

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**RWE INNOGY GMBH
AND
RWE INNOGY AERSA S.A.U.**

Claimants

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/14/34

AWARD

Members of the Tribunal

Ms. Anna Joubin-Bret, Arbitrator
Mr. Judd L. Kessler, Arbitrator
Mr. Samuel Wordsworth QC, President

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: 18 December 2020

REPRESENTATION OF THE PARTIES

*Representing RWE Innogy GmbH and
RWE Innogy Aersa S.A.U.:*

Ms. Marie Stoyanov
Mr. Antonio Vázquez-Guillén
Ms. Virginia Allan
Mr. David Ingle
Mr. Pablo Torres
Ms. Patricia Rodríguez
Allen & Overy LLP
Serrano 73
28006 Madrid
Spain

and

Mr. Jeffrey Sullivan
Gibson, Dunn & Crutcher LLP
Temple Avenue
London, EC4Y 0HB
United Kingdom

Representing Kingdom of Spain:

Mr. José Manuel Gutiérrez Delgado
Ms. Gabriela Cerdeiras Megías
Mr. Pablo Elena Abad
Mr. Antolín Fernández Antuña
Ms. Patricia Froehlingsdorf Nicolas
Ms. María del Socorro Garrido Moreno
Mr. Rafael Gil Nievas
Ms. Lourdes Martínez de Victoria Gómez
Ms. Elena Oñoro Sainz
Ms. Amaia Rivas Kortazar
Mr. Mariano Rojo Pérez
Mr. Diego Santacruz Descartín
Mr. Javier Torres Gella
Mr. Alberto Torró Molés
Abogacía General del Estado
Depto. Arbitrajes Internacionales
c/Marqués de la Ensenada, 14-16
2ª. Planta
28004 Madrid
Spain

TABLE OF CONTENTS

I.	INTRODUCTION AND PARTIES	1
II.	PROCEDURAL HISTORY.....	1
III.	THE REMAINING ISSUES ON QUANTUM	4
	A. The Parties’ Positions.....	5
	(1) The Claimants’ Position.....	5
	a. The Claw-back	5
	b. Tax Treatment of Damages	9
	c. Additional Sensitivities to Damages. No Res Judicata	10
	(2) The Respondent’s Position	12
	a. The Alternative Legal Interpretation of the Tribunal’s Decision.....	12
	b. Claw-back.....	13
	c. Amounts Related to the Coverage Ratio	14
	d. Amounts Related to the Income Tax	16
	e. Additional Sensitivities to Damages. Res Judicata	16
	B. The Tribunal’s Analysis	18
	(1) <i>Res judicata</i>	18
	(2) The Tribunal’s determination with respect to the repayment of any sums already paid to the Claimants in the period between the adoption of RDL 9/2013 and Order IET 1025/2014.....	23
	(3) Damages arising out of the finding of breach through the disproportionate nature of the new measures adopted	30
	(4) Conclusion in relation to the heads of damage ordered in the Decision.....	34
IV.	RESIDUAL ISSUES ON QUANTUM	34
	A. The Tax Gross-Up.....	34
	(1) The Parties’ Positions	34
	a. The Claimants’ Position	34
	b. The Respondent’s Position.....	35
	(2) The Tribunal’s Analysis.....	35
	B. Interest	36
	(1) The Parties’ Positions	36
	a. The Claimants’ Position	36
	b. The Respondent’s Position.....	37
	(2) The Tribunal’s Analysis.....	37

C.	Costs	39
(1)	The Parties' Positions	39
a.	The Claimants' Position	39
b.	The Respondent's Position.....	39
(2)	The Tribunal's Analysis.....	39
V.	AWARD	42

TABLE OF DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
C-[#]	The Claimants' Exhibit
Cl. Comments	The Claimants' Comments on the Experts' Joint Report, dated 1 May 2020
Cl. Mem.	The Claimants' Memorial on the Merits, dated 26 February 2016
Cl. PHB	The Claimants' Post Hearing Brief, dated 28 July 2017, as revised on 7 August 2017
Cl. Rej.	The Claimants' Rejoinder on Jurisdiction, dated 2 March 2017
Cl. Reply	The Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, dated 11 November 2016
Cl. Response	The Claimants' Responsive Submission on the Experts' Joint Report, dated 19 May 2020
CL-[#]	The Claimants' Legal Authority
Cl. Skeleton	The Claimants' Skeleton of the Case, dated 24 April 2017
CNMC	The National Commission on Markets and Competition (<i>Comisión Nacional de los Mercados y la Competencia</i>)
Decision	The Tribunal's Decision on Jurisdiction, Liability, and Certain Issues of Quantum, dated 30 December 2019
ECT	Energy Charter Treaty, adopted in Lisbon on 17 December 1994
Experts	Compass Lexecon and BDO together.
Experts' Joint Report	The Experts' Joint Report in Response to the Tribunal's Decision on Jurisdiction, Liability and Certain Issues of Quantum by

	Pablo T. Spiller and Antón García of Compass Lexecon and Gervase MacGregor, Eduardo Pérez Ruiz, David Mitchell and Francisco Javier Espel Sesé of BDO, dated 16 April 2020
Hearing	Hearing on the merits and jurisdiction held in Paris, France on 15 – 19 May 2017
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IRR	Internal Rate of Return
R-[#]	The Respondent's Exhibit
RE	Spain's Renewable Energy power generation sector
Resp. C-Mem.	The Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, dated 20 May 2016
Resp. Observations	The Respondent's Observations on the Experts' Joint Report, dated 1 May 2020
Resp. PHB	The Respondent's Post Hearing Brief, dated 14 July 2017
Resp. Rej.	The Respondent's Rejoinder on the Merits and Reply on Jurisdiction, dated 19 January 2017
Resp. Response	The Respondent's Responsive Observations on the Experts' Joint Report, dated 19 May 2020
Resp. Skeleton	The Respondent's Skeleton of the Case, dated 5 May 2017
RL-[#]	The Respondent's Legal Authority
RfA	The Claimants' Request for Arbitration, dated 16 December 2014
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing

Tribunal	Arbitral Tribunal constituted on 4 November 2015
----------	--

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Energy Charter Treaty which entered into force on 16 April 1998 for Germany and the Kingdom of Spain (the “**ECT**” or “**Treaty**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The claimants are RWE Innogy GmbH (“**RWE**”), a company incorporated under the laws of Germany, and RWE Innogy Aersa S.A.U. (“**RWE Innogy Aersa**”), a company incorporated under the laws of the Kingdom of Spain (together, the “**Claimants**”). The respondent is the Kingdom of Spain (“**Spain**” or the “**Respondent**”).
3. The Claimants and the Respondent are collectively referred to as the “**Parties.**” The Parties’ representatives and their addresses are listed above on page (i).
4. This dispute relates to measures implemented by the government of Spain modifying the regulatory and economic regime of renewable energy projects.
5. The Tribunal refers to section IV of its Decision on Jurisdiction, Liability, and Certain Issues of Quantum, dated 30 December 2019 (the “**Decision**”), for the legal and factual background of the case.

II. PROCEDURAL HISTORY

6. On 30 December 2019, the Tribunal issued its Decision on Jurisdiction, Liability and Certain Issues of Quantum (the “**Decision**”). The Decision is attached to this Award, and constitutes an integral part of it.
7. In the Decision, the Tribunal ruled:

“For the reasons set out above, the Tribunal decides as follows:

(1) That it lacks jurisdiction to hear the claims of breach of Article 10(1) ECT with respect to the two Taxation Measures introduced by Law 15/2012 of 27 December 2017, but that the jurisdictional objections of the Respondent are otherwise rejected.

(2) That the Respondent has breached Article 10(1) ECT (i) to the extent that it has procured repayment by the Claimants of sums previously paid by the Respondent under the regime in place prior to adoption of the Disputed Measures, and (ii) the disproportionate nature of the new measures that it has adopted, with specific respect to Urano, Grisel II, Bancal I and II, Siglos I and II, and Cepeda.

(3) All other claims and requests of the Parties are dismissed.

*(4) The Parties are directed to attempt to reach an agreement on the amount of compensation to be paid by the Respondent to the Claimants in respect of its breaches of its obligations as identified in paragraph (2), in accordance with the Tribunal's findings. In a first phase, the Parties are invited to agree by **January 23, 2020** on a reasonable schedule within which to attempt to reach agreement. If the Parties are unable to agree on such a schedule, such will be fixed by the Tribunal through further directions.*

(5) Insofar as the Parties fail to reach an agreement in accordance with (4) above, the Tribunal will, following consultation with the Parties, fix a calendar for further submissions of the Parties on the damages due to the Claimants.

(6) The decision on the final determination of the damages due is thus reserved and will be fixed in the Award, along with the Tribunal's decisions as to interest, tax and costs.”¹

8. The Tribunal refers to section II of the Decision for the prior procedural history.
9. On 6 February 2020, pursuant to sub-paragraph 748(4) of the Decision, and following the Tribunal's granting of a two-week extension, the Parties communicated to the Tribunal their agreement on the schedule within which to attempt to reach agreement on the amount of compensation. The Parties proposed to do so in the form of a joint expert report, and included a proposed schedule for the preparation and submission of the experts' joint report.

¹ Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019 (the “**Decision**”), ¶ 748.

10. The Parties disagreed on the modality of the Parties' eventual submissions (if any) on matters directly relating to the experts' joint report. On 6 February 2020, the Claimants expressed their view that the submissions should be simultaneous, whereas the Respondent submitted in its communication of 13 February 2020, that they should be filed sequentially.
11. On 15 February 2020, the Tribunal informed the Parties that the above indicated submissions, if any, should be simultaneous, with the possibility for the Parties to request leave from the Tribunal for a responsive (simultaneous) round, if necessary.
12. On 17 April 2020, the Parties supplied to the Tribunal the *Experts' Joint Report in Response to the Tribunal's Decision on Jurisdiction, Liability and Certain Issues of Quantum*, dated 16 April 2020 (the "**Experts' Joint Report**").
13. On 1 May 2020, the Claimants filed Comments on the Experts' Joint Report ("**CL. Comments**"), together with Legal Authorities CL-194 to CL-206.
14. On the same date, the Respondent filed Observations on the Experts' Joint Report ("**Resp. Observations**"), together with Legal Authorities RL-0101 and RL-0102.
15. On 19 May 2020, the Claimants filed their Responsive Submissions on the Experts' Joint Report ("**CL. Response**"), together with Exhibit C-0347 and Legal Authorities CL-0207 and CL-0208.
16. On the same date, the Respondent filed its Responsive Observations on the Experts' Joint Report ("**Resp. Response**").
17. On 20 May 2020, the Respondent filed a "conditional" request in the event that the Tribunal follows the "alternative legal interpretation" as suggested by the Respondent, in which case the Respondent requests to be afforded opportunity to verify the Claimants' new evidence and to submit brief observations on the figures submitted by the Claimants in their submission of 19 May 2020.
18. Also on 20 May 2020, (i) the Tribunal took note of the Respondent's request of the same date, noting that it would consider it whilst studying the Parties' responses; (ii) the

Claimants filed observations on the Respondent's request of 20 May 2020; and (iii) the Tribunal acknowledged receipt and took note of the Claimants' communication of 20 May 2020 in response to the Respondent's communication of the same date, and noted that the Tribunal would consider the Parties' respective communications of 20 May 2020, as appropriate, whilst studying the Parties' responses.

19. On 16 November 2020, the Tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).

III. THE REMAINING ISSUES ON QUANTUM

20. The Tribunal refers to paragraphs 685 and 729-747 of the Decision. As noted there, the Tribunal has found a breach of Article 10(1) ECT so far as concerns –
 - i. the procurement of repayment of any sums already paid to the Claimants in the period between the adoption of RDL 9/2013 and Order IET 1025/2014;
 - ii. disproportionality with respect to certain of the Claimants' plants, i.e. the wind plants Urano, Grisel II, Bancal I and II, Siglos I and II, and the hydro plant Cepeda.
21. As to breach (i), the Tribunal found at paragraph 731 of the Decision that: "the Claimants say that EUR 19.4 million had to be repaid, which has not been challenged. All that is required is verification and precise quantification of amounts paid."
22. As to breach (ii), the Tribunal found at paragraphs 732-746 of the Decision that it is compensation with respect to the breach concerning the disproportionate impacts to Urano, Grisel II, Bancal I and II, Siglos I and II, and Cepeda that the Tribunal must assess, using as a base Table 10 to the second report of Compass Lexecon and the spreadsheet that underlies it.
23. Consistent with the Decision and the Tribunal's directions, the Tribunal now has the benefit of the Experts' Joint Report and also the Parties' submissions as summarised below.

A. THE PARTIES' POSITIONS

(1) The Claimants' Position

24. The Claimants refer to the two heads of damages addressed in the Experts' Joint Report: (i) the "**Claw-back**", which they define as the procurement of repayment of any sums already paid to the Claimants in the period between the adoption of RDL 9/2013 and Order IET 1025/2014 (the "**Interim Period**"); and (ii) the reduction of the remuneration of the Claimants' installations below the threshold of an appropriate return. In doing so, they also address the alternatives set out in the Experts' Joint Report to quantify both head of damages.

a. *The Claw-back*

25. The Claimants recall that RDL 9/2013 repealed and replaced RD 661/2007, introducing a new "cap" – the "permissible return" – that an installation could receive during the plant's "regulatory lifetime", with the payments later defined in Order IET 1025/2014 (also referred to as the "**June 2014 Ministerial Order**"), which applied retroactively to July 2013.²
26. According to the Claimants, the Claw-back, or retroactive application of the Order IET 1025/2014, implied that the plants were required "to return the difference between the payments actually received from July 2013 and the payments that they would have received under the June 2014 Ministerial Order."³
27. As regards the Claw-back, the Claimants further submit, first, that the Claw-back is a violation of the ECT, as has been found not only by this Tribunal, but also by the *RREEF*, *BayWa*, *Watkins*, *PV Investors* and *Hydro Energy* tribunals when considering the same Disputed Measures.⁴
28. Secondly, the Claimants assert that the Claw-back repayment obligation was imposed on 21 of the Claimants' 24 installations, and was not limited to the Claimants' 10 plants

² Cl. Comments, ¶ 13.

³ Cl. Comments, ¶ 16.

⁴ Cl. Comments, ¶¶15-17 (foot notes omitted).

considered by the Tribunal in its Decision. According to the Claimants, the information concerning the 10 plants had been provided by Compass Lexecon in their First Report, as an example of the plants that had both suffered the Claw-back and had to make a cash payment to the CNMC.⁵

29. Thirdly, the Claimants further argue that the damages caused by the Claw-back are not limited by the EUR 19.4 million figure, provided by Compass Lexecon only for illustrative purposes. That figure did not purport to quantify the full impact of the Claw-back, which were quantified in the Experts' Joint Report.⁶
30. The Claimants note the disagreement between the Experts on the quantification of the impact of the Claw-back:
31. For Compass Lexecon: (i) the Decision requires the quantification of damages with respect to all of the Claimants' installations that had to repay amounts already received pursuant to the Claw-back; (ii) the Claw-back applied to 21 of the Claimants' 24 plants; (iii) those commissioned before 2004 (i.e., the Claimants' 10 plants) had to make the repayment by cash transfer to CNMC, whereas those commissioned after 2004 (i.e., the remaining 11) had to make the repayment by way of set off against the future revenues and paid in monthly installments; (iv) "both forms of repayment are equivalent: they are amounts received which had to be returned"; and (v) in line with the Tribunal's Decision that "*the Claimants are entitled to return of all sums repaid*", the Claimants' 21 plants should be considered in the quantification of damages.⁷
32. For BDO: (i) only the Claimants' 10 plants, not receiving a Special Payment under the New Regime, should be considered. They were not paid the outstanding payments they were entitled to receive for the electricity they had already sold during the Interim Period. Given that Spain did not pay them, that money never had to be repaid, these sums should be excluded from the quantification of damages;⁸ (ii) other plants have faced Claw-back,

⁵ Cl. Comments, ¶¶ 6, 16, 22.

⁶ Cl. Comments, ¶¶ 18-24.

⁷ Cl. Comments, ¶¶ 25-31 (footnotes omitted).

⁸ Cl. Comments, ¶¶ 25, 32.

but since they are receiving a Special Payment, that will allow them to obtain a reasonable pre-tax return; and (iii) as a result, BDO only considered the Claimants' 10 plants in their analysis of damages.⁹

33. To refute BDO's position, the Claimants submit that: (i) since the Experts agree that the Claw-back applied to 21 of Claimants' plants and not only to 10 of them, damages should be quantified for the 21 plants;¹⁰ (ii) the Decision required the quantification regarding the "*the procurement of repayment of any sums already paid to the Claimants in the period between the adoption of RDL 9/2013 and Order IET 10[4]5/2014*",¹¹ and did indicate that Claw-back damages should be limited to the 10 plants;¹² (iii) reference in the Decision to the repayment made by the 10 plants and the related EUR 19.4 million, originated from what Claimants claim was an "illustrative example" given by Compass Lexecon in its Second Report, and does not quantify the Claw-back damages;¹³ and (iv) BDO's argument that the 11 plants are still receiving Special Payments and may obtain a reasonable pre-tax return, does not concern the first head of damages relating to the quantification of the Claw-back.¹⁴
34. As to the Respondent's argument that the Claw-back should be limited to the 10 plants because (i) it is "*res judicata*", and (ii) making a case about the 21 plants would be "*belated*", the Claimants contend that (i) it makes no sense to suggest that the verification and quantification required by the Decision is "*res judicata*" or "*belated*"; (ii) the total sums have been verified and quantified; (iii) Compass Lexecon has provided explanations as to the repayments made by the 21 plants; and (iv) the resulting damages have been quantified in the Experts' Joint Report.¹⁵

⁹ Cl. Comments, ¶ 32. Experts' Joint Report, ¶¶ 18-20.

¹⁰ Cl. Comments, ¶ 34.

¹¹ Decision, ¶ 729(i) (emphasis added by the Claimants).

¹² Cl. Comments, ¶ 35.

¹³ Cl. Comments, ¶ 36.

¹⁴ Cl. Comments, ¶ 37.

¹⁵ Cl. Response, ¶¶ 17-21.

35. The Claimants submit that Spain’s failure to pay sums owing to the Claimants does not relieve it of its obligation to pay damages pursuant to the Claw-back.¹⁶ This, is another area of disagreement between the Experts.¹⁷
36. The Claimants explain that the New Regime introduced a deferred payment system, according to which, the sums owing to the Claimants’ plants accrued during the Interim Period, were the subject of partial monthly payments determined by reference to the “*coeficiente de cobertura*” or “*coverage ratio*.”¹⁸
37. As a result, prior to June 2014, the Claimants only received a portion (60%) of the sum they were owed for the electricity that they produced and sold during the Interim Period. Once the 2014 Ministerial Order was approved, “instead of paying the remaining sum owed to the Claimants and requiring repayment of that amount, Spain simply cancelled the payment owed to the Claimants.”¹⁹
38. The Claimants refute the Respondent’s argument that “*repayment as such did not exist*” because there was no “*transfer of money [...] into the Spanish Treasury*”, and that damages should therefore be reduced to zero. The repayments concerned money taken from the Claimants and transferred to the Respondent. Payment was required from the plants, including the 10 plants, by way of negative invoices issued to each plant, that had to be settled by repayments made to the CNMC, a wholly-owned entity controlled by Spain. The Claimants assert that the total of such negative invoices amounted to EUR 31,564,458. The above-described set-off mechanism, according to the Claimants, is a form of payment and a direct appropriation of the Claimants’ revenues.²⁰
39. The Claimants submit to the Tribunal’s attention Compass Lexecon’s explanation in this regard: “[f]rom an economic viewpoint denying the Claimants’ Plants a collection right for the energy already produced and sold (on credit to the Government) is equivalent to

¹⁶ Cl. Comments, ¶¶ 41-53. Cl. Response, ¶ 24.

¹⁷ Cl. Comments, ¶ 41.

¹⁸ Cl. Comments, ¶¶ 42-43.

¹⁹ Cl. Comments, ¶¶ 45-49. Cl. Response, ¶ 23.

²⁰ Cl. Response, ¶¶ 9-16.

asking the Claimants' Plants to return payments received for the energy already produced and sold".²¹

b. Tax Treatment of Damages

40. The Claimants note that the Experts disagree on how a 'tax shield' that may result from an entity's net operating losses, asset impairments, and depreciations would affect the quantification of the Claimants' damages.²²
41. Compass Lexecon takes into account the Claimants' tax shield – the actual net operating losses, impairments, and depreciations as reported in the Claimants' 2013 annual account – to determine the damages due to the Claimants to put the Claimants in the position they would have been in but for the Respondent's breaches.²³
42. BDO, to the contrary, justifies not considering the real-world tax obligations of the Claimants that would apply in the "*but for*" because in its view (i) the net operating losses or asset impairments are not related to the project performance; and (ii) the tax shield is "*not consistent with investment cost used to calculate the IRRs*".²⁴
43. The Claimants submit that BDO's position is absurd and unsubstantiated because: (i) for the application of the tax shield in the real world, it does not require to be linked to the "*project performance*"; and (ii) the IRRs that inform the Tribunal's findings in its Decision are calculated on a pre-tax basis, and do not reflect the Claimants' fiscal obligations.²⁵

²¹ Cl. Comments, ¶ 51.

²² Cl. Comments, ¶ 55.

²³ Cl. Comments, ¶ 61.

²⁴ Cl. Comments, ¶¶ 63-64.

²⁵ Cl. Comments, ¶¶ 64-65.

c. *Additional Sensitivities to Damages. No Res Judicata*

44. The Claimants have included two sensitivities, which in their view “are the only means to achieve full reparation consistent with the Tribunal’s findings in the Decision.” They are contained in Appendix A to the Experts’ Joint Report.²⁶
45. First, the Claimants refer to the Tribunal’s choice of a 7.398% pre-tax rate of return as the benchmark to assess the proportionality of the Disputed Measures. This determination was on the basis that a 7% post-tax return – found relevant by the Tribunal after appreciating the evidence of record²⁷ - associated with the tariff regime in Spain for renewable energy and with the application of a margin of appreciation.²⁸
46. The Claimants point out that the Experts’ Joint Report shows the difference between the 7.398 pre-tax rate and the 7% post-tax return, and submit that the Tribunal should award damages applying a 7% post-tax return, even taking into account the margin of appreciation, which the Tribunal found should not be particularly wide.²⁹
47. This, submit the Claimants, would be in line with the findings by the *Hydro Energy*, *RREEF*, *NextEra* and *PV Investors* tribunals that Spain was required to ensure that investors would receive a reasonable rate of return.³⁰
48. Secondly, the Claimants also refer to the Tribunal’s choice of “*the discount rate of 7.61% advanced by the Claimants*”³¹, arguing that it should apply to the additional cash flows received by the Claimants’ plants to achieve a reasonable return, and submit that this is an inadvertent error and that the discount rate ought to be the WACC of 6.06%.³²
49. The Claimants refute the Respondent’s argument that the appropriate minimum return and the discount rate are *res judicata* and can only be subject to review until the rendering

²⁶ Cl. Comments, ¶ 8.

²⁷ Cl. Response, ¶ 3.

²⁸ Cl. Comments, ¶¶ 9, 67, 82.

²⁹ Cl. Comments, ¶¶ 9, 67-68, 76, 86.

³⁰ Cl. Comments, ¶¶ 70-75 (footnotes omitted).

³¹ Cl. Comments, ¶ 89, citing Decision, ¶ 744, in turn citing Cl. Mem., ¶ 568, and Compass Report, Table 11.

³² Cl. Comments, ¶¶ 89-94.

of the Award. This, on the following grounds: (i) the failure to make their submission on this matter might be considered as a waiver under ICSID Arbitration Rule 27, and as found by the *ad hoc* Committee in *Lemire*, it would be contrary to procedural economy and would encourage the parties to submit their objections later as an attack to an unfavourable award;³³ (ii) the Claimants contend that they only wish that the damages resulting from the disproportionate impact that the Disputed Measures had on certain of the Claimants' plants, as found by the Tribunal, be quantified correctly, and submit that they do not wish to relitigate the questions already decided by the Tribunal;³⁴ and (iii) the Claimants submit that "the Tribunal's finding on proportionality cannot be considered *res judicata* before the necessary assessment of damages has been carried out", and invoke the *RREEF* decision in support.³⁵

50. The Claimants request the Tribunal to award damages in the amount of EUR 60,531,860, on the basis of (i) Compass Lexecon's computation of damages; (ii) a 7% post-tax return; and (iii) a discount rate of 6.06%.³⁶
51. Alternatively, the Claimants also provide three other scenarios with Compass Lexecon's computation of damages in the event that the Tribunal elects to award damages applying other rates of return and discount:
 - a) Damages of EUR 58.55 million, applying a 7% post-tax return, and a 7.61% discount rate;
 - b) Damages of EUR 48.55 million, applying 7.398% pre-tax return, and a 6.06% discount rate; and

³³ Cl. Response, ¶ 5, citing *Joseph Charles Lemire Joseph Charles Lemire v. Republic of Ukraine*, ICSID Case No. ARB/06/18, Decision on Annulment, 8 July 2013, ¶ 203 ("*Lemire*") (CL-0207).

³⁴ Cl. Response, ¶ 7.

³⁵ Cl. Response, ¶ 8, citing *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶ 472 ("*RREEF*") (RL-0099).

³⁶ Cl. Comments, ¶¶ 95-96.

- c) Damages of EUR 47.19 million, applying a 7.398% pre-tax return, and a 7.61% discount rate.³⁷

(2) The Respondent's Position

a. *The Alternative Legal Interpretation of the Tribunal's Decision*

52. According to the Respondent “the issues addressed in the Tribunal’s Decision may have not been accurately interpreted by the Parties’ economic expert teams.” This, because they identify the term *repayment* with the “Claw-back” as the “first head of damages.”³⁸
53. In the event that the Tribunal has not considered those two terms as synonyms, the Experts’ Joint Report’s conclusions regarding the “first head of damages” should be adjusted, by providing to the Tribunal, at its request, with a table disaggregating the two heads of damages.³⁹
54. The Respondent submits that the earnings accrued during the Interim Period were deducted from the subsequent CNMC settlements, and that Claimants have provided no evidence, such as wire transfers or bank receipts, that “these settlements amounted to any effective repayment from the plants to the CNMC.”⁴⁰
55. Notwithstanding its view that the Claimants had the burden of proof, the Respondent in light of the Claimants’ insistence that there had been “*payments in cash*”, requested the CNMC to provide information regarding the settlements for the Claimants’ plants from June 2014 onwards. From a preliminary examination of the documents that the Respondent was able to obtain, the Respondent says in its Response “that indeed there may have been some repayments but it is not in a position to quantify them”, and suggests that the Tribunal directs the experts to analyze the relevant CNMC settlements, which the Respondent could provide.⁴¹

³⁷ Cl. Comments, ¶ 97.

³⁸ Resp. Observations, ¶ 12.

³⁹ Resp. Observations, ¶¶ 13-14, 28.

⁴⁰ Resp. Observations, ¶¶ 17-18. Resp. Response, ¶ 4.

⁴¹ Resp. Response, ¶¶ 5-7.

56. The Respondent further explains that the balance of the settlements was always positive, because there were certain deductions that applied, which could not exceed 50% of the payable amount.⁴²

57. According to the Respondent, if “the term *repayment* is to be understood as a transfer of money from the plants to the Kingdom of Spain, the first head of damages should be reduced to zero euros.”⁴³

b. *Claw-back*

58. The Respondent notes the Experts’ disagreement as to the number of plants subject to Claw-back, with (i) BDO limiting the damages to the 10 plants which no longer receive subsidies, indicated by the Claimants and subject to the Tribunal’s Decision; and (ii) Compass Lexecon’s position that the compensation should include “*all of the plants subject to the Claw-back*”.⁴⁴

59. The Respondent further asserts that there is a disagreement as to the interpretation to be given to the Tribunal’s Decision, which is a legal issue.⁴⁵

60. The Respondent recalls that the Tribunal had rejected in its Decision the Claimants’ argument on the retroactivity of the Disputed Measures, with the exception of the 10 plants and the alleged repayment of EUR 19.4 million to which the Claimants’ had initially referred to, but that now claim such reference was only “illustrative”. This conclusion, argues the Respondent, is *res judicata* and should not be discussed.⁴⁶

61. The Respondent notes that the Claimants now argue that the damages should not be limited to the 10 plants, but to all of the Claimants’ plants which experienced a similar economic effect. Although they limit their calculations to 21 of them, excluding the three remaining plants which received additional income, and were thus compensated during

⁴² Resp. Observations, ¶ 19.

⁴³ Resp. Observations, ¶ 24.

⁴⁴ Resp. Observations, ¶ 30. Resp. Response, ¶ 10, citing Cl. Observations, ¶ 40.

⁴⁵ Resp. Observations, ¶ 31.

⁴⁶ Resp. Observations, ¶¶ 32-35, 39. Resp. Response, ¶¶ 12, 16.

the subsequent settlements.⁴⁷ This – argues the Respondent – is a further inconsistency, given that it would seem from the Claimants’ argument that “it is irrelevant whether the settlement of the amounts received was done by offsetting the amounts received against future revenues or by transferring them in cash to the CNMC.”⁴⁸

62. The Respondent argues that (i) the Tribunal, referring to the EUR 19.4 million alleged by the Claimants, only ordered the Experts the “*verification and precise quantification of the amounts paid*”; (ii) the Tribunal’s conclusion that the 10 plants were an exception to its general finding on retroactivity, does not extend to the rest of the plants and is *res judicata*; (iii) in any event, the Claimants’ new argument is belated; (iv) as BDO has explained, the rest of the plants are receiving “*special payments that will allow those plants to yield a reasonable pre-tax return*”⁴⁹; and (v) as a result, the compensation should be limited to the 10 plants to which the Tribunal referred to in its Decision.⁵⁰

c. Amounts Related to the Coverage Ratio

63. The Respondent recalls that pursuant to Third Transitory Provision of RDL 9/2013 (subsequently Act 24/2013), the payments made were “*payments on account*”, with the final amount to be paid to the plants to be adjusted in accordance with the new regime. Accordingly, from January to May 2014, the plants received a percentage of the tariffs resulting from the application by the CNMC of the “*coeficiente de cobertura*” – the Coverage Ratio.⁵¹
64. The Respondent explains that (i) to determine the “*precise quantification of the amount paid*”, BDO referred to the amount actually paid and subsequently deducted, whereas Compass Lexecon considered the amounts that, in their view, *should have been paid* to the Claimants⁵²; and (ii) that both Experts “agree that the amounts related to the Coverage

⁴⁷ Resp. Response, ¶ 13.

⁴⁸ Resp. Response, ¶¶ 13-14, citing Cl. Observations, ¶¶ 28-29.

⁴⁹ Experts’ Joint Report, ¶ 19.

⁵⁰ Resp. Observations, ¶¶ 39-41. Resp. Response, ¶¶ 15-20.

⁵¹ Resp. Observations, ¶¶ 43-44.

⁵² Resp. Observations, ¶ 45.

Ratio were never received by the Claimants and consequently were never paid back to the Respondent”.⁵³.

65. According to the Respondent, Compass Lexecon referred in its calculations to the amount that would be due from January 2014 to May 2014 “*in the absence of the Disputed Measures*”, when the Tribunal had in fact directed the Experts to quantify the amount *paid*.⁵⁴
66. The Respondent makes reference to the alleged deferral payment of sums pursuant to Article 19 of Law 24/2013, noting that (i) the Tribunal did not find such provision to be in breach of the Respondent’s obligations under the ECT, accordingly, the *coverage ratio* should be taken into account for the *actual* and *but for* scenarios; (ii) following the enactment of Law 24/2013, the monthly payments to the plants were made in accordance with the “*coverage ratio*”, subject to the existence of funds in the Electricity System; (iii) the plants were only entitled to payments under RDL 9/2013, as RD 661/2007 had been abrogated; (iv) the plants received on a provisional basis, “the tariffs which would have been due pursuant to Royal Decree 661/2007 and which were to be settled after the enactment of Ministerial Order 1045/2014.”⁵⁵
67. Finally, the Respondent submits that the amounts exceeding the *coverage ratio* in force at each of the monthly settlements were never paid, were not subject to repayment, and must not be considered by the Tribunal under the first head of damages.⁵⁶
68. As a result, the Respondent submits that the Claw-back amount should not exceed EUR 14.82 million.⁵⁷

⁵³ Resp. Observations, ¶ 46. Experts’ Joint Report, ¶ 31.

⁵⁴ Resp. Observations, ¶¶ 50, 53.

⁵⁵ Resp. Response, ¶¶ 25-30.

⁵⁶ Resp. Response, ¶ 34.

⁵⁷ Resp. Observations, ¶ 55. Joint Report, Table 3 (“Summary of Alternative Claw-back Amounts - In EUR million”). The Respondent notes that this would need the final amount to be paid, but it should be adjusted in accordance with the Experts’ Joint Report, ¶ 13 (“The Experts agree that whatever the amounts found that should have been paid to the Claimants’ Plants, either under the first head of damages or the second head of damages, these do not necessarily translate 100% into damages to the Claimants.”).

d. *Amounts Related to the Income Tax*

69. The Respondent also notes the Experts' disagreement on the inputs to calculate the income tax payable in the actual and *but-for* scenario: (i) the accumulated negative operating losses ("NOL") at the end of 2012; (ii) the 2013 amount of impairments; and (iii) the amount of depreciation.⁵⁸
70. The Respondent submits in such regard that (i) "the tax assessment must be consistent with the cash flows employed to calculate the returns of the Claimants' plant"⁵⁹; (ii) the above-indicated inputs "cannot be taken into account if they are not related to the project or are not consistent with the inputs employed to calculate the IRRs."⁶⁰

e. *Additional Sensitivities to Damages. Res Judicata*

71. The Respondent makes reference to the "*Additional Sensitivities to Damages*" included by Compass Lexecon, as Appendix A of the Experts' Joint Report, specifically: (i) a reasonable rate of return based on a post-tax 7% instead of the pre-tax 7.398% chosen by the Tribunal; and (ii) to discount damages to 20 June 2014 at the Plants' WACC of 6.06% instead of the cost of equity of 7.61%.⁶¹
72. The Respondent submits that the Tribunal already decided in its Decision the matters concerning (i) the reasonable rate of return, and (ii) the discount rate, that such findings are *res judicata*, and therefore cannot be revisited.⁶²
73. The Respondent, relying in *ConocoPhillips, Electrabel and RREEF*,⁶³ contends that (i) the Tribunal's conclusions in its Decision are *res-judicata*; (ii) they are to be incorporated in the Award; (iii) it is not possible for a tribunal to reconsider the

⁵⁸ Resp. Observations, ¶ 56. Experts' Joint Report, ¶¶ 36-37. Resp. Response, ¶ 35.

⁵⁹ Resp. Observations, ¶ 57. Experts' Joint Report, ¶ 48.

⁶⁰ Resp. Observations, ¶ 58.

⁶¹ Resp. Observations, ¶ 2.

⁶² Resp. Observations, ¶¶ 3-6.

⁶³ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent Request for Reconsideration, 10 March 2014, ¶ 21 ("*ConocoPhillips*") (RL-0102); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB 07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶10.1 ("*Electrabel*") (RL-0002); and *RREEF*, ¶ 209 (RL-0099).

conclusions it reached in a previous decision; and (iv) those previous decisions can only be subject to review afterwards, within the limits of the post-award remedies under the ICSID Convention.⁶⁴

74. According to the Respondent, the Claimants are relying on an alleged tax shield, unrelated to the project performance, to avoid the tax burden. It is the Respondent's position that the benefit of such a tax shield "should be limited to those NOLs and asset impairments generated directly from the operating performance of the plants."⁶⁵
75. As to the reasonable rate of return, the Respondent recalls that the Tribunal found in its Decision that 7.398% was "*an appropriate minimum figure to protect against and excessive and disproportionate burden being placed on investors such as the Claimants with respect to the Respondent's need to address the Tariff Deficit.*"⁶⁶ Such decision, argues the Respondent, is *res judicata*, and the debate on this issue should not be re-open.⁶⁷
76. The Respondent contends that the Claimants' request for the Tribunal to rectify the 7.398% benchmark is procedurally inadmissible, their arguments inaccurate, and should be rejected, with the relevant costs allocated to the Claimants.⁶⁸
77. The Respondent argues that the Claimants' reliance on the approach followed by the *Nextera*⁶⁹ and *RREEF*⁷⁰ tribunals regarding the reasonable rate of return is misplaced. Although the Tribunal was aware of the findings of those tribunals when it issued its Decision, it nevertheless chose a different benchmark.⁷¹

⁶⁴ Resp. Observations, ¶¶ 7-8.

⁶⁵ Resp. Response, ¶ 39.

⁶⁶ Resp. Response, ¶ 41, citing the Tribunal's Decision, ¶ 599(d).

⁶⁷ Resp. Response, ¶ 44.

⁶⁸ Resp. Response, ¶¶ 45-46.

⁶⁹ *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019 (CL-0195).

⁷⁰ *RREEF* (CL-0134).

⁷¹ Resp. Response, ¶ 47.

78. Regarding the appropriateness or not of the return, and the margin of appreciation to be allowed to the Respondent in accordance with the Tribunal's Decision, the Respondent submits that the Claimants' reliance on the *RREEF* and *PV Investors*⁷² benchmarks is inapposite.⁷³
79. The Respondent criticizes the Claimants for (i) their attempt to have the Tribunal reconsider its finding of the pre-tax 7.398% as the reasonable rate of return; and (ii) providing new calculations on the assumption that the Tribunal had erred in its findings; and submits that there is no need for the Tribunal to reconsider its conscious and well-reasoned decision as to the benchmark to be applied.⁷⁴
80. The Respondent further contends that the Claimants' request to revisit the Tribunal's decision as to the 7.61% discount rate – originally advanced by the Claimants - to be applied “*with respect to cash flows that would have been received only in the future*”,⁷⁵ is procedurally inadmissible and wrong from an economic point of view.⁷⁶

B. THE TRIBUNAL'S ANALYSIS

(1) *Res judicata*

81. Given its potential importance to both the heads of compensation that have been ordered, the Tribunal considers first the Parties' contentions on the *res judicata* (or otherwise) effect of the Decision.
82. As noted above, it is the Respondent's position, referring to the decisions in *ConocoPhillips*, *Electrabel* and *RREEF*, that the principle of *res judicata* applies to the Decision with the result that it is not open to the Tribunal to seek to revisit matters that it has already decided.⁷⁷ The Claimants make three points in response.

⁷² The *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-2014, Final Award, 28 February 2020.

⁷³ Resp. Response, ¶ 48.

⁷⁴ Resp. Response, ¶¶ 50-51.

⁷⁵ Tribunal's Decision, ¶ 744.

⁷⁶ Resp. Response, ¶¶ 52, 54-55.

⁷⁷ Cl. Comments, ¶ 7.

83. As an initial point, the Claimants contend by reference to *Lemire v. Ukraine* that they may be positively required to object to the terms and content of the Decision now so as to avoid a later conclusion – at an annulment stage – that they had made some form of waiver.⁷⁸ The Tribunal notes, however, that *Lemire* concerned a number of alleged procedural violations which, according to the annulment committee, could and should have been raised earlier than in the annulment proceedings so as to avoid a waiver pursuant to Rule 27 of the ICSID Arbitration Rules.⁷⁹ The current situation is in no way analogous. There is no suggestion that the Tribunal engaged in any procedural irregularities in its Decision and Rule 27 is not engaged. It was only in that context that the annulment committee in *Lemire* was concerned with procedural economy and found that, if there were no waiver, this “*would mean it was correct for Respondent to leave such procedural irregularity as future ammunition against a possible unfavourable award*”.⁸⁰
84. The Claimants also contend that there is an inescapable interaction between liability and quantum in the present case and that, relying on *RREEF v. Spain*, the assessment of damages must inform the finding on proportionality, such that the latter cannot be considered *res judicata* before the necessary damages assessment has been carried out.⁸¹ This is misconceived. The paragraph in *RREEF* relied upon concerns that tribunal’s conclusion that it would “*be in the position to determine whether the measures taken by the Respondent have adversely affected the Claimants’ legitimate expectation for a reasonable return only when it has evaluated the loss sustained by them, taking into account all the relevant elements*”.⁸² Thus the passage relied on turns on specific conclusions as to the existence of a legitimate expectation to a reasonable return that this Tribunal did not reach. This Tribunal does not understand the tribunal in *RREEF* as intending to reflect a general principle that an assessment of proportionality must await the detailed consideration of damages that forms part of a quantum phase. All will depend

⁷⁸ Cl. Response, ¶¶ 5-6.

⁷⁹ *Lemire*, ¶ 203.

⁸⁰ *Lemire*, ¶ 216; cf. Cl. Response, ¶ 6.

⁸¹ Cl. Response, ¶ 8, referring to *RREEF*, ¶ 472 (RL-0099).

⁸² *RREEF*, ¶ 472 (RL-0099).

on the individual case. In the current case, the Tribunal has already made its finding on disproportionality.

85. As to *res judicata* more specifically, the Claimants do not contend that cases that the Respondent relies on – *ConocoPhillips*, *Electrabel* and *RREEF* – were wrongly decided, but they do portray these as confined. According to the Claimants, these cases “*concern the possibility of revisiting a decision on jurisdiction or a finding as to the applicable law*” whereas, by contrast, the Claimants “*do not seek to challenge the Tribunal’s findings on these issues or relitigate a question already determined by the Tribunal*”.⁸³
86. While the finding on *res judicata* in *RREEF* may be seen as confined in the way the Claimants contend,⁸⁴ the Tribunal does not consider that either the analysis or the finding on *res judicata* in the *ConocoPhillips* case is confined to issues of jurisdiction or applicable law. The *ConocoPhillips* decision at issue concerned the *res judicata* status of a series of determinations made in a Decision on Jurisdiction and the Merits dated 3 September 2013, deciding a number of matters including as to the rejection and acceptance of various claims as to breach of treaty. All the determinations – without any distinction as to jurisdiction or liability – were found to be *res judicata*. Referring to the *Electrabel* case, the tribunal stated in a passage to which the Respondent now refers, and the Claimants also:

“Those decisions [seven determinations on jurisdiction and liability in the Decision of 3 September 2013 on Jurisdiction and the Merits] in accordance with practice are to be incorporated in the Award. It is established as a matter of principle and practice that such decisions that resolve points in dispute between the Parties have *res judicata* effect. ‘They are intended to be final and not to be revisited by the Parties or the Tribunal in any later phase of their arbitration proceedings.’”⁸⁵

87. The tribunal then went on to say why no different conclusion could be reached by reference to the Convention or the Arbitration Rules:

⁸³ Cl. Response, ¶ 7.

⁸⁴ *RREEF*, ¶ 209 (CL-0134).

⁸⁵ *ConocoPhillips*, ¶ 21 (RL-0102).

“Do the provisions of the Convention and Rules to which the Respondent referred make any difference to that position? The Tribunal does not think so, for two reasons. The first is that those provisions are about procedural matters. Article 44 of the ICSID Convention makes explicit the tribunal’s powers to address procedural issues not dealt with in the Convention or the Rules. And ICSID Arbitration Rule 38(2) has a much more limited function. Their essentially procedural character appears from the cases on which the Respondent relied. Those concerning Article 44 were about stay, allowing *amicus curiae* submissions and participation of counsel. Article 44, it is frequently said, is designed to enable gaps in the procedure to be filled. It cannot be seen as conferring a broad unexpressed power of substantive decision.

That gap filling character of the provision relates to the second reason for the Tribunal’s conclusion that those procedural provisions cannot be the source of a power to reconsider. The overall structure and the detailed provisions of the ICSID Convention were plainly designed to provide for review or actions in respect of decisions of a tribunal only once the Award was rendered. There is no gap to be filled by the power proposed here. Section 3 of Part IV of the ICSID Convention sets out the Powers and Functions of the Tribunal, with nothing among its provisions even hinting at such a power. Section 4 deals succinctly with the Award itself. And it is only in Section 5 that powers are conferred on the Tribunal to interpret and revise the Award and on an *ad hoc* Committee to annul an Award on prescribed grounds. It is in those ways and those alone that decisions such as that in September 2013 can be questioned, changed or set aside. Those various post-award remedies are, of course, available to both Parties. Those provisions and that structure exclude the possibility of the proposed powers of reconsideration being read into the Convention. That reading of the Convention is also supported by the drafting history mentioned above (paragraph 18).”⁸⁶

88. Neither this conclusion nor the underlying reasoning is challenged. Further, neither the conclusion nor the underlying reasoning can be seen as confined to the possibility of revisiting a decision on jurisdiction or a finding as to applicable law. Hence, on the Claimants’ case, the remaining question is whether the Claimants are correct in contending that they “*do not seek ... to relitigate a question already determined by the Tribunal*”.⁸⁷ That question is considered as appropriate by reference to the individual heads of claim in sections (2) and (3) below.

⁸⁶ *Id.*, ¶¶ 22-23.

⁸⁷ Cl. Response, ¶ 7.

89. For completeness, the Tribunal notes that, at the passage in *Electrabel* to which the Respondent has referred,⁸⁸ the tribunal stated its intention that the decision that it was making “*be final*”, and did not refer to *res judicata*. Within the scheme established by the ICSID Convention, this may be seen as a more accurate characterisation. According to the analysis in *Standard Chartered Bank (Hong Kong) Limited v. Tanzania (TANESCO)*:

“[313] Decisions of tribunals are of course binding within the scope of the proceedings, but this does not make them *res judicata*. That is so with procedural orders and provisional measures as pointed out earlier. An essential feature of *res judicata* is that the judgment in question produces effects on the parties outside the proceedings in which it is granted. But decisions of tribunals only have effect within the proceedings until they have been incorporated into the final award.

[314] This conclusion is supported by the structure and architecture of the ICSID Convention itself. Contracting States have an obligation to recognize only an award as binding (Art. 54(1)); recognition and enforcement is contemplated only in respect of an award (Art. 54(2)); only awards can be challenged through annulment proceedings (Art. 52). The proper inference to be drawn from these provisions is that only the Contracting State that is a party to the proceedings is under an obligation to recognize decisions of a tribunal as binding. Thus, decisions cannot have legal consequences outside the ICSID proceedings in which they are issued (i.e. they cannot be recognized and enforced and they cannot be challenged through annulment). Indeed, if decisions were *res judicata* before incorporation in the final award, then the requirement of incorporation into the final award under Article 48(3) would be redundant. ...

[318] The Tribunal is of the view that it is incorrect to characterize the decisions of ICSID tribunals, as opposed to their awards, as *res judicata*. They are binding within the scope of the proceedings but do not impose obligations upon the parties or other Contracting States outside the proceedings as is the case with awards that are *res judicata*.⁸⁹

⁸⁸ Resp. Observations, ¶ 7, referring to *Electrabel*, ¶ 10.1 (RL-0002): “This Decision is made in regard only to the first phase of these arbitration proceedings, relating to extant issues of jurisdiction and liability; and it is not made in regard to any issue of quantum (including interest). Although necessarily described as a “Decision” and not an “Award” under the ICSID Convention and ICSID Arbitration Rules, the several decisions and reasons contained in this Decision are intended by the Tribunal to be final and not to be re-visited by the Parties or the Tribunal in any later phase of these arbitration proceedings.”

⁸⁹ *Standard Chartered Bank (Hong Kong) Limited v. Tanzania (TANESCO)*, ICSID Case No ARB/10/20, Award, 12 September 2016, ¶¶ 312-313, 318 (“*TANESCO*”). See also *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶¶ 86-89 (“*Burlington*”).

90. On this basis, prior determinations such as made in the Decision would be seen as binding on the Parties, but not *res judicata* as such. This does not in any way mean that such determinations could be revisited at will: they still bind the Parties. Moreover, as usefully explained by the tribunal in *Burlington Resources Inc v. Republic of Ecuador*, which endorsed the approach of the tribunal in the *Standard Chartered Bank* case:

“In the words of the second *Amco Asia* tribunal, the approach is stated as a general principle “that a right, question, or fact distinctly put in issue and distinctly determined cannot be disputed”. Whatever the justification, these tribunals express the opinion that an issue resolved once in the course of an arbitration should in principle not be revisited in the same proceedings. Irrespective of *res judicata*, the rationale for this opinion is obvious: a contrary view would defeat the purpose of efficient dispute settlement, entailing constant re-litigation of issues already resolved, with unavoidable adverse consequences in terms of increased costs and length of proceedings. In addition, the possibility of re-litigating issues would jeopardize legal certainty and ultimately undermine the confidence of the users in the system.”⁹⁰

91. The Tribunal has not been referred to the *Standard Chartered Bank* and *Burlington Resources* cases and, in the current case, it does not see the slightly different approach there adopted as material. While the Tribunal notes the conclusion reached by the tribunals in *Standard Chartered Bank* and *Burlington Resources* that it may be appropriate for an ICSID tribunal to re-open a decision in exceptional circumstances such as, by analogy, where the circumstances would justify revision under Article 51 of the Convention,⁹¹ no such circumstances have been put before the Tribunal.

(2) The Tribunal’s determination with respect to the repayment of any sums already paid to the Claimants in the period between the adoption of RDL 9/2013 and Order IET 1025/2014

92. The Parties have competing visions as to what the Tribunal decided with respect to the repayment of any sums already paid to the Claimants in the period between the adoption of RDL 9/2013 and Order IET 1025/2014. It is appropriate to start with the *dispositif* in the Decision, pursuant to which the Tribunal decided that:

⁹⁰ *Burlington*, ¶ 91.

⁹¹ *TANESCO*, ¶¶ 319-322; *Burlington*, ¶¶ 92-106.

“the Respondent has breached Article 10(1) ECT (i) to the extent that it has procured repayment by the Claimants of sums previously paid by the Respondent under the regime in place prior to adoption of the Disputed Measures;”⁹²

93. Consistent with basic principle, this must be understood in light of the Tribunal’s reasoning on this issue. In this respect, at paragraphs 620-621 of the Decision, the Tribunal found:

“As to the contention that EUR 19.4 million was paid by the ten plants that do not receive a Special Payment under the new regime in the period between the adoption of RDL 9/2013 and Order IET 1025/2014, and that this sum subsequently had to be repaid, the Tribunal considers this to be of a different order. This contention was made in the Reply and in oral opening and closing, while the only response has been to accept the principle that there could be no recovery of sums already paid, as follows:

“Something is forbidden in the international law, that is the idea of claiming excessive premiums already received. Those cannot be claimed and cannot be received by law.

If it did happen, then these can be recouped and proceedings may be entered before the Supreme Court.”

The Tribunal does consider that it would be a subversion of the prior legal regime, and in breach of the FET standard in Article 10(1), for the Respondent to require repayment of sums already paid, including in the period between the adoption of RDL 9/2013 and Order IET 1025/2014. The Claimants say that EUR 19.4 million nonetheless had to be repaid. That fact has not been challenged. It follows that, subject to verification and precise quantification of the amount paid, there has been a breach of Article 10(1) ECT, and the Claimants are entitled to return of all sums repaid.”

94. It is this conclusion to which the Tribunal referred at paragraphs 729(i) and 731 of the Decision where it stated:

“(...) The Tribunal has found a breach of Article 10(1) in this case, but this is a breach so far as concerns only –

⁹² See Decision, ¶ 748(2).

- (i) the procurement of repayment of any sums already paid to the Claimants in the period between the adoption of RDL 9/2013 and Order IET 1025/2014; (...)

As to breach (i) identified above, the Claimants say that EUR 19.4 million had to be repaid, which has not been challenged. All that is required is verification and precise quantification of amounts paid.”

95. The reasoning at paragraphs 620-621 concerns a specific contention by the Claimants: that EUR 19.4 million was paid by the ten plants that do not receive a Special Payment under the new regime in the period between the adoption of RDL 9/2013 and Order IET 1025/2014, and that this sum subsequently had to be repaid. This is confirmed by the references to which the Tribunal referred in a footnote to paragraph 604 (footnote 728), i.e. Claimants’ Reply, paragraph 478 referring in turn to Compass Lexecon, Second Report, paragraph 149, both of which concern the 10 plants that no longer receive any ‘special payment’ and the EUR 19.4 million that allegedly had to be repaid in respect of these. In this footnote, the Tribunal also referred to the Claimants’ oral opening at Day 1/146, where a submission was made with respect to this sum of EUR 19.4 million, i.e. concerning the 10 plants only, as follows:

“The June 2014 Order which sets out the details is then applied as if it were there from July 2013, so however you define retroactive, I think that probably ticks the box! And this required RWE to pay back some 19 million in revenues, €19.4 million in revenues, because they continued to pay under 661 in that period of uncertainty, and then once the June Order comes in, it’s treated as if it were there from July 2013, obviously there is a big cut, and RWE then had to pay back, just for that 11-month period, €19.4 million. You can see this in the second Compass report, paragraph 149.”

96. The Tribunal found in favour of the Claimants so far as concerns the specific contention that had been put, concerning the alleged repayment of EUR 19.4 million with respect to the 10 plants which the Tribunal regarded as not having been challenged by the Respondent. It follows that, correctly understood, the determination at paragraph 748(2) of the Decision is limited in this respect. It is plain that, given that the alleged figure of EUR 19.4 million had not yet been subjected to verification and precise quantification, it was omitted from the *dispositif*. There is no basis on which now to re-open this determination. It was not motivated by any error of fact but by the Claimants’ case as

pleaded, which – very understandably – drew specific attention to the 10 plants that no longer received a special payment under the New Regime and that had even been required (allegedly) to repay back certain sums received. The Claimants’ deployment of the EUR 19.4 million figure was not, and was not understood as, merely illustrative.⁹³ Further, in the context of the question of whether there had been some form of total and unreasonable change to, or subversion of, the legal regime,⁹⁴ the Tribunal’s specific focus on these 10 plants – which were not to benefit from the New Regime and were moreover allegedly required to repay sums received under the prior regime – could in no way be seen as inadvertent.⁹⁵

97. The only question left open by the Decision is precisely what sums – if any – did the Claimants procure repayment with respect to these 10 plants.
98. As to this, it is common ground that, in the period between the adoption of RDL 9/2013 and Order IET 1025/2014, the 10 plants were paid in accordance with the prior Special Regime (established by RD 661/2007). In the period subsequent to Order IET 1025/2014, Spain issued so-called negative invoices⁹⁶ and recovered certain sums that it had paid by deducting these from sums that were due in respect of electricity that had been generated by the 10 plants. As explained by the Claimants:

“Thus, the Claimants’ plants were issued negative invoices totalling EUR 31,564,458. This matches the figure for the Claw-back amount payable excluding the impact of the coverage ratio calculated by BDO and Compass Lexecon and set out in Table 3 of the Joint Report.

The negative invoices issued to each plant had to be settled by repayments being made to the CNMC. This transfer of money to the CNMC was effected by the CNMC appropriating the cash that the plants were entitled to receive from the sale of the electricity they had produced in the months following June 2014. This was even applied to the 10 plants no longer entitled to receive

⁹³ Cf. Cl. Comments, ¶ 36.

⁹⁴ See Decision, ¶ 610.

⁹⁵ The approach of the *RREEF* and other tribunals dealing with allegations of impermissible retroactivity with respect to other claims concerning RDL 9/2013 and Order IET 1025/2014 is not relevant to the current question, which concerns what the Tribunal decided in its Decision. Cf. Cl. Comments, ¶ 15. Moreover, as the Respondent correctly points out, the Tribunal expressly noted at fn. 751 of the Decision that its conclusion on retroactivity differed from that reached at *RREEF*, ¶¶ 326-329 (**RL-0099**).

⁹⁶ **C-0347**.

any incentive under the New Regime. There can be no question that power plants in Spain are entitled to receive payment for the electricity they sell at the market price on the open market. However, instead of allowing the 10 plants to keep the cash earned for the electricity sold, the CNMC appropriated up to half of the revenues earned by the Claimants each month to satisfy the repayment obligation imposed by the New Regime.”⁹⁷

99. The Tribunal has no doubt that this was a form of “procuring repayment”⁹⁸ (as indeed is consistent with the approach of both Parties’ experts in the Experts’ Joint Report). It makes no difference that “the plants did not have to transfer any money to the Respondent”.⁹⁹ As a matter of economic reality and, more important, within the meaning of what was ordered by the Tribunal, the repayment of sums can be procured just as readily by deducting such sums from debts that are due as by requiring repayment in the form of a transfer, and the Respondent’s so-called “alternative legal interpretation of the Tribunal’s Decision”¹⁰⁰ can accordingly be rejected in short order. It is inconsistent both with the approach of the Respondent’s own expert and the plain meaning of the *dispositif* in the Decision.
100. The Tribunal notes that the Respondent has stated that the figures submitted by the Claimants at paragraph 13 of their Response and the so-called negative invoices were introduced by the Claimants without leave, and has requested “that, if the Tribunal is minded to concur with the *alternative legal interpretation* proposed by the Kingdom of Spain, Respondent is afforded an opportunity to verify Claimants’ new evidence and submit brief observations on the figures presented by Claimants in yesterday’s submission”.¹⁰¹ As follows from the above, the Tribunal is not so minded, and anyway does not accept the submission as to the figures and the invoices being submitted without leave. In its Observations, the Respondent stated its case that there had been no repayments (expressly noting at footnote 21 that it had no objection to Claimants presenting evidence of alleged payments). The Claimants submitted the so-called

⁹⁷ Cl. Response, ¶¶ 14-15 (footnotes omitted).

⁹⁸ See Decision, ¶ 748(2).

⁹⁹ Cf. Resp. Observations, ¶ 18.

¹⁰⁰ Resp. Observations, section III.

¹⁰¹ See Respondent’s email of 20 May 2020.

negative invoices with their Response as evidence that payment was required from the plants.¹⁰² There has been no formal objection to the admission of these invoices onto the record of this arbitration, and any such objection would be untenable because (i) the invoices were submitted as responsive to a position adopted by the Respondent in its Observations and (ii) the Claimants contend, and the Tribunal accepts, that the Parties' experts relied on the invoices to prepare the Experts' Joint Report and that the figures at paragraph 13 of the Claimants' Response are contained within the Report model.¹⁰³

101. In any event, the Respondent accepts that the sums at issue were deducted by it at source,¹⁰⁴ and the sums as to which repayment was procured have been verified and quantified in the Experts' Joint Report.
102. The last issue to be considered under this heading concerns the amounts related to the so-called coverage ratio. The operation of the coverage ratio is explained at paragraphs 22-23 of the Experts' Joint Report as follows:

“Following the enactment of 2013 Electricity Law (Article 19), starting in 2014 a deferred payment system was introduced under which the revenues accrued by renewable energy source (RES) generators, including all of Claimants' Plants, were to be paid gradually and with a delay rather than upon demand. Under this system, the regulated revenues accrued in a month are received in successive monthly instalments. The amount of the accrued revenues paid up to any particular point in time is driven by the so called “coverage ratio” (“*coeficiente de cobertura*” in Spanish). The coverage ratio is calculated on a monthly basis as the ratio of accumulated costs and the accumulated revenues of the Spanish Electricity System (SES) over the year. This ratio reflects that there is a lag between the moment regulated revenues of the SES are accrued and when such revenues are collected by the SES. Over a year, as the SES collects revenues, the coverage ratio increases eventually reaching 100% (at such point in time RES generators finish collecting 100% of their accrued revenues).

At the time the calculations of the claw-back amounts were made, June 2014, the coverage ratio was 60%. That is, RES producers, including Claimants'

¹⁰² Cl. Response, ¶ 13.

¹⁰³ See Claimants' email of 20 May 2020.

¹⁰⁴ Cf. Resp. Observations, ¶ 18.

Plants, had received only 60% of the regulated revenues they had accrued between January 2014 and May 2014 (both inclusive).”

103. The thrust of the Claimants’ complaint is then that “in June 2014 the deferred payment was cancelled and the Claimants never received the debt that was owed to them. ... In essence through the June 2014 Order, Spain unilaterally cancelled a debt that had crystallised and was owing to the Claimants in consideration for electricity that the Claimants’ plants had already produced and sold.”¹⁰⁵
104. However, as the Respondent correctly points out, “both Parties agree that the amounts related to the coverage ratio were never received by Claimants and consequently were never paid back to Respondent”.¹⁰⁶ By definition, such amounts, i.e. allegedly due amounts that were never paid to the Claimants’ plants, fall outside the scope of the recovery as defined at paragraph 748(2) of the Decision which concerns “procured repayment by the Claimants of sums previously paid by the Respondent under the regime in place prior to adoption of the Disputed Measures”. As a further and separate matter, the Claimants’ description of the deferred payments as a crystallised debt appears very questionable in light of the fact that the payments in this period were anyway made on account pursuant to the Third Transitory Provision of RDL 9/2013.¹⁰⁷
105. It follows that the Claimants are only entitled to recover in respect of the repayment of sums actually paid in the first place, and only with respect to the 10 plants. This amount has been calculated by the Experts as EUR 14.82 million.¹⁰⁸ As explained by the Experts, however, this is not the sum to be awarded as damages as it is necessary to consider the correct approach to taxation and the time value of money.¹⁰⁹ These are matters considered in conjunction with the issues under the second head of damages.

¹⁰⁵ Cl. Comments, ¶¶ 48-49.

¹⁰⁶ Resp. Response, ¶ 32.

¹⁰⁷ Resp. Response, ¶¶ 26-27; **R-0095**.

¹⁰⁸ See Experts’ Joint Report, Table 3.

¹⁰⁹ See Experts’ Joint Report, section II.3.

(3) Damages arising out of the finding of breach through the disproportionate nature of the new measures adopted

106. It is recalled that the Tribunal found a breach of Article 10 ECT arising out of the disproportionate nature of the new measures adopted by the Respondent, with specific respect to certain of the Claimants' plants, i.e. the wind plants Urano, Grisel II, Bancal I and II, Siglos I and II, and the hydro plant Cepeda. Three issues arise (two of which also concern the damages to be awarded in respect of procured repayment).
107. The first issue concerns tax treatment, notably an alleged "tax shield" which, according to the Claimants and their expert (Compass Lexecon), existed by virtue of available reliefs in respect of net operating losses, asset impairments and depreciations.
108. There is a degree of common ground as to this issue. Both Parties accept that applicable taxes must be taken into account so that the sum awarded as damages is net of such taxes, and both Parties accept the availability in principle of a tax shield comprised of net operating losses, asset impairments and depreciation.¹¹⁰ Further, the Claimants' starting point, with which the Respondent does not take issue, is that the aim is to achieve full reparation and to re-establish the situation that would have existed had the illegal acts not been committed.¹¹¹
109. The Tribunal accepts that, in principle, there should be no more accounting for tax than there would be in what Compass Lexecon refers to as the "real world".¹¹² If a tax shield would indeed have been available, the Tribunal sees no reason in principle why account should not be taken of it consistent with the Claimants' position that: "Since the damages must put the Claimants back in the position they would have been in but for Spain's breaches, the tax shield must also be taken into account in the experts' damages calculations."¹¹³

¹¹⁰ Cl. Comments, ¶¶ 57-58; Resp. Observations, ¶ 35; Experts' Joint Report, ¶¶ 41 and 46.

¹¹¹ Cl. Comments, ¶56.

¹¹² Experts' Joint Report, ¶ 38.

¹¹³ Cl. Comments, ¶ 61.

110. The Respondent's position is that the inputs to the tax shield – net operating losses, asset impairments and depreciation – cannot be taken into account unless these are (i) related to project performance and (ii) consistent with the inputs employed to calculate the IRRs at Table 10 of the Second Compass Lexecon report and the related spreadsheet (CLEX-0235), which form the basis for the assessment of damages in this case pursuant to the Decision.
111. As to (i), the Tribunal agrees with the Claimants that what matters is whether the tax shield existed under the applicable tax legislation in Spain (which is common ground) and would have been applied to reduce taxable revenues (which the Tribunal is willing to infer). In the absence of any evidence to the contrary, it likewise accepts that there is no requirement that the tax shield be linked to project performance for it to apply in the real world.¹¹⁴ It has not been established to the Tribunal's satisfaction that the supposed lack of clarity as to whether net operating losses were generated by the plants, and likewise the alleged fact that the 2013 asset impairments are referenced to other assets of the Claimants (intangible assets, goodwill etc) apart from the tangible asset costs used for the IRR calculation, would impact on the actual availability of the tax shield or lead to any substantial inconsistency in the way that damages are being calculated.¹¹⁵
112. As to (ii), it is common ground between the Parties that the IRRs that form the basis of the Tribunal's decision are calculated on a pre-tax basis. On this basis, the Claimants say that it is inevitable that these IRRs do not reflect the Claimants' taxation obligations, and that to determine on the basis of an alleged inconsistency that "the Claimants' real world taxation obligations should be ignored when assessing damages is absurd".¹¹⁶ By contrast, the Respondent contends that the calculations made to reach both sets of damages must be consistent, including because damages under the first head of damages operate to reduce damages under the second head because the receipt of the former would increase the plants IRR. In this respect, it contends that the depreciation figures that Compass Lexecon wishes to include in the tax shield are inconsistent with CLEX-0235

¹¹⁴ Cl. Comments, ¶ 64.

¹¹⁵ Cf. Resp. Response, ¶¶ 38-39.

¹¹⁶ Cl. Comments, ¶ 65.

as such figures include the depreciation of additional assets (intangible and goodwill, etc).

113. The Tribunal considers that there is an air of unreality to the Respondent's position. It is not being said that, as a matter of the applicable Spanish tax legislation, it would be impermissible to assess taxable returns depreciating only for tangible assets, but then seek to include depreciation of intangible assets in a so-called tax shield. The issue is one of alleged inconsistency, but the Tribunal accepts the Claimants' basic proposition that the Tribunal should be seeking to replicate the actual tax situation of the plants, and it has not been established that the scope of depreciable assets must be precisely the same when it comes to calculating returns and assessing taxes or that failure to do so leads to a material discrepancy, including in the way the two heads of damages are assessed. The Respondent's submissions on this issue are rejected.
114. The second issue under this head of damages concerns the Claimants' position that damages should be awarded on the basis of a 7% post-tax return.¹¹⁷ However, as the Claimants correctly identify, the Tribunal concluded that a 7.398% pre-tax return was an appropriate minimum rate of return,¹¹⁸ and the Tribunal ordered damages on that basis with respect to the disproportionality impacting certain of the Claimants' plants, i.e. the wind plants Urano, Grisel II, Bancal I and II, Siglos I and II, and the hydro plant Cepeda: see the Decision at paragraphs 599 and 735-742. While the Claimants have focused on paragraph 599(d) of the Decision, it is plain both in that sub-paragraph and in the accompanying and later reasoning that the Tribunal decided that damages were to be assessed on the basis of a 7.398% return. Indeed, at paragraph 599(e) of the Decision, the following conclusion was reached:

“The Tribunal considers excessive and disproportionate the burden on the Claimants' Investments to the extent that even the 7.398% pre-tax return figure is not reached so far as concerns the projected returns of actual plants.”

¹¹⁷ Cl. Comments, section 5.

¹¹⁸ Cl. Comments, ¶ 81.

115. This conclusion is binding on the Parties, whether it is regarded as strictly *res judicata* or not (see the discussion under (1) above). The Claimants’ suggestion that the assessment of damages must inform the finding on proportionality, such that the latter cannot be considered *res judicata* before the necessary damages assessment has been carried out, is misconceived.¹¹⁹
116. As to whether there could be any basis for re-opening the conclusions in the Decision on disproportionality, the Claimants’ position is that the Tribunal proceeded on the appreciation that the 7.398% pre-tax figure and the 7% post-tax figure were roughly equivalent, whereas this has now been shown to be incorrect through the Experts’ Joint Report.¹²⁰ It is however clear from the paragraph that the Claimants cite (paragraph 599(d) of the Decision), as well as the Decision more generally, that the Tribunal was well aware that these pre-tax and post-tax figures were different, and that the conclusion reached at paragraph 599(e) was not based on any misapprehension. Thus, even if a misapprehension as alleged could in theory justify re-opening the Decision, there could be no basis for re-opening. The Claimants’ submissions on this issue are rejected.
117. The third issue concerns the discount rate which, as is common ground, the Tribunal fixed at 7.61% by reference to the rate advanced by the Claimants in their Memorial, at paragraph 568.¹²¹ The Claimants may well be correct that the intention was, at this particular paragraph, to refer to the discount rate as calculated by reference to the WACC, i.e. 6.06%, not the cost of equity, i.e. 7.61%. However, the Claimants advanced a discount rate both by reference to the WACC and the cost of equity. Thus it was explained in the Memorial:

“Compass has made its DCF analysis following two approaches: A free cash flows to firm (FCFF) approach, which is the cash flow available to the company, based on revenues over the life of the project after deducting all operating expenses, expenditures in working and fixed capital, discounted at a rate that reflects the cost of raising capital, both equity and debt for a similar company; and a free cash flow to equity (FCFE) approach, which also deducts

¹¹⁹ Cl. Response, ¶ 8.

¹²⁰ Cl. Comments, ¶¶ 83-85.

¹²¹ Decision, ¶ 744, referring to Cl. Mem, ¶ 568.

all debt interests and net debt capital payments, discounted at the rate that reflects the cost of raising equity capital for a similar project.”¹²²

118. At paragraphs 568 and 570 of the Memorial, the Claimants then claimed damages by reference to both discount approaches. The Claimants now argue that the WACC discount is to be preferred and has been generally applied,¹²³ but the Tribunal does not see on what basis it can appropriately accord weight to such submissions. Notwithstanding the possibility of error at paragraph 568 of the Memorial, the key point is that the Claimants advanced two discount rates, and the Tribunal accepted the rate of 7.61% on the basis that it was advanced by the Claimants as was, and remains, correct. Accordingly the Tribunal rejects the Claimants’ position on this issue.

(4) Conclusion in relation to the heads of damage ordered in the Decision

119. In light of the discussion above, the correct sum to be awarded to the Claimants, as assessed in the Experts’ Joint Report and reflected at Table 1 thereof, is EUR 28,080,000.

120. The Tribunal wishes to express gratitude to the Experts for the extremely helpful and accessible report that they produced.

IV. RESIDUAL ISSUES ON QUANTUM

121. As indicated in the Decision, the Tribunal has still to determine its position with respect to the tax gross-up claimed by the Claimants, as well as interest and costs.

A. THE TAX GROSS-UP

(1) The Parties’ Positions

a. *The Claimants’ Position*

122. The Claimants submit that in order to achieve full reparation, they had previously included a claim for tax gross-up to reflect the taxes payable on an award on damages.¹²⁴

¹²² Cl. Mem, ¶ 542.

¹²³ Cl. Comments, ¶¶ 83-85.

¹²⁴ Cl. Comments, ¶ 105.

123. Since such tax gross-up would need to be quantified following the Tribunal's determination on damages, the Claimants suggest instead that Tribunal "order Spain to hold the Claimants harmless from any amount of tax due as a result of the Tribunal's Award." The Claimants, in turn, would then request that damages be paid to the Second Claimant, RWE Innogy Aersa S.A.U., which is a tax resident in Spain. The Claimants submit that in the event that the Spanish tax authorities determine that tax is payable on the Award, once the Award has been paid to the Second Claimant, Spain should pay the Second Claimant the appropriate sum on the first demand of the Claimants.¹²⁵

b. *The Respondent's Position*

124. The Respondent contends that the tax gross-up claim should be rejected because: (i) it has not been justified or reasoned; (ii) no proof has been provided that an eventual award would be subject to Spanish taxes; (iii) no expert tax report has been submitted to support this claim; (iv) Article 21.1 of the ECT vetoes tax gross-up claims; and (v) it is speculative, contingent and uncertain.¹²⁶

(2) The Tribunal's Analysis

125. The Tribunal notes that the position of the Claimants with respect to a tax gross-up has evolved from payment of a specific additional sum to a request for an order of indemnity. Yet it remains the case that the Claimants have failed adequately to demonstrate that the Award will be subject to tax in Spain as is claimed. Although, in their Reply, the Claimants relied on a 2007 tax ruling of Spain's General Directorate of Taxation made in response to a consultation in order to demonstrate that tax would be payable,¹²⁷ the Respondent contends that this and other such consultations are not applicable to this case and are not in any way binding for the Spanish Tax Authority. As to this, it says that none of the submitted consultations address the application of taxes to compensation granted in an international arbitration award, and there is no identity between the facts and

¹²⁵ Cl. Comments, ¶106.

¹²⁶ Resp. Response, ¶ 69.

¹²⁷ Cl. Reply, ¶ 732, referring to Exhibit C-0220, Binding tax ruling of the General Directorate of Taxation No. V0276-07, dated 14 February 2007, p. 2.

circumstances, as would be required for binding effect. The Respondent also notes that the Claimants' position is not supported by a tax expert.¹²⁸ In the light of these points, which have not been satisfactorily rebutted, and the absence of any legal authority supporting the case for a tax gross-up, the Tribunal does not consider that the case for a tax gross-up has been made out.

126. Further, the Tribunal considers that Spain is correct to identify that there are two Claimants in this case, and it appears to be accepted that the First Claimant would not be subject to any taxation in Spain: hence the Claimants' offer of an undertaking to request that damages be paid to the Second Claimant.¹²⁹ This is not a practicable solution: the Tribunal will be *functus officio* when it makes this Award, and therefore would not be in place to ensure that such an undertaking was given or to ensure compliance. Moreover, it has not been established that there is a problem that calls for a solution.

B. INTEREST

(1) The Parties' Positions

a. *The Claimants' Position*

127. The Claimants request the Tribunal to award pre-award interest at the rate of 7.61% - the cost of equity – compounded monthly. This, because (i) more than 95% of the estimated damages correspond to losses of the Claimants' equity stake; and (ii) awarding compounded interest would be in line with the most recent practice of investment treaty tribunals.¹³⁰
128. The Claimants also request to be awarded post-award interest also at the rate of 7.61% , compounded monthly. Awarding post-award interest would be in line with what tribunals

¹²⁸ Resp. Rejoinder, ¶ 1123, referring to Exhibit C-0245, Law 58/2003, of 17 December, on General Taxation, Article 89.1.

¹²⁹ Cl. Comments, ¶ 106. See also Resp. Rejoinder, ¶ 1120.

¹³⁰ Cl. Comments, ¶ 101.

have awarded in other investor-state arbitrations against the Kingdom of Spain relating to the same disputed measures.¹³¹

b. *The Respondent's Position*

129. The Respondent submits that the rate of 7.61% is associated to high risk investment, and is not justified.¹³² Accordingly, the Respondent asserts that the interest rate on the Spanish Government bonds should be the one used to calculate both the pre-and post-award interest.¹³³

(2) The Tribunal's Analysis

130. Both Parties have approached the question of the appropriate interest rate for the damages awarded on the basis that pre-Award and post-Award interest should be the same rate. The Tribunal sees no reason to depart from such an approach, which is supported by multiple cases.¹³⁴
131. As to the appropriate interest rate, the Parties differ very widely: the Claimants argue for a rate of 7.61% compounded monthly (on the basis of cost of equity approach), while the Respondent argues for 0.6% (the return on a 2-year Spanish bond).
132. As to the rate, the Tribunal is mindful that interest rates have been historically low in the period from June 2014, and does not consider it appropriate to award a rate as high as 7.61% as derived by the Claimants as the opportunity cost of equity. The Tribunal accepts the Respondent's position that such a rate would result in compensating the Claimants at a rate linked to a high risk investment, when no such investment has been made.¹³⁵ In this respect, the Tribunal notes that while the Claimants have referred in their submissions on interest to three cases concerning Spain's New Regime,¹³⁶ the rates

¹³¹ Cl. Comments, ¶¶ 102-104.

¹³² Resp. Response, ¶ 64.

¹³³ Resp. Response, ¶ 66.

¹³⁴ See e.g. *Ioan Micula, Viorel Micula and others v. The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 1269.

¹³⁵ Resp. Response, ¶ 64; BDO First Report, ¶ 261.

¹³⁶ Cl. Comments, ¶ 103.

awarded in these cases were: 2.07% compounded monthly pre-award, and 2.50% compounded monthly post-award (*Eiser*); 0.906% compounded monthly pre-award, and 1.60% compounded monthly post-award (*Masdar*); 1.4% compounded monthly pre-award, and 3.5% compounded monthly post-award (*Foresight*).

133. The Tribunal does not, however, consider appropriate the rate of 0.6%, proposed by the Respondent with respect to the return on a 2-year Spanish bond, by reference to the return in June 2014. Although the Tribunal accepts that the return on a Spanish bond may be appropriate, it would not be appropriate to fix a rate as if the Claimants were short term investors willingly lending to Spain. The Tribunal considers more suitable the return on a 10-year Spanish bond, and it is willing to adopt the Respondent's approach by fixing this by reference to the return in June 2014 which, consistent with various other awards, it takes as 2.07%. It considers that interest at this rate should be payable from 30 June 2014, i.e. the end of the month in which Order IET 1045/2014 was adopted.
134. As to whether interest should be simple or compounded, there is of course no uniform practice, but the Tribunal considers that, at least in the current context, the goal of wiping out all the consequences of the illegal act is best-served by an order of compound interest, to be compounded on a monthly basis as claimed. As the Claimants correctly contend, the awarding of compound interest has been followed in multiples cases in the ICSID investment treaty context.¹³⁷
135. The Tribunal therefore awards interest from 30 June 2014 to the date of this Award at the rate of 2.07%, compounded monthly, and interest from the date of the Award to the date of payment at the rate of 2.07%, again compounded monthly.

¹³⁷ See the cases and materials referred to at Cl. Memorial, ¶ 575; also Cl. Comments, ¶ 101.

C. COSTS

(1) The Parties' Positions

a. *The Claimants' Position*

136. The Claimants submit that the Tribunal has found that the Respondent has breached its obligations to the Claimants under the ECT. As a result, the Claimants argue that they are entitled to receive full payment of their costs in these proceedings on a full-indemnity basis, including all expenses that the Claimants have incurred or will incur in respect to the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants.¹³⁸
137. The Claimants request the opportunity to submit an updated statement of costs, given that they have incurred in additional costs than the ones reflected in their statement of costs of 16 February 2019.¹³⁹

b. *The Respondent's Position*

138. The Respondent submits that it has prevailed on most of the claims that were raised by the Claimants. The Respondent argues that the amount claimed by the Claimants is speculative, and requests the Tribunal to exercise its broad discretion to make an award of costs in the Respondent's favor.¹⁴⁰

(2) The Tribunal's Analysis

139. Pursuant to Article 61(2) of the ICSID Convention:

“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”

¹³⁸ Cl. Comments, ¶ 107.

¹³⁹ Cl. Comments, ¶ 108.

¹⁴⁰ Resp. Response, ¶71.

140. It follows from this provision that the Tribunal has a very broad discretion with respect to allocation of the costs (in their various different forms) among the parties. Neither here, nor elsewhere in the Convention or Arbitration Rules, is guidance given as to how the discretion is to be exercised.
141. Both Parties have sought their costs in this arbitration, on the basis of the rejection of the other Party's case. It follows that both have adopted the principle – which is frequently but far from universally applied in ICSID investment treaty arbitrations – that a losing party should be responsible for costs.
142. The reality in this case is that neither Party can be seen as wholly successful. The Claimants have succeeded in establishing jurisdiction over the greater part of their claims, but it was not successful in respect of the claims of breach of Article 10(1) ECT with respect to the two Taxation Measures introduced by Law 15/2012 of 27 December 2012. The Claimants have succeeded in establishing a breach of Article 10(1) ECT, but did not succeed in certain limbs of the claim, and have not recovered the quantum they sought. As follows from this Award, many of their claims made by reference to the Experts' Joint Report were rejected.
143. At the same time, each aspect of the claims was reasonably brought and skilfully and appropriately pursued, while the same applies so far as concerns the jurisdictional objections and defences raised by the Respondent. Moreover, the issues of law and fact raised in the case have been multiple and difficult, whilst there is notable inconsistency on many of the key issues when it comes to the pool of relevant arbitral cases.
144. In these circumstances, and with particular reference to the implicit endorsement by both Parties in this case of the principle that a losing party should bear responsibility for costs, the Tribunal considers it appropriate to accord recognition to the fact that the Claimants have established a breach of Article 10(1) ECT, and have had to pursue time-consuming and costly litigation to establish the wrongful acts of the Respondent. It therefore considers it appropriate to order that the Respondent be responsible for 50% of the

Claimants' costs for the jurisdiction and liability phase,¹⁴¹ together with the costs of the arbitration in their entirety, i.e. the fees and expenses of the Tribunal, the costs of the Centre and related expenses.

145. As to the legal costs and other expenses that the Claimants have incurred in the course of the jurisdiction and liability phase of the arbitration, the Tribunal will take as a basis the figures contained in the Claimants' Statement of Costs dated 26 February 2019. Although the Claimants have sought permission to put in an updated Statement of Costs, the costs subsequent to 26 February 2019 substantially arose with respect to the quantum phase, and the Tribunal considers that each Party should be responsible for bearing its own legal and other costs with respect to the quantum phase.¹⁴² According to the Claimants' Statement of Costs dated 26 February 2019, their legal and other costs and disbursements (such as travel and accommodation) for the jurisdiction and liability phase amount to EUR 5,367,797.18, which however includes payments made to ICSID of EUR 619,978.70.¹⁴³ The Tribunal considers that, given the scale of this arbitration, such costs were reasonably incurred. Accordingly, the Tribunal awards to the Claimants 50% of EUR 4,747,818.48, that is EUR 2,373,909.24.

146. As to the costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):¹⁴⁴

¹⁴¹ Arbitrator Joubin-Bret takes a different view from the other members of the Tribunal with respect to a central aspect in the analysis by the Tribunal of the allocation of costs. The Tribunal could have focussed its analysis on whether each aspect of the claims was reasonably brought and put forward as were the jurisdictional objections and defences raised by the Respondent. Moreover, the issues of law and fact raised in the case have been multiple and difficult, whilst there is notable inconsistency on many of the key issues when it comes to the pool of relevant arbitral cases. However, the two other members of the Tribunal have preferred to limit themselves in their analysis given that both parties have separately stated that costs should follow the event. It is the view of Arbitrator Joubin-Bret that the reality in this case is that neither Party can be seen as totally successful or unsuccessful. Moreover, if the Tribunal were to judge success by the amounts claimed vs. the amounts awarded to the Claimants in this case, it would have to take into account that it is awarding less than 10% of the amounts claimed by the Claimants. It would therefore be more appropriate for the Tribunal to limit the recovery of the Claimant's costs to (at most) 10% of its own legal and other costs.

¹⁴² The Tribunal recalls that, following their submissions on costs of February 2019, the Parties made a further advance payment pursuant, as requested by letter of 10 January 2020.

¹⁴³ Claimants' Statement of Costs, 26 February 2019.

¹⁴⁴ Upon resuming her position as member of the Tribunal in the present case, Arbitrator Joubin-Bret informed the Parties that, due to her recent appointment as Secretary of UNCITRAL, she had sought specific authorization from the Secretary General of the United Nations to be able to discharge her duties as arbitrator as a staff member of the

Arbitrators' fees and expenses	
Mr. Samuel Wordsworth QC	USD 401,444.52
Mr. Judd L. Kessler	USD 437,286.25
Ms. Anna Joubin-Bret	USD 155,685.08
ICSID's administrative fees	USD 232,000.00
Direct expenses (estimated)	USD 205,064.87
Total	<u>USD 1,431,480.72</u>

147. The above costs have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share of the costs of arbitration amounts to USD 715,740.36.
148. Accordingly, the Tribunal orders the Respondent to pay the Claimants USD 623,886.96 for the expended portion of the Claimants' advances to ICSID and EUR 2,373,909.24 in respect of the Claimants' legal and other costs and expenses.

V. AWARD

149. For the reasons stated in its *Decision on Jurisdiction, Liability and Certain Issues of Quantum* of 30 December 2019 and the body of this Award, the Tribunal hereby declares, orders and decides:
- The Respondent shall pay to the Claimants a sum of EUR 28,080,000 as compensation for the damages resulting from its wrongful acts as determined in the Tribunal's Decision on Jurisdiction, Liability and Certain Issues of Quantum.
 - The Respondent shall pay interest on the sum awarded above from 30 June 2014 to the date of payment in full of all sums due pursuant to this Award at a rate of 2.07%, compounded monthly.

United Nations. Arbitrator Joubin-Bret was subject to certain restrictions from the UN as to the fees she could charge in the present case, and did not claim payment for time spent on the case during 2017. Subsequently, given the numerous additional submissions made by the Parties and the time spent on the case, after discussing the matter with her co-arbitrators and seeking advice from the Secretary-General of ICSID, she asked for authorization by the Legal Counsel of the United Nations to record her time at a reduced hourly rate of 1 US\$/hour, and so informed the Parties by letter of 29 November 2018.

- c) The Respondent shall bear 100% of the costs of the arbitration. The Respondent shall thus pay the Claimants USD 623,886.96 for the expended portion of the Claimants' advances to ICSID.
- d) The Respondent shall reimburse the Claimants EUR 2,373,909.24 in respect of the Claimants' legal fees and other costs and expenses incurred in connection with the jurisdiction and liability phase.
- e) Subject to paragraph c) above, each Party shall bear the legal fees and other costs and expenses which it incurred in connection with the quantum phase.
- f) All other claims and requests of the Parties are dismissed.

[Signed]

[Signed]

Mr. Judd L. Kessler

Arbitrator

(See separate opinion¹⁴⁵)

Date: December 1, 2020

Ms. Anna Joubin-Bret

Arbitrator

Date: December 16, 2020

[Signed]

Mr. Samuel Wordsworth QC

President of the Tribunal

Date: December 15, 2020

¹⁴⁵ As is emphasised in Arbitrator Kessler's Separate Opinion, he joined fully in the Decision and joins fully in this Award. Arbitrators Wordsworth and Joubin-Bret wish to express their sincere and abiding respect for Arbitrator Kessler and, like Arbitrator Kessler, to emphasise the years of common effort and careful deliberations, even though they do not share the differing perceptions addressed in his Separate Opinion.