain enacted RD 1565/2010 and RDL 14/2010, it defeated the investors' legitimate expectations that had been created by the previous provisions, and particularly by RD 661/2007 and RD 1578/2008. [428]

488. To show that the latter rules gave rise to legitimate expectations, the Claimants refer to various decisions of investment tribunals,[429] as well as to the study conducted in 2012 by the UNCTAD on Fair and Equitable Treatment.[430]

489. The UNCTAD study on which the Claimants base their allegations[431] points out that "*arbitral decisions suggest* [...] *that an investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example in the form of stabilization clause, or (b) rules that are not specifically addressed to a particular investor but which are*

426 Response, para. 567.

427 *El Paso* v. *Argentina*, *International Thunderbird Gaming Corporation v. The United Mexican States,* NAFTA Ad hoc, UNICITRAL, Final Award, 26 January 2006 (RL-376*); Waste Management Inc. v. The United Mexican States, ICSID case No. AARB(AF)/00/3, Award, 30 April 2004; Saluka v. The Czech Republic; CME v. The Czech Republic.*

428 PHB1 Claimants, para. 578.

429 *El Paso v. Argentina*, *Perenco v. Ecuador*, *Total v. Argentina*, *CMS v.* Argentina, *Enron v. Argentina.*

430 RL-174.

431 PHB1 Claimants, para. 260.

put in place with a specific aim to induce foreign investment and on which the foreign investor relied in making his investment".[432]

490. In the present case, there are no specific commitments entered into by Spain towards the Claimants. This kind of commitment could have been entered into on the basis of a stabilization clause, or through any kind of declaration made by the State to the investors, stating that the existing regulatory framework would not change. The Claimants were not the addressees of any such declaration.

491. Nevertheless, the Claimants consider that RD 661/2007 and RD 1578/2008, since they were addressed to a specific and limited group of investors who met the requirements laid down within the set deadlines, amounted to specific commitments entered into by Spain.[433]

492. The Tribunal will examine below whether such regulatory framework could give rise to the legitimate expectations that it would not be modified as it actually was in 2010. However, the Tribunal does not accept the argument that such rules could amount to or could be equivalent to a specific commitment.

493. Even if RD 661/2007 and 1578/2008 were addressed to a limited group of investors, that does not turn them into commitments specifically addressed to each of those investors. Having a specific scope does not mean that the disputed provisions lose the general nature that characterizes any legislative or regulatory measure. Turning a regulatory provision, due to the limited number of persons that may be subject thereto, into a specific commitment entered into by the State towards each and every one of those persons would be an excessive limitation of the capacity of States to regulate the economy according to the public interest.

432 [Translation into Spanish of the quote: "*las decisiones arbitrales sugieren* […] *que un inversor puede derivar expectativas legítimas ya sea de (a) compromisos específicos dirigidos hacia él personalmente, por ejemplo en la forma de una cláusula de estabilización, o (b) de reglas que no están específicamente dirigidas a un inversor particular pero que han sido establecidas con el propósito específico de inducir la inversión extranjera y en las que el inversor extranjero se basó al hacer su inversión*".]

433 PHB2 Claimants, paras. 159-160, 261.

494. Based on the foregoing, the Tribunal concludes that there was no specific commitment entered into by Spain towards the Claimants. Thus, the matter lies in analysing whether the legal order in force at the time of the investment could by itself give rise to legitimate expectations and, if appropriate, to what expectations.

495. The determination of whether the investor's legitimate expectations have been defeated must be based on an objective standard or analysis. The mere subjective belief that the investor could have had at the time of making the investment does not suffice. Similarly, the application of this principle depends on whether the expectation has been reasonable or not in the specific case. In this regard, the representations that may have been presented by the host State to encourage the investment are relevant.

496. In the first place, the arguments submitted by the Claimants must be examined in order to contend that Spain launched a "*campaign to attract investments*."[434] According to the Claimants, this campaign was carried out through the dissemination of documents such as the brochure *El sol puede ser suyo*, in which very high returns on investment were advertised.[435] The Tribunal does not believe that, by themselves, such documents could have given rise to the legitimate expectations that the tariff provided at the time of the investment was not going to be modified.

497. It is true that these documents and the presentation thereof carried out in Spain, show the Respondent's intention to encourage and attract investments in the renewable energy sector. However, these documents are not sufficiently specific to give rise to any expectations regarding the fact that RD 661/2007 and RD 1578/2008 were not going to be modified. Although the 2007 presentation does indeed contain a reference to RD 661/2007, none of its wording could lead anyone to reasonably infer that the regulated tariff would remain unmodified during the entire lifespan of the plants.

434 PHB1 Claimants, paras. 143 *et seq.*
435 PHB1 Claimants, para. 148.

498. Therefore, the key issue is to know whether the regulatory framework existing at the time of the investment had the ability to give rise to a legitimate expectation, protected by international law, that it was not going to be modified or otherwise altered by provisions such as those enacted in 2010.

499. According to the Arbitration Tribunal, in the absence of a specific commitment an investor cannot have the legitimate expectation that the regulation in place is going to remain unchanged.

500. In this regard, the Tribunal shares the stance of the tribunal of the case *Electrabel v. Hungary* under the ECT, according to which "*While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment*."[436]

501. The Tribunal also considers relevant the considerations made by other tribunals, despite the fact that they were made under other treaties. The Arbitration Tribunal, in this regard, shares the stance of the tribunal of the case *CMS v. Argentina*, according to which "*it is not a question of whether the legal framework may need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with all together when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects*."[437]

436 *Electrabel* v. *Hungary*, part VII, p. 21, para. 7.77. *Vid*. *Continental Casualty v. Argentina*, para. 258; *Marvin Feldman v. Mexico*, para. 103.

437 *CMS v. Argentina*, para. 277.

502. Similarly, the tribunal of the case *El Paso v. Argentina* considered that "*if the often repeated formula to the effect that 'the stability of the legal and business framework is an essential element of fair and equitable treatment' were to be admitted, legislation could never be changed: the mere enunciation of that proposition shows its irrelevance. This standard of behaviour, if strictly applied, is not realistic, nor is it the BITs' purpose for States to guarantee that the economic and legal conditions in which investments take place will remain unaltered* ad infinitum*."* […] *"In other words, the Tribunal cannot follow the line of case law which determined that fair and equitable treatment was viewed as implying the stability of the legal and business framework. Economic and legal life is by nature evolutionary.*"[438]

503. In this case, the Claimants could not have the legitimate expectation that the regulatory framework laid down by RD 661/2007 and RD 1578/2008 would remain unchanged during the entire lifespan of their plants. Accepting such an expectation would, in fact, amount to freezing the regulatory framework applicable to eligible plants, even though the circumstances may change. Any modification to the tariff amount or any limitation in the number of eligible hours would thus constitute a violation of international law. In practice, the situation would be equivalent to that resulting from the signing by a State of a stabilization agreement, or of a commitment to never modify the regulatory framework. The Arbitration Tribunal cannot accept such a conclusion. In fact, the Claimants themselves have clearly stated that they could not reasonably expect that the regulatory framework would remain unchanged.[439]

504. The conclusion drawn by the Tribunal, i.e. that in the absence of a specific commitment the Claimants could not reasonably expect that the applicable regulatory framework provided in RD 661/2007 and

438 *El Paso v. Argentina*, paras. 350, 352.
439 PHB1 Claimants, para. 285.

RD 1578/2008 would remain unchanged, is backed by case law from the highest courts in Spain. Prior to the investment, these courts had clearly established the principle that domestic law could modify the regulations in force.

505. In this regard, the Arbitration Tribunal agrees with the Respondent, which claims that "*in order to rely on legitimate expectations, the Claimants should have conducted a diligent analysis of the legal framework applicable to their investment.*"[440] This stance is in line with the stance of other tribunals. The tribunal of the *Frontier* case, for instance, considered that "*a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the moment of the investment.*"[441] Indeed, in order for regulatory measures to be in violation of the investor's legitimate expectations, these regulatory measures must not have been reasonably foreseeable at the time of the investment. However, in the present case the Arbitration Tribunal considers that the Claimants could have easily foreseen the possibility that the regulatory framework was going to be modified, as it in fact was through the 2010 provisions. Indeed, Spanish law left wide open the possibility of modifying the remuneration scheme applicable to photovoltaic energy.

506. For instance, the Spanish Supreme Court had considered in December 2005 that: "*There is no legal obstacle for the Government, in the exercise of the regulatory powers entrusted thereto as well as its broad powers in a heavily regulated area such as electricity, to modify a specific remuneration scheme, provided that it remains in compliance with the framework provided by the LSE.*"[442] Likewise, in October 2006, the Supreme Court decided that: "*the owners of electricity production facilities under the special regime do not have an 'unmodifiable right' to have the feed-in remuneration scheme remain unchanged.*

440 Rejoinder, para. 876.

441 *Frontier Petroleum Services Ltd. v. Czech Republic,* UNCITRAL Award, 12 November 2010, para. 287.

442 Supreme Court Ruling of 15 December 2005 (RL-76).

Said regime, indeed, aims to promote the use of renewable energies by means of incentives which, as is always the case with incentives, are not guaranteed remain unchanged in the future."[443]

507. The Tribunal does not agree with the Claimants that said decisions are irrelevant or out of context. Although they refer to different rules, those judgments clearly lay down the principle that domestic law can modify, in compliance with the LSE, an economic regime, such as the one provided in RD 661/2007 and RD 1578/2008, aimed at fostering renewable energy production. To the Tribunal's understanding, at the time of making the investment in 2009 the Claimants could have carried out an analysis of their investment's legal framework in Spanish law and understood that the regulations enacted in 2007 and 2008 could be modified. At least that is the degree of diligence that could be expected from a foreign investor in a heavily regulated sector like the energy industry. In such a sector, thorough prior analysis of the legal framework applicable thereto is essential to make an investment.

508. Although these decisions by the Spanish courts are not binding on this Arbitration Tribunal, they are factually relevant to verify that the investor was unable, at the time of the disputed investment, to have the reasonable expectation that in the absence of a specific commitment the regulation was not going to be modified during the lifespan of the plants.

509. In this regard, the Claimants have submitted that according to the existing regulatory framework, registration on the RAIPRE granted energy producers a vested right to receive the tariff,[444] which provided a legitimate expectation that it would not be subsequently modified. The Tribunal does not agree with this argument.

443 Supreme Court Ruling of 25 October 2006 (RL-90); See also Supreme Court Rulings of 9 October 2007 (RL-331) and of 9 December 2009 (RL-332).

444 Memorial, paras. 95-96, 320; Response, para. 524.

510. Firstly, the Respondent has convincingly proved that, under Spanish law, registration with the RAIPRE was a mere administrative requirement in order to be able to sell energy, and by no means implied that registered facilities had a vested right to a certain remuneration.[445] Secondly, the existence of legitimate expectations has to be analysed on the basis of international law, not under domestic law. However, as has been stated in prior sections of this award, in the absence of a specific stability commitment, an investor cannot have the legitimate expectation that a regulatory framework like the one disputed in this arbitration would never be modified in order to adapt it to market needs and the public interest.

511. Therefore, the Tribunal concludes that the Claimants could not have the reasonable expectation that RD 661/2007 and RD 1578/2008 were not going to be modified during the lifespan of their facilities.

512. This does not mean, however, that the 2010 provisions may not be, in themselves, a violation of the fair and equitable treatment standard.

513. In their Memorial on the Merits, the Claimants submit in this regard that "*the investor's legitimate expectations* […] *are defeated, even in the absence of specific commitments, when the host State carries out actions that are incompatible with a criterion of economic reasonableness, with the public interest, or with the proportionality principle.*"[446]

514. As a matter of principle, the Arbitration Tribunal accepts this approach. Indeed, an investor has the legitimate expectation that, when the State modifies the regulation under which the investor made the investment, it will not do so unreasonably, contrary to the public interest, or in a disproportionate manner.

515. The Claimants' legitimate expectations are based on the content of RD 661/2007 and RD 1578/2008. Therefore, the Tribunal will analyse below whether, when amending those regulations

445 Rejoinder, paras. 633(e), 831-833.
446 Memorial, para. 293.

through the enactment of the 2010 provisions, the Respondent acted unreasonably, contrary to the public interest, or in a disproportionate manner.

516. The regulatory framework in force at the time of the regulation mainly comprised RD 661/2007 and RD 1578/2008. Said provisions can be summarized as follows:

- First, only those investors that fulfilled certain requirements (among others, investing in facilities and registering these facilities with the RAPIRE) within the set deadlines, could benefit from the feed-in remuneration scheme;
- Second, those energy producers that were able to launch their facilities within the deadlines laid down by the Government would benefit from the application of a certain tariff (the Feed-in Tariff or "**FIT**") set forth in the economic regime. For those facilities under RD 661/2007—registered prior to 30 September 2008—the FIT would apply during the first 25 years of operation, and it could be reduced to 80% of its value from year 26. In the case of facilities regulated by RD 1578/2008, the FIT was envisaged for the first 25 years of operation; and
- Third, both RD 661/2007 and RD 1578/2008 allowed for selling the entire net amount of energy produced and did not establish any time limits for the application of the FIT.

517. The Arbitration Tribunal considers that the proportionality requirement is fulfilled as long as the modifications are not random or unnecessary, and that they do not suddenly and unexpectedly eliminate the essential features of the regulatory framework in place.

518. The Arbitration Tribunal understands that RD 661/2007 and RD 1578/2008 establish specific rules whose essential characteristics are offering a guaranteed tariff (or a premium, where appropriate) as well as privileged access to the electricity transmission and distribution grid, to each energy producer that fulfils the established requirements. Within the framework of the

LSE, said principles make it possible to guarantee to renewable energy producers the reasonable returns to which Article 30.4 LSE refers.

519. Be that as it may, the 2010 provisions have not eliminated these characteristics from the existing regulation.

520. Indeed, RD 1565/2010 maintained the tariff until the 26th year. This period was subsequently extended, through Act 2/2011, until the 30th year of operation for each eligible plant. The difference between the situation resulting from Act 2/2011 and the previous situation is that under RD 661/2007 the tariff remained in force, although reduced by 80% of its value, from the 26th year of operation onwards and for the entire lifespan of the facility.

521. In this regard, there is a debate between the Parties on whether the lifespan of a photovoltaic plant can exceed 30 years. If it cannot, the modification introduced in 2010 would, obviously, not affect investors.

522. The Tribunal does not find the evidence provided by the Claimants for the purposes of proving that a plant's lifespan could actually exceed 30 years to be convincing.

523. The Claimants state that the lifespan of the facilities ranges between 35 and 50 years,[447] and they also contend that obtaining the FIT for the entire lifespan of the plants was a fundamental element of the regulatory regime under RD 661/2007.[448]

524. The Respondent claims that the lifespan of a plant ranges between 25 and 30 years, and that in order to extend this lifespan, it would be necessary to replace nearly all of the equipment, which would entail a "*substantial modification*" according to Article 4 of RD 661/2007. Said substantial modification would imply losing entitlement to the tariff.[449]

525. Although the Claimants agree with the Respondent in that performing substantial modifications would imply losing the right to the regulated tariff,[450] the Claimants contend that there was no need to perform substantial modifications, since with minor maintenance modifications

447 PHB2 Claimants, paras. 17(a) and 165, citing CT-1, pp. 49-50.
448 PHB1 Claimants, para. 160.
449 Counter-Memorial, paras. 78, 146-147, 590 (b)(i-iv), 807-812 citing Report RT-1, para. 54; Rejoinder, para. 238.
450 Response, para. 251; Rejoinder, para. 315.

the lifespan of the facilities could be extended beyond 30 years.[451]

526. According to the Respondent, the fact that the Claimants' expectation did not exceed 30 years is confirmed by the fact that this limit matches the terms of the lease contracts for the use of the land where the facilities are located.[452] In this regard, the Respondent claims that this is not an essential factor, since the contracts had clauses that allowed for the extension thereof.[453]

527. The Tribunal considers the arguments and explanations submitted by the Respondent and its expert Altran Mac-Group[454] to be convincing in that, taking into account the technology available when the plants were built, the horizon for the lifespan of the plants would not exceed 30 years without making essential modifications thereto. In any event, regardless of the objective analysis of the lifespan of each plant, the Tribunal deems significant that in the vast majority of the cases the Claimants themselves foresaw in the lease contracts for the lands a 25-year term (24 out of 34); a few agreements had 30-year terms (6 out of 34), and only two agreements provided for terms of over 30 years. In fact, the average of "*the time limits for the operation of the facilities*" described in the expert report provided by the Claimants, to calculate cash flows in the long term, is 27.5 years.[455]

528. Moreover, other documents prior to the investment which have been invoked by the Claimants as giving rise to their expectations, PER 2005-2010,[456] and the *El sol puede ser suyo* ["The Sun Can Be Yours"] documents of 2005 and 2007,[457] also provide for standard plants with a 25-year lifespan.

529. For the foregoing reasons, the Tribunal is not persuaded by the Claimants' assertion that an essential element of their

451 Response, para. 252, C-293.
452 Counter-Memorial, para. 811.
453 PHB2 Claimants, para. 59.
454 RT-1, pp. 172-182.
455 CT-1, p. 51, table 16.
456 C-9, 168.
457 C-86, pp. 14-29; C-87, pp. 14-17.

expectations as an investor was to be able to operate the plants during a period ranging between 35 and 50 years, without making any essential modifications and thus enjoying the tariffs. Hence, the modification made by RD 1565/2010, which in application of Act 2/2011 subsequently extended the application of the tariffs until the first 30 years of operation of the plants, could not have defeated the Claimants' legitimate expectations.

530. Another modification introduced by the 2010 regulations was the limit to the yearly hours that were eligible for obtaining the tariff according to two elements: (i) the climate zone in accordance with the average solar radiation in Spain under RD 314/06; and (ii) the type of technology used (fixed facility or facility with uniaxial or biaxial tracking system). The Arbitration Tribunal considers that the number of hours eligible for the tariff is not capable of giving rise to legitimate expectations under international law. To maintain an opposing position would be equivalent, as has been stated, to freezing the regulatory framework in force in 2008 in terms of its duration, amount, and number of eligible hours. Spain contends that the limitation of eligible hours according to climate zones and the type of technology used is simply the result of the PER 2005-2010, which links the generation of electricity using photovoltaic technology to the availability of the solar resource, thus establishing a map of the amount of daily average energy per surface unit divided into five climate zones, which are defined in the Technical Building Code.[458]

531. In this regard, the Tribunal is convinced by the Respondent's arguments. According to the Respondent, the ceilings provided in RDL 14/2010 were the ceilings of usable hours of production accounted for in RD 661/2007 and RD 1578/2008 in order to calculate the plants' remuneration (to calculate the tariff). As regards the zones provided for, Spain proved that Annex XII of RD 661/2007 contained a chart in which time zones were provided for.[459]

458 Counter-Memorial, paras. 178-179; RL-83.

459 Transcript 2014, day 2, p. 119, lines 17-31, and p. 120, lines 1-4; RL-97; Likewise, the presentation "El sol puede ser suyo 2005" ["The Sun Can Be Yours"] contained a map of the five geographical solar radiation zones in Spain (C-86, p. 6).

532. These circumstances reinforce the conclusion drawn by the Arbitration Tribunal that introducing a time limit based on the adjustment principle, according to climate zones established in the PER 2005-2010, was not disproportionate and cannot have defeated any legitimate expectation under international law.

533. Ultimately, the 2010 regulations have implemented adjustments and adaptations that did not eliminate the essential characteristics of the existing regulatory framework, since the photovoltaic producers retained their right to receive a tariff (FIT), as well as the possibility of selling the net amount of energy produced on the market on a priority basis. Therefore, in the opinion of this Arbitration Tribunal, no legitimate expectation whatsoever under international law could have been defeated.

534. Regarding the economic rationality arguments, the Tribunal considers that both the time limits and the limitation of eligible hours cannot be deemed as irrational. As has been stated, the 30-year limit of the tariff comes in response to an objective criterion, i.e. the expected lifespan of a photovoltaic facility, whereas the limitation of eligible hours comes in response to an objective criterion based on the climate zone in which the plant is located and on the technology used. According to the Arbitration Tribunal, although these measures may harm the producers' economic interests, they have been adopted on the basis of objective criteria, and they cannot be considered irrational or arbitrary.

535. Nor has it been proved that the 2010 measures were contrary to the public interest. Although there is a debate between the Parties on the evolution of the tariff deficit, it is true that the premiums paid to the photovoltaic sector amounted to more than those paid to all of the remaining technologies, in absolute terms,[460] and they increased significantly year by year.[461] The Arbitration Tribunal is also convinced that the price paid by national consumers per kW/hour steadily increased in Spain in a proportion much greater than the EU average.[462]

460 Submission by Mac Group-Altran during the hearing of 29 July 2015, p. 3.
461 Submission by Mac Group-Altran during the hearing of 29 July 2015, p. 4.
462 Counter-Memorial, para. 189; Rejoinder, para. 112; Report RT-1, paras. 354-357.

536. In view of all these circumstances, the fact that the Respondent has implemented measures to try to limit the deficit and price evolution is neither arbitrary, nor irrational, nor contrary to the public interest. In addition, the burden of proof concerning the arbitrary or irrational nature of the disputed measures is on the Claimants, and they have provided no evidence in this regard.

537. Nor have the Claimants proved in any way that the remaining measures about which they have complained to a lesser degree (payment of a 0.5 €/MW fee to access the transmission and distribution grid, as provided by Transitional Provision One of RDL 14/2010 in accordance with EU regulations, and the implementation of security measures against voltage sags in the facilities, as provided in Article 1.5 of RD 1565/2010) were irrational, arbitrary, disproportionate, or contrary to the public interest, and thus in violation of international law.

538. The Kingdom of Spain rightfully claims that the requirement to cover voltage sags is reasonable, since it is aimed at preventing the system's technical collapse, thus enhancing its security and management. The Claimants have alleged that the regulations on voltage sags are discriminatory, since they do not apply the same compensations provided for wind energy.[463] The Tribunal considers that there is no basis for this argument, since the State may apply different rules to different industries without violating the obligation not to discriminate under international law.

539. In sum, the Tribunal considers that the 2010 regulations cannot be considered to be in violation of the ECT. Indeed, said rules introduce modifications that are restricted to the regulatory framework applicable at the time of the investment, without eliminating its essential features, and in particular, the existence of a tariff guaranteed during the entire lifespan of the facilities. The Claimants have not proved that the 2010 regulations defeated their legitimate expectations under the ECT

463 Memorial, para. 187; Response, para. 171-172.

due to being unreasonable, arbitrary, contrary to the public interest or disproportionate. Neither is there any proof whatsoever that such provisions were unfair or inconsistent. Finally, the Claimants have not proved that the 2010 regulations were adopted in violation of the due process requirements under Spanish law.[464]

540. Therefore, the Tribunal considers that, based on the analysis restricted to the 2010 regulations submitted by the Claimants, it has not been proved that Spain violated its obligation to grant fair and equitable treatment.

541. Finally, the Claimants have neither alleged nor proved any violation of Spain's obligation to guarantee full protection and security, or of its obligation not to adopt inordinate or discriminatory measures that could impair the management, maintenance, use, enjoyment or disposal of the investment.

542. By reaching this conclusion, the Arbitration Tribunal obviously does not intend to prejudge in any way the conclusions that could be reached by another arbitration tribunal based on the analysis of all the regulations enacted to date, including the 2013 regulations, which, at the choice of the Parties, are outside the scope of the analysis submitted to this Tribunal.

b) Retroactivity

543. The Claimants allege that when immediately applied to the plants that had already been registered with the RAIPRE, the 2010 measures undermined "*T-Solar's vested rights.*"[465] In this regard, the Claimants submit that "*T-Solar was entitled to a fixed tariff, with no time restrictions, for the time period established in RD 661/2007. The replacement of this right with a mutilated version that alters the economic equilibrium under which the Claimants invested constitutes a retroactive regulation contrary to Article 10(1) ECT.*"[466] In their Response, the Claimants raise this argument again,

464 The Tribunal in this regard agrees with the observations made by Spain in Annex 3 of PHB2, paras. 19-21.
465 Memorial, para. 316.
466 Memorial, para. 327.

adding that their "vested right" constituted a "*true asset incorporated into the facilities operated by T-Solar; integrated into their assets, amenable to economic valuation and transferable with the facility*."[467] The Claimants support this argument with the award of the case *CMS v. Argentina* and other awards that ordered Argentina to compensate the effects of "peso-ification".

544. The Arbitration Tribunal does not agree with the Claimants' argument regarding the alleged retroactive nature of the 2010 measures.

545. Firstly, the current situation is very different from the situation addressed in the award *CMS v. Argentina*, in which the subject was the breach of contractual commitments. In the present case there is no such commitment. Herein we must assess to what extent the State can modify, with immediate effect, generally applicable regulatory provisions.

546. In fact, the retroactivity argument raised by the Claimants is a mere re-wording of the argument that the State could not alter in any way the regulatory framework from which the Claimants' plants benefited. However, this Tribunal has already explained that the obligation to provide fair and equitable treatment does not mean that the regulatory framework must remain unchanged for all eligible plants during their entire lifespan. This stance would, in fact, freeze the regulatory framework, thus restricting any possible regulatory change to new energy plants installed after said changes.

547. The Tribunal has already, in previous sections of this award, pronounced itself on the fact that, under Spanish law, registration with the RAIPRE was a mere administrative requirement in order to be able to sell energy, and it did not mean that the registered facilities had a vested right to a certain remuneration.[468]

548. In their submissions, the Claimants fail to explain why under international law it should be concluded that there was a vested right

467 Response, para. 615.
468 See above, paras. 508-509.

to having the tariff maintained, and why the application of the 2010 regulations to plants already registered with the RAIPRE was contrary to the ECT. In this regard, it is undisputed that the 2010 regulations applied immediately, from their entry into force, to the plants already in operation, and that they did not apply retroactively to previous time periods. The Arbitration Tribunal considers that unless there are specific commitments in place such as those stemming from a contract, there is no principle of international law preventing a State from adopting regulatory measures with immediate effect on ongoing situations. At the very least, the existence of such a principle has not been proved by the Claimants.

549. Based on the foregoing, the Tribunal rejects the Claimants' argument that the immediate application of the 2010 regulations breached Article 10(1) ECT.

5. Arbitration Costs

a) Arbitration costs (Article 43 of the Rules)

550. Pursuant to Article 43 of the Rules, the arbitration costs include the fees of the Arbitration Tribunal, the administrative fee, and the expenses of the Arbitration Tribunal and the SCC, as well as any reasonable costs incurred by the Parties according to Article 44 of the Rules.

551. On 19 January 2016, the Board set the costs of the arbitration as follows:

> The fees of the President of the Arbitration Tribunal, Alexis Mourre, amount to 218,500 euros and his compensation for expenses amounts to 9,941.74 euros.
>
> The fees of Arbitrator Guido Santiago Tawil amount to 131,100 euros and his compensation for expenses amounts to 18,864.85 euros.[469]
>
> The fees of Arbitrator Claus Von Wobeser amount to 131,100 euros and his compensation for expenses amounts to 20,620 USD.

469 Of which 14,565.69 euros were provided in advance by the SCC (5,000 euros as *per diem* and 9,565.69 euros for expenses).

The administrative fee of the SCC totals 28,910 euros, and the costs incurred total 14,565.69 euros .[470]

552. Pursuant to the foregoing, although the Parties had paid in advance deposits of 659,500 euros, the SCC Board determined the total costs under Article 43 of the Rules to be 538,416.59 euros and 20,620 USD. Value added tax (V.A.T.) must be added to such amounts, where applicable.

b) <u>Reasonable costs incurred by the Parties (Article 44 of the Rules)</u>

553. On 15 September 2015, each Party submitted its claim submission for the costs of the arbitration.[471]

554. The Claimants declared to have incurred a total cost amounting to 1,211,287.18 euros for arbitration costs, and request the Tribunal to order the Kingdom of Spain to pay all costs and expenses arising out of this arbitration proceeding.

555. According to the breakdown of the total amount claimed, 329,750 euros correspond to the advance on costs of the arbitration; 13,727.52 euros correspond to expenses related to organizing the hearings and the transcripts thereof; 102,750 euros correspond to the fees of their Deloitte expert; and 765,059.66 euros correspond to the fees and expenses of their lawyers.

556. The Respondent declared to have incurred a total amount of 2,560,256.75 euros as costs of the arbitration, and requests the Tribunal to order the Claimants to pay for those costs. In addition, the Respondent refuses to bear, in full or in part, the costs incurred by the Claimants.

557. According to the cost breakdown submitted by the Respondent, out of the total amount claimed, 329,750 euros correspond to the advance on costs of the arbitration; 16,610.31 euros correspond to expenses related to organizing the hearings and the transcripts thereof;[472] 659,571 euros correspond to the

470 These are the costs incurred by the SCC for the advance on costs of the expenses of Arbitrator Tawil. Therefore, said amount shall only be accounted for once, when determining the total cost established by the Institute.

471 On 16 September 2015, the Claimants sent a supplementary written submission completing the costs incurred for professional services provided by the Deloitte expert, and the amounts paid as provision of funds to cover the costs of the arbitration.

472 According to the invoices submitted by the Respondent on 9 December 2015.

fees of its Mac Group-Altran experts; and 1,554,325.44 euros correspond to the fees and expenses of its lawyers.

c) Arbitration Tribunal's Decision on costs

558. Article 43(5) of the Rules sets forth that, unless otherwise agreed by the parties, the Arbitration Tribunal shall, at the request of a party, apportion the costs of the arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.

559. For its part, Article 44 of the Rules sets forth that unless otherwise agreed by the parties, the Arbitration Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

560. In the present case there has been no agreement between the Parties regarding the apportionment of costs, and in fact each Party has requested the Tribunal to order the counterparty to pay for the costs incurred.

561. The Arbitration Tribunal considers that since the Claimants have not been successful in their claims, they must bear all of their own expenses and the part of the costs of the arbitration they have paid in advance. Thus, the Claimants are not entitled to any compensation from the Respondent.

562. As for the Respondent, the Tribunal considers that since it has been successful on the merits but it has not been successful in the complex matters of jurisdiction submitted to the Tribunal, it shall only be entitled to repayment of part of its own reasonable costs.

563. With regard to the fees of their lawyers, the Arbitration Tribunal notes the disproportionality between the amount of 1,554,325.44 euros claimed by the Respondent as the fees and expenses of its lawyers and the claim made by the Claimants on the same account, which amounts to 765,059.66 euros. The Tribunal also considers that the Respondent's request for the fees is not in line with the amount of the claims, which is less than ten million euros. Although the issues debated may be complex, the Tribunal considers that the Parties could have limited their expenses having regard to the limited amount of the dispute.

564. Therefore, in light of all relevant circumstances, the Arbitration Tribunal considers that the reasonable amount of the Respondent's costs for legal representation is one million euros.

565. However, the Tribunal also takes into account that the Respondent has not been successful in its arguments on jurisdiction. Due to their complexity, both the parties and the Tribunal have devoted a significant amount of time in this arbitration to examining these jurisdictional arguments. Thus, the Tribunal deems it appropriate to limit the repayment to which the Respondent is entitled to 50% of its reasonable costs for legal representation.

566. Based on the foregoing, the Arbitration Tribunal has decided that the Claimants must repay to the Respondent the amount of 500,000 euros as costs for legal representation.

567. Regarding the costs of the expert reports, the Respondent requests the amount of 659,571 euros as expert fees. The Arbitration Tribunal considers that, since these costs relate to the merits of this arbitration, the Respondent is entitled to request full repayment of such costs.

568. As for the costs of the arbitration determined by the SCC Board which were paid in advance by the Respondent, i.e. the amount of 269,208.29 euros and 10,310 USD, the Arbitration Tribunal considers that, on the same grounds stated above for the costs for legal representation, the Claimants must pay the Respondent half of that amount, i.e. 134,604.14 euros and 5,155 USD. Value added tax (V.A.T.) must be added to such amounts, where applicable.

569. Finally, the Respondent is entitled to be reimbursed for the total amount of the costs incurred thereby for organizing the hearings and the transcripts thereof, i.e. 16,610.31 euros.

570. In conclusion, the Claimants must pay the Respondent the amount of 1,310,785.45 euros and 5,155 USD as reasonable costs and expenses.

571. The Respondent claims interests "*at a reasonable rate*" on said amount from the date on which such costs were incurred until the date of effective payment thereof.[473]

572. The Respondent, however, has not justified the date on which it paid the requested amounts; therefore, it is not possible to identify in the present award the starting date for interest. Thus, the Arbitration Tribunal will only grant post-award interests. As for the applicable interest rate, because they are amounts paid by the Spanish State, the Arbitration Tribunal deems it appropriate to apply the legal rate in force in Spain.

X. DECISION

573. For the above-mentioned reasons, the Arbitration Tribunal:

a) Declares that it has jurisdiction to resolve the present dispute;

b) Rejects in full the claims submitted by the Claimants;

c) Orders the Claimants, jointly and severally, to compensate the Respondent:

- For the arbitration costs determined by the SCC Board under Article 43 of the Rules, the amounts of 134,604.14 euros and 5,155 USD. Value added tax (V.A.T.) must be added to such amounts, where applicable.

- For all reasonable costs incurred by the Respondent under Article 44 of the Rules, the amount of 1,176,181.31 euros.

d) The amounts mentioned in section (c) shall accrue interest in favor of the Respondent at the legal rate of interest in force in Spain from the date of this award and until the date of payment.

[473] PHB1 Respondent, para. 983(e).

Seat: Madrid, Spain

Date:

Dr. Guido Tawil

Mr. Claus von Wobeser

M
r.

Charanne B.V.

Construction Investments S.A.R.L.

v.

The Kingdom of Spain

(Arbitration No.: 062/2012)

Dissenting opinion of Prof. Guido Santiago Tawil

1 I agree with the conclusions drawn by my distinguished arbitrator colleagues on those aspects of the case

relating to the recognition of the jurisdiction of this Arbitration Tribunal to resolve the present dispute. In that sense, I agree that this Tribunal is competent to decide on the dispute between the Claimants and the Kingdom of Spain under the Energy Charter Treaty ("ECT").

2. As to the merits of the case, I agree with the standard for "*indirect expropriation*" as followed by the majority of the Arbitration Tribunal in paragraph 461 of the Award, to the extent that it is characterised by the existence of a "*substantial effect*" on property rights. This Arbitration Tribunal having been limited to hearing and deciding upon—due to a decision of the Parties—information received up to the enactment and entry into force of RD 1565/2010 and RDL 14/2010 (the "2010 measures", as defined in the Award), and excluding from the analysis any regulations issued thereafter, I also agree that in the present case there has not been any evidence of an indirect expropriation of investments by the Kingdom of Spain under Article 13(1) ECT.

3. Unfortunately, I cannot agree with the reasoning made and conclusions drawn by the majority on the treatment of "*legitimate expectations*" as they relate to the standard of "*fair and equitable treatment*" under Article 10(1) ECT.

4. First of all, I agree that the verification of whether there has been a violation of the investor's legitimate expectations should be based upon an "objective" standard or analysis (not on the mere subjective belief that the investor could have held at the time of making the investment), a criterion which must be evaluated on a case-by-case basis. In addition, it is my understanding that the application of the principle depends on whether the expectation was reasonable in this specific case,[1] with special emphasis on the representations made by the receiving State to induce the investment, and, in this case, the change of the legal regime that occurred once that investment was made.

5. My disagreement with the majority is based on the fact that, in my opinion, the creation of legitimate expectations in an investor is not limited solely to the existence of a "specific commitment"—either contractual in nature or based on specific statements or conditions declared by the receiving State—but it can also

1 See: *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic,* (ICSID Case No. ARB/03/19), Decision on Liability, 30 July 2010, ¶ 226.

derive from, or be based on, the legal system in force at the time of the investment.[2]

6. In the present case, the policy outline of the special regime put into place by the Kingdom of Spain through RD 661/07 and RD 1578/08, establishing a "Feed-In Tariff" ("FIT") to remain in force—at a minimum—for 25 years, and in relation to which Spain had *declared that it would not be affected by future tariff reviews*,[3] together with other documents issued contemporaneously by the Spanish Government[4] (which, by themselves, may not have had the full effect of generating legitimate expectations, but did serve to interpret the context and the purpose of the regulatory measures), in my view, appear to be determining factors for the Claimants to decide to carry out the investment in photovoltaic plants. Therefore, pursuant to the provisions of RD 661/07 and RD 1578/08, the Claimants could have "objectively" believed that the tariff regime established under each one[5] would remain unaltered.

[2] See: United Nations Conference on Trade and Development (UNCTAD), Fair and Equitable Treatment, 2012, p. 69: *"Arbitral decisions suggest [...] that an investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example, in the form of a stabilization clause, or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment."* In *Total v. Argentina,* the Tribunal concluded that legitimate expectations can be created not only in contracts, concessions and stabilization clauses, but also from any intentional conduct on the part of the host State to make an investor reasonably believe that it has "*the intent to pursue a certain conduct in the future*", or to create "*expectations in potential investors with respect to particular treatment or comportment*". See: *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010,115 119-121. In the same vein, Rudolph Dolzer and Christoph Schreuer, *Principies of International Investment Law,* Oxford University Press, second edition, (2012), p. 145.

[3] See: Article 44.3 of RD 661/07 ("During the year 2010, in view of the outcome of the monitoring reports on the degree of compliance with the Renewable Energy Plan [PER] 2005-2010 and the Strategy for Energy Saving and Efficiency in Spain (E4), as well as any new objectives included in the next PER for the 2011-2020 period, the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree shall be reviewed, based on the costs associated with each of these technologies, the degree of involvement of the special regime in covering demand, and its impact on the economic and technical management of the system, while guaranteeing reasonable profitability rates with reference to the cost of money in the capital market. Every four years, from then on, there shall be a new review maintaining the above criteria. *Revisions to the regulated tariff and to the upper and lower limits referred to in this section shall not affect facilities whose deed of entry into service is granted before 1 January of the second year after the year in which the review was made")* (italics mine).

[4] See: Renewable Energy Plan 2005-2010, approved by the Spanish Government through a Council of Ministers Decision of 26 August 2005. In the same vein, the document *El sol puede ser suyo* [The Sun Can Be Yours] (PHB1 Claimants, para. 148).

[5] With greater incentives for those who invested before 29 September 2008 under the regime established in RD 661/07. See Article 22 of RD 661/07, the NEC Resolution of 27 September 2007 and Article 2 of RD 1578/2008.

7. In this sense, the system established by RD 661/07 and RD 1578/08 constitutes a regime of promotion or "fostering", a typical economic policy instrument aimed at creating differentiated incentives that would lead private capital in a certain direction, an objective that otherwise would probably not be achieved. This constitutes a legitimate action by the Spanish State designed to "protect or promote" those economic activities by individuals that fulfil a public need or a general purpose, initially avoiding the use of coercion or the benefit-related activity that characterises a public service.

8. Moreover, I am of the opinion that the system implemented by RD 661/07 and RD 1578/08 was not targeting an indeterminate "generality" or an imprecise or indefinite collective, but rather a limited number of potential recipients, who had sufficient capital for investing in the industry in question, and that the Kingdom of Spain considered it appropriate to encourage this, thus avoiding having to use its own resources.

9. This regime was not valid *sine die* or indefinitely, but rather it required that investments in photovoltaic facilities be made, entered into the registry[6] and put into operation prior to the expiration of a deadline. Failure to comply with this schedule prevented access to the special benefit established in the regulation. These two elements, namely, (i) a regulation that created a strong incentive to invest in the generation of renewable energy, aimed at a quantifiable number of possible interested parties, and (ii) a short period in which to be entitled to the benefit, directing private capital to the desired investment, are both defining factors, in my opinion, for accepting the existence of the Claimants' legitimate expectations.

10. Once the Claimants made the investment, complying with all the existing requirements of the regulations governing the granting of the expected benefit (in this case, the FIT), it does not appear to be recognized as legally acceptable for the receiving State to be recognized as having the prerogative to modify or eliminate it without any legal consequence.

11. There is an argument used repeatedly in the Award, according to which the recognition of legitimate expectations in this case would be equivalent to admitting that the regulatory power of the

[6] See Article 14 of RD 661/07: *"The final registration of the facility in the Public Authority Register of production facilities under the special regime shall be a necessary requirement for the application of the economic regime regulated under this Royal Decree to such facility, with effect from the first day of the month following the date of the final deed of entry into service of the facility."*

receiving State remains “frozen” *sine die* or that the legislation cannot be subsequently amended in conformity with the public interest. I respectfully disagree with this assessment. There is no doubt that as a general rule, no vested right to the continuance of a specific general legal regime exists, nor does a legitimate expectation regarding the stability of laws and regulations. The receiving State always preserves its regulatory power and may amend its legislation, even in cases in which it had granted stabilization clauses. Nevertheless, if in the valid exercise of this regulatory power, the receiving State affects vested rights or legitimate expectations, it must provide compensation for the damage caused.

12. In short, when an investor complies with all the requirements established by the legislation in force to be entitled to a particular and specific benefit, subsequent disregard on the part of the State receiving the investment violates a legitimate expectation. The Kingdom of Spain was entitled to amend or eliminate the established promotion regime. No risk of freezing, petrification or immutability of the economic framework existed. Nevertheless, if the modification of the benefit granted to parties that had already invested as a result of this special regime—which established, in this case, a limitation to the number of production hours and years of entitlement to tariffs—caused harm without providing adequate compensation, this would violate the legitimate expectations created, and thus, the fair and equitable treatment protected by Article 10 ECT.

13. Given **the way in which the majority has decided, it is not applicable to make any declaration** in relation to the existence or non-existence of the alleged damage, its importance, or the required compensation.

Prof. Guido Santiago Tawil

Arbitrator

Date: 21 December 2015