



School of International Arbitration

IACLC
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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Award Name and Date: Watkins Holdings S.Á.R.L, Watking (Ned) B.V., Watkins Spain S.L., Redpier S.L., Northsea Spain S.L., Parque Eólico Marmellar S.L., and Parque Eólico La Boga S.L. v. The Kingdom of Spain (ICSID Case No. ARB/15/44) – Award 21 January 2020

Case Report by: Anna Rivetti**, Editor Ignacio Torterola***

Summary: The Claimants brought an action for reparation and restitution against the Kingdom of Spain (‘Spain’) pursuant to the Energy Charter Treaty (‘ECT’) alleging that Spain breached the fair and equitable treatment protection in Art. 10(1) ECT by failing to protect the Claimants’ legitimate expectations in relation to their EUR 91 million investment in wind installations located in Spain. The measures adopted by Spain between 2012 and 2014 altered the applicable legal and regulatory framework which the Claimants relied upon when they made their investment, and this could indicate Spain’s failure to comply with its obligation under Article 10(1) of the ECT. The Tribunal unanimously decided on the matter of jurisdiction. On the merits of the case and quantum, by majority the Tribunal rendered its Award largely in favor of the Claimants while one member of the Tribunal rendered a Dissenting Opinion.

Main Issues: Jurisdiction – Competence of the Arbitral Tribunal; Treaty Obligations – Fair and Equitable Treatment; Damages – Determination of Value of Compensation

Tribunal: Mr. Tan Sri Dato’ Cecil W.M. Abraham (President), Dr. Michael C. Pryles AO PBM (Arbitrator), Prof. Dr. Hélène Ruiz Fabri (Arbitrator)

Claimants’ Counsel: Ms. Marie Stoyanov, Mr. Antonio Vázquez-Guillén, Mr. Antonio Jiménez-Blanco, Mr. David Ingle, Ms. Augustina Álvarez, Mr. Pablo Torres, Mr. Alexandre Fichaux, Mr. Tomasz Hara, Mr. Valentin Bourgeois, Ms. Carmen De La Hera (Allen & Overy LLP, Madrid)

Respondent’s Counsel: Mr. José Manuel Gutiérrez Delgado, Mr. Pablo Elena Abad, Mr. Antolín Fernández Antuña, Mr. Roberto Fernández Castilla, Ms. Patricia Froehlingsdorf Nicolás, Ms. María del Socorro Garrido Moreno, Mr. Rafael Gil Nieves, Ms. Mónica Moraleda Saceda, Ms. Elena Oñoro Sainz, Ms. Amaia Rivas Kortazar, Mr. Mariano Rojo Pérez, Ms. Almudena Pérez Zurita Gutiérrez, Mr. Diego Santacruz Descartín, Mr. Javier Torres Gella, Mr. Francisco de la Torre Diaz, Mr. Alberto Torró Molés and Mr. Luis Vacas Chalfoun (Abogacía General del Estado, Dirección del Servicio Jurídico del Estado, Madrid)

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Digest:

1. Relevant Facts

The Claimants are: Watkins Holdings S.à r.l. (the “First Claimant”), a private limited liability company incorporated under the laws of Luxembourg; Watkins (Ned) BV (the “Second Claimant”), a limited liability company incorporated under the laws of the Netherlands, Watkins Spain, S.L. (the “Third Claimant”), a private limited liability company incorporated under the laws of Spain; Redpier, S.L. (the “Fourth Claimant”), a private limited liability company incorporated under the laws of Luxembourg; Northsea Spain S.L. (the “Fifth Claimant”); Parque Eólico Marmellar, S.L. (the “Sixth Claimant”); and Parque Eólico La Boga, S.L. (the “Seventh Claimant”), all three are private limited liability companies incorporated under the laws of Spain. The seven companies are collectively referred to as “Watkins” or the ‘Claimants’ (¶ 1).¹ The Respondent in this case is the Kingdom of Spain (‘Spain’ or the ‘Respondent’) (¶ 2). The Claimants and the Respondent are collectively referred to as the ‘Parties’.

The dispute arose out of the Claimants’ investments in the Spanish wind generation sector and, in particular, the purchase of seven wind farms located in Spain (¶3). Since 1997, the Respondent has aimed to create a legal regime to encourage the production of renewable energy in the country (¶76,77). In 2007, Spain adopted Royal Decree 661/2007 (‘RD 661/2007’), revising the legal regime to include attractive rates to guarantee a predictable level of profitability for renewable energy investors with a guaranteed duration, and notably increasing the installed capacity target for wind power generation (¶92, 93). Moreover, Article 44(3) reviewed the tariffs, guaranteeing reasonable returns (¶ 98). However, from the beginning of 2012 until 2014, Spain adopted a series of measures and made a number of amendments to the legal regime, which culminated in a series of laws that are at issue in this arbitration (¶111 - 133).

In 2015, the Claimants filed with the International Centre for Settlement of Investment Disputes (‘ICSID’) a request for arbitration against Spain (¶4), pursuant to the Energy Charter Treaty (‘ECT’), which entered into force in 1998 with respect to Spain, Luxembourg and the Netherlands (¶5). They alleged that the regulatory changes in the energy market made by the Respondent constituted a violation of their right to fair and equitable treatment under Art. 10(1) ECT (¶ 302). The Claimants argued that after the Disputed Measures were implemented, the system left in place completely dismantled the prior legal framework applicable to the Claimants’ companies: the new regime was plagued by uncertainty, lack of transparency and long-term instability (¶ 314). The subsequent regulatory changes were a denial of their

¹ All citations (e.g. ‘¶ 1’) are to the Tribunal’s Decision on Jurisdiction, Liability and Partial Decision on Quantum (Decision), unless stated otherwise.

legitimate expectations, which constituted a violation of their right to fair and equitable treatment under Art. 10(1) ECT (¶¶ 332,333).

2. Procedural History

The Claimants filed a Request for Arbitration on 26 October 2015 (¶ 4), which was registered by ICSID on 4 November 2015 (¶ 7). The Tribunal was constituted on 31 March 2016 (¶ 9). The first session was held by means of a telephone conference on 23 May 2016 (¶ 11). On 26 May 2016, the Tribunal issued Procedural Order No. 1 which provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the place of proceeding would be Washington, DC and that the procedural languages would be English and Spanish (¶ 13).

On 14 November 2016, the Claimants filed their Memorial on the Merits (¶ 15). On 10 February 2017, the Respondent filed its Counter-Memorial on the Merits and a Memorial on Jurisdiction (¶ 16). On 28 April 2017 the Parties jointly filed their document production applications (¶17) and on 16 May 2017 the Tribunal issued Procedural Order No. 4 ruling on the Parties' document production applications. On 29 May 2017 the Respondents submitted its comments (¶ 20) and on 5 June 2017 the Claimants filed their observations (¶ 21). On 28 September 2017, the Claimants filed their Reply on the Merits and Counter-Memorial on Jurisdiction (¶ 25) and on 9 January 2018 the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (¶ 26). On 7 March 2018 the Claimants filed their Rejoinder on Jurisdiction (¶ 28).

On 24 April 2018 the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference (¶ 41). The Hearing was held from 21 May 2018 to 24 May 2018 in Paris, France (¶ 43). The Parties submitted their corrections to the hearing transcripts on 11 July 2018 (¶ 46).

On 13 August 2018, the Claimants requested the introduction of the award in the *Antin Infrastructure Services Luxembourg S.à.r.l and Antin Energia Termosolar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/13/31), and the Tribunal admitted the *Antin* award into the record (¶ 47). On 7 September 2018 the Parties submitted their Post-Hearing briefs (¶ 49). On 18 October 2018 the Claimants requested the introduction into the record of the “Decision on the *Achmea* Issue” rendered in the *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12) (the “*Vattenfall* Decision”) and the Final Award rendered in *Antaris Solar GmbH and Dr Michael Göde v. Czech Republic* (PCA Case No 2014-01) (the “*Antaris* award”). On 22 October 2018 the Tribunal granted the Claimants' request (¶50). On 31 October 2018 the Parties submitted their Reply Post-Hearing briefs (¶53).

The Submission on Costs were filed on 30 November 2018 by the Claimants (¶ 54) and, due to technical issues (¶ 51, 54) on 16 January 2019 by the Respondents (¶ 55).

On 19 April 2019 the Tribunal granted the Respondent's request made on 8 April 2019 to add a new legal authority *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, to the record (¶ 56, 57). The Tribunal invited the Parties to comment on the *RREEF* Decision and the Partial Dissenting Opinion, and the Respondent filed its comments on the *RREEF* Decision on 3 May 2017 (¶ 58) and the Claimants filed their Comments on the *REEF* Decision and Partial Dissenting Opinion on 17 May 2019 (¶ 59).

On 11 October 2019, the Claimants requested leave to the Tribunal to introduce new awards which concerned the Kingdom of Spain (¶ 60): after receiving the response by the Respondent (¶ 60) the Tribunal decided they were not necessary and denied the Claimants' request on 22 October 2019 (¶61). On 4 December 2019 the Respondent requested leave to the Tribunal to introduce two new awards to the record of the case (¶ 62): after receiving the response by the Claimants (¶62) the Tribunal decided that the new awards were not necessary and denied the Respondent's request (¶63).

3. Relief Sought by the Parties

The Claimants requested that the Tribunal granted the following relief (¶65):

- Declaring that Spain had breached Article 10(1) of the ECT and
- Ordering that Spain provided full restitution to the Claimants and pay for all losses suffered as a consequence of Spain's breach of the ECT. Moreover, the Claimants requested that Spain pay the pre-award interest at a rate of 1.16% compounded monthly and the post-award interest, the cost of this arbitration and any other further relief that the Tribunal shall deem just and proper.

The Respondent requested that the Tribunal granted the following relief (¶68):

- Declare a lack of jurisdiction over the claims of the Claimants, or the inadmissibility of said claims. In the event that the Arbitral Tribunal decides it has jurisdiction, to dismiss all the claims of the Claimants regarding the Merits, and to dismiss all the Claimants' claims for damages and order the Claimants to pay all costs and expenses derived from this arbitration.

4. Positions of the Parties

4.1 Jurisdiction

The Respondent raises two general objections to the Tribunal's jurisdiction (¶141):

- First, the Respondent asserts that the Tribunal lacks jurisdiction because the law of the EU precludes the applicability of the ECT to disputes involving investments in an EU state by EU investors (the intra-EU Objection, ¶ 142-166);
- Second, the Respondent contends that the 7% TVPEE, created by Law 15/2012 is a tax measure which falls outside the scope of protection of the ECT (the Tax Objection ¶ 227-248) and therefore the Tribunal lacks jurisdiction to hear the dispute over the tax measures that Spain had adopted through the introduction of the TVPEE (¶227).

The Claimants' position regarding the general objections to the Tribunal's jurisdiction:

- Regarding the intra-EU Objection, according to the Claimants both the EU and its Members States are Contracting Parties to the ECT and may be subject to claims brought by investors from other contracting parties (¶167)

- Regarding the Tax Objection the Claimants do not put into question the qualification of the TVPEE as “tax” but they contend that this measure is not a *bona fide* taxation measure as it is arbitrary and discriminatory (¶267): “the 7% Levy is not a real tax measure, but was in fact a measure designed to strip away the rights of the Claimants’ installations under the RD 661/2007 regulatory regime” (¶256).

4.2 Applicable Law

The Parties agree that Article 42(1) of the ICSID Convention and Article 26(6) of the ECT define the law applicable to the merits of this dispute (¶ 275). When it comes to the relevance of EU Law, the Respondent contends that EU law is applicable international law, and it must be applied by the Tribunal to decide all the issues in the dispute (including jurisdictional, merits and quantum issues) (¶ 279). The Respondent argued that Article 26(6) of the ECT does not grant ECT prevalence over any other applicable rule or principle of international law (¶279). Spain argues that the subsidies provided under RD 661/2007 are State aid under EU law: EU law is decisive to determine the scope of the Claimants’ rights, legitimate expectations, and the proportionality and reasonability of the disputed measures (¶282). The Claimants argue that RD 661/2007 has not been found to constitute State aid and that awarding the Claimants damages in this arbitration would not be in breach of EU State aid rules (¶¶ 288, 289).

4.2.1 The Object and Purpose of ECT

The Claimants assert that the ECT provides a high level of protection for investors in the energy sector (¶295), and when the Claimants invested €91 million into the Spanish wind generation sector they reasonably relied on the expectations that the Wind farms would be entitled to the economic regime of RD 661/2007 which confers immutable economic rights protected by the ECT (¶301). Claimants assert that Spain had allegedly taken several wrongful measures which had fundamentally altered the applicable legal and regulatory framework (¶302). Due to this, the Claimants allege that they have suffered considerable losses by Spain violating Article 10(1) of the ECT. The Claimants allege that Spain adopted measures which amounted to a tariff cut, deprived the Claimants of the attractive support scheme option under RD 661/2007, established a New Regime for RE power-generation installation which was radically different from the framework established by RD 661/2007 and affected past and future income streams by passing Law 24/2013 and other laws and regulations (¶¶ 302, 303).

The Respondent disputes the Claimants’ reading of the purpose of the ECT stating that the primary objective of the ECT is non-discrimination, and that the ECT does not bar States from adopting reasonable macroeconomic control measures (¶305). Moreover, Spain asserts that in the absence of a specific stability commitment, an investor cannot have an expectation that a regulatory framework will not be modified (¶312).

4.3 Merits

The Claimants allege that after the Disputed Measures were implemented, the system left in place completely dismantled the prior legal framework applicable to the Claimants’ companies: the new regime was “plagued by uncertainty”, “lack of transparency” and “long-term instability” (¶ 314). The Respondent sustains that it did not breach any international obligations under the ECT (¶315).

4.3.1 Article 10(1) of the ECT

The Claimants states that the Respondents had violated the FET standard contained in the ECT by failing to fulfill its obligation to “encourage and create stable, equitable, favorable and transparent conditions” for the investors, which is the first sentence of Article 10(1) of the ECT (¶ 316, 321). The Claimants argue that after RD 661/2007, Spain re-confirmed its commitment to provide stable conditions and it established that any future changes to the economic regime would not apply to existing installations (¶320). In the Claimants’ view, their investment was subject to 18-month period “roller coaster” of constant regulatory changes (¶320): Law 15/2012 (7 % levy) (¶322), RDL 2/2013 which deprived the Claimants of the most attractive support scheme option under RD 661/2007 (¶323), RDL 9/2013 brought substantial changes (¶324), as did Law 24/2013 (¶326), and implementing regulation to fully define the economic regime that applied to RE installations such as RD 413/2014 (¶327) which constituted a “fundamental change” (¶328). The Claimants argue that the FET standard is additional to the international minimum standard under customary international law (¶323).

The Respondent sustains that it did not breach any international obligation under the ECT (¶ 315) and objects that there is an autonomous standard of the FET generating an obligation to “create stable, equitable, favorable and transparent conditions” for foreign investors (¶329). And the Respondent insists that the Claimants had not justified the existence of a “grandfathering” institution in Spanish Law nor in the Spanish Regulatory framework (¶337).

4.3.2 Obligation to provide a stable and predictable regulatory scheme

The Claimants rely on investment arbitration scholarship and several landmark decisions to contend that “the State must not frustrate a foreign investor’s legitimate expectations” maintaining that “the ECT expressly recognizes an obligation to provide for legal stability” (¶338) which is “of particular importance in the energy sector” (¶339). The Claimants argue that they had two distinct expectations: one pertaining to the nature, amount of duration of the FIT offered under RD 661/2007 and RD 1614/2010 and the second one pertaining to the stability of the RD 661/2007 economic regime, which would leave existing installations unaffected (¶341). Moreover, the Claimants specify that Spain’s own conduct prior to the Claimants’ investment confirms that Spain’s expectations on the application of RD 661/2007 economic regime were the same as the Claimants’ expectations (¶345).

The Respondent contends that in order to determine if there has been a violation of the FET standard, the Respondent asks the Tribunal to analyze the investor’s knowledge of the general regulatory framework when making its investment (¶360) since the investment was made in May 2012 (¶361), following a series of relevant events such as the announcement of future regulatory changes made by the President in his inauguration speech, CNE’s press release urging a reform, CNE’s Report proposing measures for revenues and costs to reinstate the financial balance and the National Reform Program (¶362). In Spain’s view, based on international arbitration case law, it is clear an investor should know and understand the regulatory framework, how it is applied and how it affects its investment (¶363).

4.3.3 Alleged frustration of legitimate expectations

According to the Claimants, Spain’s general policy aimed to develop renewable energy power-generation infrastructure and Spain’s enactment of regulations confirmed that installations would not be affected by any review of the FIT under RD 661/2007 (¶382). Thus, the Claimants argue that Spain through a process extending over two years (¶385) frustrated the Claimants’ legitimate expectations in breach of the FET under the ECT (¶383). The Claimants note that

the Tribunal in *RREEF* concluded that the retroactive nature of the new regime breached Art. 10(1) of the ECT and that “must result in an appropriate compensation for the damage that the breach caused the Claimants” (¶396).

As regards the legitimate expectations under the FET standard of the ECT, the Respondent highlights that such expectations must be “reasonable” and “objective” (¶397), and that the Claimants could not have the legitimate expectation that the Spanish regulatory framework for supporting renewables would remain unchanged if the economic sustainability of the SES was at risk (¶399). The Respondents argue that the “economic parameters changed radically” in Spain from 2009 to 2014 (¶399), and that the evolution of the Spanish legal framework had occurred before the Claimants made their investment and that the Claimants invested in a highly regulated sector (¶413).

4.3.4 Transparency

The Claimants contend that the FET standard further requires the State’s conduct towards investors and its legal environment be transparent (¶415). In Claimants’ view, Spain’s conduct was characterized by uncertainty and ambiguity, breaching the requirements of transparency under the FET (¶415): by not being forthcoming with information about intended changes in policy and regulations that affected the investments, Spain didn’t allow the investors to adequately plan (¶416) and the dismantling of the RD 661/2007 wasn’t done in a transparent manner (¶417).

The Respondent rebuts that Spain had breached its obligations under the ECT to provide transparent conditions (¶424): Spain argues that the need to adopt measures with the view of eliminating tariff deficit had been announced to all known investors and that the measures were not obscure nor unpredictable (¶424).

4.3.5 Obligation of Reasonableness

In the Claimants’ view, for a State’s conduct to be reasonable it needs to bear a reasonable relationship to some rational policy (¶428), and therefore Spain needs to show that the measures taken were reasonable to fulfill the goal of the policy (¶429). The reasoning behind the measures taken by the Respondent was that the measures had to be adopted due to so called tariff deficit (¶432), however in the Claimants’ view the tariff deficit was the result of Spain’s own regulatory decisions and the burden cannot be attributed to foreign investors protected under the ECT, in violation of their reasonable and legitimate expectations (¶432). The Claimants also assert that the economic crisis had already affected Spain when it opted to implement RD 1614/2010, which reiterated the application of the RD 661/2007 economic regime for existing installations (¶440) and that Spain could have funded the deficit through other alternatives such as increasing the bill to consumers or establishing taxes (¶456).

The Respondent contends that the tax deficit and the economic crisis presented important challenges and the measures Spain undertook shall not be deemed as irrational (¶451), especially when certain facts are not attributable to the Kingdom of Spain but rather to the worsening international crisis between 2007 and 2012 and the exceptional fall in electricity demand (¶454). The Respondents point out that the measures not only affected the RE Sector but rather all activities that involve a cost for the SES (¶457). In the Respondent’s view, the fact that the current regulatory regime attracted over 5 billion euros of investment in RE in Spain in 2015 demonstrated the stability and security of the current system (¶461) and the

proportionality and reasonability of the measures and the mass entry of new investors would only be logical if the new regulation guarantees reasonable returns (¶462).

4.3.6 Umbrella Clause

The Claimants argue that the purpose of an umbrella clause (such as Article 10(1) of the ECT) is to bring the host State's compliance with commitments assumed with investors under the protective "umbrella" of the ECT (¶607). In the Claimants' view, it cannot be disputed that under RD 661/2007 and RD 1614/2010, the Government entered into obligations with the Claimants within the meaning of Article 10(1) of the ECT, which consisted of the payment of the FIT (¶611). The language of the ECT does not differentiate between contractual obligations and legislative or regulatory undertakings (¶612).

The Respondent argues that the Claimants take the application of the "umbrella clause" beyond reasonable interpretation (¶616), and that the Spanish regulatory framework is *erga omnes* by nature and it is not aimed at any group (¶621).

5. Tribunal's Analysis

5.1 Jurisdiction

The Tribunal holds that:

- Regarding the Intra-EU Objection, the Tribunal rejects the Respondent's argument concerning the primacy of EU law over the ECT (¶196), as the ordinary meaning of Article 26 of the ECT confers jurisdiction on the Tribunal (¶222). The two legal orders (the EU legal order and the ECT normative space) evolve in parallel and the Tribunal finds its jurisdiction in a treaty validly established in the international legal order (¶225)
- Regarding the Tax Objection, the Tribunal argues that the tax measure is not sufficient to establish the bad faith of the Respondent (¶ 273), and the Claimants failed to demonstrate any improper or abusive use of the State's power to tax (¶ 274)

5.2 Applicable Law

Article 26(6) of the ECT provides that the Tribunal shall "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law" (¶486).

The RREEF Decision rejected Spain's jurisdictional objection and the decision also, when considering the merits, found that if there was incompatibility or discrepancy between the ECT and the EU law, then ECT must prevail (¶490).

5.3 Merits

5.3.1 Article 10(1) of the ECT

The Tribunal has to consider in the light of the rival contentions of the Claimants and the Respondent and the terms of the ECT, whether the changes to the Spanish legislation provide a "reasonable return" and how is "reasonable return" determined (¶498). Given that the

Claimants have put forward extensive evidence of documents showing that Spain offered investors a fixed guaranteed return and not just a reasonable return, the Tribunal is not persuaded that the evidence adduced by the Respondent is sufficient for determining a “reasonable return” and neither is it in fulfilment of the representation made by the Respondent with regard to the stability of the legal and economic regime that would be applicable to RE projects (¶503). The Tribunal finds that Spain is not entitled, pursuant to the provisions of Article 10(1) ECT, to deprive the Claimants of the economic rights associated with the RD 661/2007 regime when it freely undertook to grant those rights and guarantee their continuity over the entire operational life of the installations (¶509).

The Tribunal finds that the Claimants’ expectations on the continued application of the economic regime to the Project Companies was legitimate and reasonable because RD 661/2007 FIT (which the Claimants relied on) provided very specific tariffs that would apply to Project Companies, there was a commitment in Article 44(3) that the fixed tariff would not be changed (¶527). The Tribunal is of the view that Spain through the economic regime of RD 661/2007 made this commitment to attract investments by offering stability when Spain had no obligation to do so and without the commitment the Claimants would not have invested in the Spanish RE sector (¶528).

The Tribunal determined that Spain had failed to accord fair and equitable treatment to the Claimants pursuant Article 10(1) of the ECT (¶538, 629). The Tribunal also is of the view that it is not necessary to address the issue of whether Spain violated the Umbrella Clause, relying on the decision in *Micula v. Romania* (¶629, 630). The Tribunal concludes that Spain is not only in violation of the FET standard under the ECT, but that Spain also violated its obligation under Article 10(1) (¶606).

5.3.2 Obligation to provide a stable and predictable regulatory scheme

Spain, between 2012 and 2013, enacted a number of legislative measures which, in the Tribunal’s view, took away the stability provisions that it had undertaken to provide under RD 661/2007 and RD 1614/2010 (¶555). The Tribunal is of the view that stability cannot exist when Spain continuously changes its legislation and that Spain’s conduct from December 2012 breaches the concept of a stable and predictable environment for the Claimants’ investment by breaching its international obligations under the ECT. Spain’s conduct, states the Tribunal, demonstrates “quite categorically that it failed to provide a stable and predictable regulatory regime” (¶569).

5.3.3 Alleged frustration of legitimate expectations

The Tribunal finds that the Claimants’ legitimate expectations were that the economic regime would not be altered by retroactive measures (¶578), and that the Claimants were entitled to rely on the 2010 measures, which have no impact on the guaranteed remuneration schemes for wind installations (¶582). The measures which frustrated the Claimants’ legitimate expectations were the introduction of the 7% levy pursuant to Law 15/2012, elimination of the Premium pursuant to RDL 2/2013 and wiping out the RD 661/2007 economic regime in its entirety in July 2013 and introducing an entirely different regime that is less favorable to the Claimants (¶534). Moreover, the Tribunal adopted the persuasive reasons of the *Eiser* Tribunal which confirms that the Claimants were entitled to an expectation that the regime would not be radically altered in respect of existing investments (¶563).

5.3.4 Transparency

The FET standard requires that Spain's conduct towards the Claimants and the legal environment must be transparent (¶590). The Tribunal, having considered the conduct of Spain, holds that Spain did dismantle the RD 661/2007 economic regime and that that was not transparent due to the following reasons: first, in the Tribunal's view there was no urgent need for RD 661/2007 to be modified; second, there was an 11-month period during which Spain did not give any indication with regard to the remuneration that the qualifying plants would be entitled to and third, there was a lack of visibility and predictability under the new regime (¶593). These acts (and more) demonstrate that Spain's conduct was not transparent (¶594).

5.3.5 Obligation of Reasonableness

In order to determine if Spain's measures are unreasonable, the Tribunal must identify a rational policy goal and it must then demonstrate that these measures were reasonable. The Tribunal is of the view that Spain cannot satisfy this test because having induced the Claimants to invest, there was a sudden and drastic change in Spain's policy with regard to the RD industry and the legal and regulatory framework was amended over a period of time (¶595-597). The wind farms were duly registered in December 2010, and the Claimants were entitled to the RD 661/2007 economic regime: Spain attempted to justify its regulatory measures due to a tariff deficit, but a tariff deficit is a result of Spain's own regulatory conduct and cannot be attributed to the Claimants. Thus, the conduct is in the Tribunal's view, a violation of the Claimants' reasonable and legitimate expectations (¶599) and that the dismantling of the legal and business framework which was applicable to the Claimants' investment was unreasonable (¶600).

It is the Tribunal's view that Spain's actions were disproportionate: Spain tried to address the issue of tariff deficit, yet it imposed retroactive changes to the FIT, thereby destroying the RD 661/2007 economic regime (¶601, 603). There were less intrusive means available to achieve Spain's goals (such as tax on all CO₂ emissions) (¶602).

5.3.6 Umbrella clause

Having determined that Spain had not accorded fair and equitable treatment to the Claimants pursuant to Article 10(1) of the ECT, the Tribunal is of the view that in the interest of judicial economy, it is not necessary for the Tribunal to address the issue of whether Spain violated the Umbrella Clause (¶629, 630).

6. Quantum

The Claimant submit that they are entitled to full reparation that would wipe out all the consequences of Spain's unlawful acts (¶632), and the restitution would be effected by Spain withdrawing all the harmful laws and regulation and compensating the Claimants for all losses suffered before the reinstatement of the original regulatory regime (¶633). The Claimants ask the Tribunal to turn to customary international law for the applicable standard of relief (¶635). To establish the fair market value of their investments the Claimants rely on Discounted Cash Flow ("DCF") method (¶635), claim pre-award and post-award interest on the amounts due and rely on Article 13 of the ECT (¶644) as well as gross-up for tax (¶651).

The Respondent states that since the Claimants have not been deprived of anything nor is there any damage to speak of, no reparation is required (¶653). The Respondent contends that the DCF method is inappropriate to use because it is overly speculative (¶658), the post-award interest rate should not exceed the pre-award interest rate (¶ 665), and that the tax gross-up claim is without basis (¶667).

The Tribunal agrees with customary international law being the standard of reparation (¶673). Tribunal considers restitution an inappropriate remedy (¶674) and therefore the Tribunal awards reparation in the form of monetary compensation (¶675). The Tribunal adopts the approach of the *Lemire* tribunal, as proving the amount of damages is a very difficult task (¶684), even though the Tribunal is sufficiently certain that the Claimants have suffered damage as a result of the Respondent's breaches (¶686). The Tribunal considers that it is appropriate to value the Claimants' investment using the DCF method (¶689). The Tribunal establishes the valuation date is June 2014 (¶695-698) that the presumed operating life of the wind projects is 25 years (¶708). The Tribunal establishes a discount rate for June 2014 of 4,64% (¶731), adopts the Spanish 1-year bond rate to bring forward historical cash flows (¶743), sets the interest rate at a rate compounded on a monthly basis (¶748), and rejects the Claimants' tax gross up claim (¶759).

7. Costs

The Claimants submitted their Submissions on Costs dated 30 November 2018 and requested the Tribunal to award them costs in the total sum of €3,353,722.25 (¶760,763). The Respondent (due to technological issues) submitted its Submissions on Costs on 16 January 2019, for the total of €1,555,976.10 that should be paid by the Claimants should the Respondent succeed (¶ 764, 766, 767). The costs of the arbitrators and the ICSID administrative fees and direct expenses amount to US680,255.62 (¶771).

The Tribunal states that out of the two jurisdictional objections submitted by the Respondent, one was rejected. The Claimants prevailed on the principal issue with regard to jurisdiction and they established a breach of Article 10(1) of the ECT. The Tribunal did not accept all the items of the Claimants' claim for costs (¶769). The Tribunal holds that since the Respondent has partial success, the Claimants are to be paid 75% of the Claimants' legal costs and disbursements and the administrative expenses incurred by ICSID and the fees of the arbitrators (¶773).

8. Award

The Tribunal decided unanimously as follows (¶ 775, 776):

- The Tribunal has jurisdiction under ECT and the ICSID Conventions over the Claimants' claim.
- The Tribunal has no jurisdiction under the ECT and the ICSID Convention with regard to the claim that the Respondent's tax measures (7% tax on the value of electrical energy production created by Law 15/2012) violates the ECT.
- The Claimants' claim for gross-up tax is dismissed

The Tribunal decided by majority as follows (¶ 775, 776):

- The Respondent has breached Article 10(1) of the ECT by failing to accord fair and equitable treatment to the Claimants
- The Tribunal does not need to determine the Claimants' claim with regard to the violation of the Umbrella Clause
- The Claimants are awarded damages in the sum of €77 million for violation of the ECT and the Respondent shall pay interest on the sum awarded from 20 June 2014 to the date of this Award at 1.16% per annum compounded monthly.
- The Respondent shall pay the Claimants 75% of the Claimants' cost of the proceedings.

9. Dissenting Opinion of Prof. Dr. Hélène Ruiz Fabri

Although Prof. Dr. Hélène Ruiz Fabri agrees that the Tribunal has jurisdiction over large parts of the claims made by the Claimants (Dissenting Opinion ¶ 1), Prof. Fabri disagrees with the conclusion reached on liability and quantum, concerning mainly the meaning and functioning of the FET in the case (Dissenting Opinion ¶ 2).

According to Prof. Fabri, the Tribunal did not justify sufficiently the reasoning that brought the conclusion regarding FET (Dissenting Opinion ¶4): a “fine-tuned balance” needs to be found between the protection of the investment (legitimate expectations of the investors) and the sovereign prerogatives of the State (Dissenting Opinion ¶ 5). In this case, the functioning of the FET standard requires balancing the regulatory margin of the State with the legal security of investors (Dissenting Opinion ¶9). The Tribunal considered there were “firm undertakings” on the side of the State, Prof. Fabri, however, cannot adhere to the solution reached by the Majority for two main reasons: first, she cannot agree with the method to justify the legal analysis of the qualification of the obligation of stabilization allegedly created with Article 44(3) of the Royal Decree (RD) 661/2007 (Dissenting Opinion ¶11) and second, she states that the Majority did not take into sufficient consideration the date of the investment (Dissenting Opinion ¶ 12). To assess whether the State had overstepped the boundaries set by the FET standard, the Majority should have explained the method adopted to operate the proportionality control (Dissenting Opinion ¶14). The parameters were not clearly set for the proportionality, and there was no verification and justification of the effective accuracy and feasibility of the means the State could have taken. Furthermore, the Majority should have analyzed clearly the impact of the “regulatory risk” existing at the date of the investment on the amount of reparation (e.g. the economic crisis was not even acknowledged) and the amount of damages should have been adapted (Dissenting Opinion ¶ 14,15). Lastly, Prof. Fabri states that contrary to the Majority's opinion in ¶ 593, the investment of the Claimants was not “destroyed”. She concludes by questioning what the damages of €77 million awarded to the Claimants is in fact repairing (Dissenting Opinion ¶ 16).