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International Arbitration Case Law
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Award Name and Date: RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain (ICSID Case No. ARB/14/34) – Award – 18 December 2020

Case Report by: Erick Santín**, Editor Ignacio Torterola***

Summary: The Tribunal issued its Decision on Jurisdiction, Liability and Certain Issues of Quantum (the 'Decision') ruling that the Respondent had breached Article 10(1) Energy Charter Treaty ('ECT') (i) to the extent it had procured repayment by the Claimants of sums previously paid by the Respondent under the regime in place prior the adoption of the Disputed Measures, and (ii) the disproportionate nature of the new measures it had adopted concerning certain of the Claimants' plants. The Tribunal now rules on the remaining issues of quantum regarding both breaches.

Main Issues: Quantification of damages and other issues of quantum due to measures implemented by the government of Spain modifying the regulatory and economic regime of renewable energy projects.

Tribunal: Mr Samuel Wordsworth QC (President), Ms Anna Joubin-Bret (Arbitrator) and Mr Judd L. Kessler (Arbitrator)

Claimants' Counsel: Ms Marie Stoyanov, Mr Antonio Vázquez-Guillén, Ms Virginia Allan, Mr David Ingle, Mr Pablo Torres, Ms Patricia Rodríguez (Allen & Overy LLP, Madrid) and Mr Jeffrey Sullivan (Gibson, Dunn & Crutcher LLP, London)

Respondent's Counsel: 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, Madrid)

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Digest:

1. Relevant Facts

RWE Innogy GMBH ('First Claimant') is a company incorporated under the laws of Germany and RWE Innogy Aersa S.A.U. ('Second Claimant', and jointly with First Claimant, the 'Claimants') is a company incorporated under the laws of the Kingdom of Spain. Respondent is the Kingdom of Spain ('Spain' or 'Respondent') (¶ 2[1]). The dispute concerns the Claimants investment in renewable energy projects in Spain. Claimants bought and developed four hydroelectric plants and 16 wind farms in Spain within April 2001 and December 2011 with a total installed production of approximately 446.75 MW (¶ 190[2]).

From the mid-1990s, Spain sought to develop its renewable energy generation sector (¶ 128[3]). Spain adopted Law 54/1997 on the Electronic Power Sector and established a "Special regime" that applied to non-consumable renewable energies, which would be governed by specific provisions (¶ 131[4]). Claimants contended that, among other things, Spain's measures via the RDL 2/2013, RDL 9/2013, Law 24/2013, RD 413/2014 and June 2014 Order (the 'Disputed Measures') (¶ 394[5]) caused losses to Claimants' investments in Spain. Claimants brought the case against Spain alleging that Spain breached Article 10(1) of the ECT by failing to create and maintain "stable, equitable, favourable and transparent investment conditions; breached its fair and equitable treatment obligation; impairing the investment through unreasonable and discriminatory measures and by failing to observe its obligations entered into with Claimants or their investments (violation of Umbrella Clause) (¶ 395[6]).

The Tribunal issued a Decision finding that it lacked jurisdiction to hear the claims of breach of Article 10(1) ECT for the two Taxation Measures introduced by Law 15/2012 of 27 December 2017; that the Respondent had breached Article 10(1) ECT (i) to the extent that it had procured repayment by the Claimants of sums previously paid by the Respondent under the regime in place before the adoption of the Disputed Measures, and (ii) the disproportionate nature of the new measures that it adopted, with specific respect to certain plants; and the Tribunal dismissed all other claims (¶ 748[7]).

The Tribunal ordered the Parties to attempt to reach an agreement on the amount of compensation, establishing that in case the Parties failed to do so, the decision on the final determination of damages due should be fixed in the Award, along with the Tribunal's decisions as to interest, tax and costs (¶ 748[8]).

2. Procedural History

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The Tribunal was constituted on 4 November 2015 (¶ 10[9]). Claimants filed a memorial on the Merits, and the expert report of Compass Lexecon dated 24 February 2016, on 26 February 2016 (¶ 16[10]). Respondent filed a Counter-Memorial on the Merits and Memorial on Jurisdiction on 20 May 2016 (¶ 22[11]). The European Commission filed an *amicus curiae* on 11 August 2016 (32[12]) and updated it on 13 July 2018 (¶ 101[13]). Claimants submitted a Reply on the Merits and Counter-Memorial on Jurisdiction on 11 November 2016 (¶ 38[14]), the Respondent filed a Rejoinder on the Merits and Reply on Jurisdiction on 19 January 2017. Claimants filed a Rejoinder on Jurisdiction on 2 March 2017 (¶ 56[15]). The hearing on the merits and jurisdiction was held from 15 May to 19 May 2017 (¶ 74[16]). The Tribunal issued its Decision on Jurisdiction, Liability and Certain Issues of Quantum on 30 December 2019 (¶ 6). The Parties communicated on 6 February 2020 their agreement on the schedule to attempt to reach an agreement on the amount of compensation, in the form of a joint expert report (¶ 9). 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 April 16 2020 (the 'Experts' Joint Report') on 17 April 2020 (¶ 12). The Claimants filed its Comments on the Experts' Joint Report on 1 May 2020, and Respondent filed its Observations on the Experts' Joint Report on the same date (¶¶ 13-14). The Claimants filed its Responsive Submissions on the Experts' Joint Report on 19 May 2020, and the Respondent filed its Responsive Observations on the Experts' Joint Report on the same date (¶¶ 15-16). The Tribunal on 20 May 2020, took note of the "conditional" request filed by the Respondent if the Tribunal followed the "alternative legal interpretation as suggested by the Respondent, and the Claimants' communication in response therein, noting that it would consider the Parties' respective communications as appropriate (¶¶ 17-18). The Tribunal declared the proceeding closed on 16 November 2020 (¶ 19).

3. Positions of the Parties

3.1 Claimants' Position

Claimants refer their position to the two head of damages addressed in the Experts' Joint Report, namely: (i) the "Claw-Back"; and (ii) the reduction of the remuneration of the Claimants' installations below the threshold of an appropriate return (¶ 24).

3.1.1 The Claw-back

Claimants defined the Claw-back 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 1025/2015 (the 'Interim Period'). Claimants recalled 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 payment later defined in Order IET 1025/2014 which applied retroactively to July 2013 (¶¶ 24-25). According to the Claimants, the Claw-back or retroactive application of the Order IET 1025/2014 implied that the plants were

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"required to return the difference between the payments received from July 2013 and the payments that they would have received under the June 2014 Ministerial Order (¶ 26).

Claimants submitted, first, that the Claw-back is a violation of the ECT, as found by the Tribunal. Secondly, that the Claw-back repayment obligation was imposed on 21 of the Claimants' 24 installations and was not limited to the Claimants' 10 plants considered by the Tribunal in its Decision, as those were only provided as an example of the plants that had suffered the Claw-back and had to make a payment to the National Commission on Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*) ('CNMC'). Thirdly, the Claimants argued that the damages were not limited by the EUR 19.4 million figure provided by Compass Lexecon only for illustrative purposes, and noted the disagreement between the Experts on the quantification of the impact of the Claw-back, Compass Lexecon considered that the Claw-back applied to 21 of the Claimants' 24 plants. In contrast, BDR considered that only the Claimants' 10 plants receiving a Special payment under the New Regime should be considered (¶¶ 27-32).

Claimants submitted that Spain's failure to pay sums owed to the Claimants did not relieve it of its obligation to pay damages pursuant to the Claw-back. 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". Due to this, Claimants contended that they only received a portion of the sum they were owed for the electricity that they produced. Claimants considered that instead of receiving the sums they were owed and subsequently repaying the respective amount to Respondent, the 2014 Ministerial Order indicated that "Spain simply cancelled the payment owed to the Claimants". Claimants submitted that this was equivalent to asking the Claimants' plants to return payments received for the energy produced and sold (¶¶ 35-40).

3.1.2 Tax Treatment of Damages

Claimants noted the Experts disagreement on how a 'tax shield' may result from an entity's net operating losses, asset impairments, and depreciations would affect the quantification of damages. Claimants submitted that BDO's position is unsubstantiated because, for the application of the tax shield in the real world, it does not require to be linked to the "*project performance*"; and the Internal Rates of Return included in the Tribunal's finding in its Decisions are calculated on a pre-tax basis, and do not reflect the Claimants' fiscal obligations. Whereas, Compass Lexecon considers Claimants' tax shield to determine the damages due to the Claimants, to put Claimants in the position they would have been in but for the Respondent's breaches (¶¶ 40-43).

3.1.3 Additional Sensitivities to Damages. No Res Judicata

Claimant included two sensitivities. First, Claimants submitted that the Tribunal should award damages applying a 7% post-tax return, even considering the margin of appreciation, the Claimants relied on *Hydro Energy, RREEF, NextEra and PV Investors* cases on this point. Secondly, Claimants submitted that the discount rate should be the WACC of 6.06% instead of the 7.61% chosen by the Tribunal (¶¶ 44-48).

Claimants refuted Spain's argument that the appropriate minimum return and the discount rate were *res judicata* and could only be subject to review until the rendering of the Award. The

foregoing on the following grounds: (i) failure to make their submission on this matter might be considered as a waiver under ICSID Arbitration Rule 23 and would be contrary to the procedural economy and encourage the parties to submit their objections later as an attack to an unfavourable award; (ii) Claimants only wished damages to be quantified correctly, and did not wish to relitigate the questions already decided by the Tribunal; and (iii) that "the Tribunal finding on proportionality cannot be considered *res judicata* before the necessary assessment of damages has been carried out" (¶ 49).

Claimants requested 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%. Claimants also provided three other scenarios with Compass Lexecon's computation of damages in the event that the Tribunal elected to award damages applying other rates of return and discount (¶¶ 50-51).

4. Respondent's position

Respondent submitted an Alternative Legal Interpretation of the Tribunal's Decision. Respondent contended that the Decision had not been accurately interpreted by the economic expert teams. Moreover, the Respondent contended that the Claw-back should only be applicable to the 10 Claimants' plants mentioned in the Decision. The Respondent also submitted that regarding the amounts related to the coverage ratio, the disputed amounts were never received by the Claimants and consequently never repaid to the Respondent (¶¶ 52-68).

4.1 The Alternative Legal Interpretation of the Tribunal's Decision

The Respondent submitted that "the issues addressed in the Tribunal's Decision may not have been accurately interpreted by the Parties' economic expert teams." This, because they identified the term repayment with the "Claw-back" as the "first head of damages." In the event, the Tribunal had not considered both terms as synonyms, the Experts' Joint Report conclusion regarding the "first head of damages" should be adjusted (¶¶ 52-23).

In Respondent's view, the earnings accrued during the Interim Period were deducted from the subsequent CNMC's settlements, and Claimants submitted no evidence that these settlements amount to any effective repayment from the plants to the CNMC. Respondent responded to Claimants' insistence that there had been payments in cash by requesting the CNMC to provide information regarding the settlements for the Claimants' plants from June 2014 onwards. The balance of the settlements was always positive, according to Respondent. Furthermore, Spain contended that 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" (¶¶ 54-57).

4.2 Claw-back

Respondent noted the Experts' disagreement as to the number of plants subject to Claw-back. Spain recalled 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, argued the Respondent, was

res judicata (¶¶ 58-60).

The Respondent argued 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, did not extend to the rest of the plants and was *res judicata*; (iii) in any event, the Claimants' new argument that the damages should not be limited to the 10 plants was belated; (iv) as BDO had explained, the rest of the plants were receiving "special payments that would allow those plants to yield a reasonable pre-tax return"; and (v) as a result, the compensation should be limited to the 10 plants to which the Tribunal referred to in its Decision (¶¶ 60-62).

4.3 Amounts Related to the Coverage Ratio

Respondent submitted that pursuant to the Third Transitory Provision of RDL 9/2013, 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. Thus, in order to determine the "precise quantification of the amount paid", both Experts referred to different amounts; and both of them "agree that the amounts related to the Coverage Ratio were never received by the Claimants and consequently were never paid back to the Respondent" (¶¶ 63-64).

In Respondent's view, Compax Lexecon referred in its calculations to an amount that would have been due by Spain "in the absence of the Disputed Measures", however, Spain considered that, contrary to the Tribunal's directions to the Experts to quantify the amount paid. Spain contended that BDO's quantification of damages was restricted to amounts actually paid and subsequently deducted (¶¶ 64-65).

For the abovementioned, Respondent submitted that the amounts exceeding the coverage ratio in force at each of the monthly settlements were never paid, thus not subject to repayment, and must not be considered by the Tribunal under the first head of damages (¶ 67).

As a result, the Respondent submitted that the Claw-back amount should not exceed EUR 14.82 million (¶ 68).

4.4 Amounts Related to the Income Tax

Respondent noted the Experts' disagreement with respect to 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. Respondent submitted that (i) the tax assessment must be consistent with the cash flows employed to calculate the returns on Claimants' plant; (ii) the above-indicate inputs could not be taken into account if they were not related to the project or were not consistent with the inputs employed to calculate Internal Rates of Return (¶¶ 69-70).

4.5 Additional sensitivities to Damages. Res Judicata

Respondent referred to the Additional Sensitivities to Damages included by Compass Lexecon, and it submitted that the Tribunal had already decided in its Decision the matters concerning (i) the reasonable rate of return, and (ii) the discount rate, that such findings were *res judicata*, and therefore could not be revisited (¶¶ 71-72).

The Respondent relying on *CoconoPhillips, Electrabel* and *RREEF*, contended that the Tribunal's conclusions in its Decisions were *res judicata*; and consequently (ii) they were to be incorporated in the Award; (iii) it was not possible for a tribunal to reconsider the conclusions it reached in a previous decision; and (iv) those previous decisions could only be subject to review afterwards, within the limits of the post-award remedies under the ICSID Convention (¶ 73).

The benefit of the tax shield alleged by Claimants should be limited to those NOLs and asset impairments generated directly from the operating performance of the plants. Furthermore, Claimants relied on a tax shield unrelated to the project performance to avoid the tax burden (¶¶ 74).

The Respondent considered that the Claimants' request for the Tribunal to rectify the 7.398% benchmark was procedurally inadmissible, their arguments inaccurate, and should be rejected, with the relevant costs allocated to the Claimants. 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 submitted that the Claimants' reliance on the *RREEF* and *PV Investors* benchmarks is misplaced (¶¶ 76-77).

Finally, the Respondent contended 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", was procedurally inadmissible and wrong from an economic point of view (¶ 80).

5. Tribunal's analysis

The Tribunal concluded that previous decisions of the Tribunal were final and binding on the Parties, but not *res judicata* as such and that in the present case, no circumstance justified any revision under Article 51 of the ICSID Convention (¶¶ 81-91). The Tribunal referred to the Decision to recall that the breach of Article 10(1) ECT was solely on the procurement of repayment during the Interim Period and Claimants' request for EUR 19.4 million with respect to the 10 plants. The Tribunal found no basis to re-open said determination (¶¶ 92-96). The Tribunal agreed to seek to replicate the actual tax situation of the plants and fixed the discount rate at 7.61% (¶¶ 106-118). The Tribunal established that the sum to be awarded to the Claimants was EUR 28,080,000 (¶ 119).

5.1 Res judicata

The Tribunal noted the potential importance that *res judicata* could have to both the heads of compensation that have been ordered. The Tribunal established that the present case is in no way analogous to the *Lemire* situation. The Tribunal found no suggestion that the Tribunal engaged in any procedural irregularities in its Decision and Rule 27 of the ICSID Arbitration Rules was not engaged (¶¶ 81-83).

In relation with Claimants' contention 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. The Tribunal declared that it is misconceived. The Tribunal's view is that the paragraph in *RREEF* relied upon concerns that tribunal's conclusion that it would "be in a 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". The tribunal in *RREEF* did not intend to reflect a general principle that an assessment of proportionality must await the detailed considerations of damages that forms part of a quantum phase. The Tribunal considered that it would depend on the individual case, and in the current situation the Tribunal had already made its finding on disproportionality (¶ 84).

In relation to Claimants' contention that the *ConocoPhillips, Electrabel* and *RREEF* cases were confined and concerned the possibility of revisiting a decision on jurisdiction or a finding as to the applicable law, and Claimants did not seek to challenge the Tribunal's findings or relitigate a question already determined by the Tribunal. The Tribunal did not consider that either the analysis or the finding on *res judicata* in the *ConocoPhillips* case were confined to issues of jurisdiction or applicable law, as all the determinations -without any distinction as to jurisdiction or liability – were found to be *res judicata*. Referring to the *Electrabel* case, the Tribunal referred to the finding by said tribunal that "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" (¶¶ 85-86).

Addressing Claimants' submission that they did not seek to relitigate a question already determined by the Tribunal, the latter considered the question as appropriate. The Tribunal additionally relied on the *Standard Chartered Bank (Hong Kong) Limited v. Tanzania (TANESCO)* and the *Burlington Resources Inc v. Republic of Ecuador* cases with a view to establishing that prior determinations such as the ones made in the Decision would be seen as binding on the Parties, but not *res judicata*. This did not mean that such determinations could be revisited at will: they still bind the parties (¶¶ 88-91).

5.2 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

The Tribunal had already established in the Decision that the Respondent breached Article 10(1) ECT (i). The Tribunal considered that it would be a subversion of the prior legal regime and a breach of the FET standard provided for in Article 10(1) if the Respondent requires repayment of sums already paid. Having said that, the Tribunal observed that Claimants' submission, including the oral opening submission, had been restricted to the 10 plants that no longer received any 'special payment' and consequently, the Tribunal's specific focus on these 10 plants could in no way be seen as inadvertent (¶¶ 92-96).

The Tribunal observed 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, and in the period subsequent to Order IET 1025/2014, Spain issued the so-called negative invoices 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. The Tribunal rejected Respondent's "alternative legal interpretation of the Tribunal's Decision" on the basis that "as a matter of economic reality and, more important, within the meaning of what was ordered by the Tribunal, the repayment of sums could be procured just as readily by deducting such sums from debts that are due as by requiring payment in the form of a transfer" (¶¶ 96-99).

The Tribunal, while reviewing the coverage ratio amounts, declared that said were never received by Claimants and consequently were never paid back to Respondent. Thus, the

Tribunal decided that the Claimants were 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. The amount had been calculated by the Experts as EUR 14.82 million. This amount was not the sum to be awarded as damages as it was necessary to consider the correct approach to taxation and the time value of money (¶¶ 102-105).

5.3 Damages arisen out of the finding of breach though the disproportionate nature of the new measures adopted

Three issues arose from Respondent's breach of Article 10 ECT. The first issue concerned the alleged "tax shield", which, according to the Claimants and their expert, existed by virtue of available reliefs in respect of net operating losses, asset impairments and depreciation (¶¶ 106-107).

The Tribunal observed that both Parties accepted that applicable taxes must be considered so that the sum awarded as damages is net of such damages, and both Parties accepted the availability of a tax shield comprised of net operating losses, asset impairments and depreciation. The Tribunal recognised the Claimants' submission that the Tribunal should be seeking to replicate the actual tax situation of the plants and rejected Respondent's proposal due to inconsistency (¶¶ 108-113).

The second issue concerns the basis of the tax return. The Tribunal observed that its conclusion established in the Decision is binding on the Parties, whether it is regarded as strictly *res judicata* or not. The Tribunal rejected the Claimants' position to re-open the conclusion in the Decision on disproportionality (¶¶ 114-116).

The third issue concerns the discount rate, which the Tribunal fixed at 7.61% by reference to the rate advanced by the Claimants in their Memorial. The Tribunal observed that the Claimants' submission in their Memorial included 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 remained, correct (¶¶ 117-118).

5.4 Conclusion in relation to the heads of damage ordered in the Decision

The Tribunal observed that the correct sum to be awarded to the Claimants, as assessed in the Experts' Joint Report, was EUR 28,080,000 (¶¶ 119-120).

6. Residual Issues on Quantum

The Tribunal then moved to determine its position with respect to the tax gross-up claimed by the Claimants, as well as interest and costs (¶ 121).

6.1. The Tax Gross-Up

The Claimants submitted that in order to achieve full reparation, they included a claim for tax gross-up to reflect the taxes payable on an award on damages. Claimants submitted that the tax gross-up would need to be quantified following the Tribunal's determination on damages and suggested instead that the Tribunal ordered Spain to hold the Claimants harmless from any amount of tax due as a result of the Tribunal's Award. Claimants submitted that in the event that the Spanish tax authorities determine that tax was payable on the Award, once the Award

had been paid to the Claimant, which was a tax resident in Spain, then Spain should have pay to said Claimant the appropriate sum on the first demand of the Claimants. The Respondent contended that the tax gross-up should be rejected because it had not been justified or reasoned; (ii) no proof had been provided that an eventual award would be subject to Spanish taxes; (iii) no expert tax report had been submitted to support this claim; (iv) Article 21.1 of the ECT vetoed tax gross-up claims; and (v) it was speculative, contingent and uncertain (¶¶ 122-124).

The Tribunal denied the Claimants' tax gross-up request on the basis of Claimants' failure to adequately demonstrate that the Award will be subject to tax in Spain. Further, the Tribunal considered that Claimants' offer of an undertaking to request that damages be paid to the Second Claimant due to the fact that there were two Claimants in this case, and it appeared to be accepted that the first Claimant would not be subject to any taxation in Spain, was not a practicable solution. The Tribunal observed that after rendering the Award it would be *functus officio,* and therefore would not be in place to ensure that such undertaking was given or to ensure compliance. Finally, the Tribunal recognised that a problem that called for a solution had not been established (¶¶ 125-126).

6.2 Interest

The Claimants requested the Tribunal to award pre-award interest at the rate of 7.61% - the cost of equity – compound monthly. The Claimants submitted that (i) more than 95% of the estimated damages corresponded 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. On the other hand, Respondent submitted that the rate of 7.61% was associated to high-risk investment and was not justified. Thus, the Respondent submitted that the interest rate of the Spanish Government bonds should be the one used to calculate both the pre- and post-award interest (¶¶ 127-129).

The Tribunal considered that a compound interest on a monthly basis was applicable to reach the goal of wiping out all the consequences of the illegal act. The Tribunal decided to consider the return on a 10-year Spanish bond, fixing the reference to the return in June 2014, which takes 2.07%. In sum, the Tribunal awarded interest from 30 June 2014 to the date of the 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 (¶¶ 130-135).

6.3. Costs

The Tribunal ordered Respondent to be responsible for 50% of the Claimants' costs for the jurisdiction and liability phase, together with the costs of the arbitration in their entirety. The Tribunal considered that each party should be responsible for bearing its own legal and other costs with respect to the quantum phase (¶¶ 136-148).

7. Separate Opinion of Mr Judd L. Kessler

Mr Judd L. Kessler opined that Spain entered either into a firm commitment or the equivalent thereof with the Claimants and accordingly, Claimants should receive more compensation (¶¶ 5-6). Two schools of thought could be considered to exist regarding the entire enterprise of international investment arbitration, namely the (i) Rationale for and the Rise of Investment Arbitration and the (ii) Critique of Investment Arbitration. The former considers that sovereign governments made a commitment to honour their treaty obligation and commitments as part of

their domestic law even if such commitments were understood to include standards that are more demanding than those normally applied in domestic law, while the latter considers that investment arbitration tribunals are insufficiently connected to the political sources of legitimacy and suggest the use of a proportionality analysis (¶¶ 7-19). Mr Kessler considers that the Tribunal's conclusion that the ECT is relatively neutral regarding the protection of foreign investment is not correct (¶ 23). Respondent should have been found squarely at fault and preferably not have been analysed under the proportionality test of its right to regulate, and consequently, full reparation could have been granted to Claimants (¶¶ 47, 49, 84).