INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

BAYWA R.E. RENEWABLE ENERGY GMBH AND BAYWA R.E. ASSET HOLDING GMBH
Claimants

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/15/16

AWARD

Members of the Tribunal
Judge James R. Crawford, President
Dr. Horacio A. Grigera Naón
Ms. Loretta Malintoppi

Secretary of the Tribunal
Mr. Francisco Grob

Date of dispatch to the Parties: 25 January 2021

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Claimants	BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH
Decision	Tribunal's Decision on Jurisdiction, Liability and Directions on Quantum dated 2 December 2019
ECT	Energy Charter Treaty
Parties' Experts	KPMG Asesores, S.L. and Quadrant Economics
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
Spain or the Respondent	Kingdom of Spain

I. INTRODUCTION AND PARTIES

1. This case has been submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") under the Energy Charter Treaty, which entered into force for the Kingdom of Spain and the Federal Republic of Germany on 16 April 1998 (the "**ECT**") 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 BayWa r.e. Renewable Energy GmbH ("**BayWa RE**")[1] and BayWa r.e. Asset Holding GmbH ("**BayWa AH**"),[2] companies incorporated under the laws of Germany (together, the "**Claimants**").

3. The Respondent in this case is the Kingdom of Spain ("**Spain**" or the "**Respondent**").

4. The Claimants and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 2 December 2019, the Tribunal issued a Decision on Jurisdiction, Liability and Directions on Quantum, which included a Dissenting Opinion by Dr. Grigera Naón (the "**Decision**"). The full text of that Decision is hereby made an integral part of this Award.

6. The Tribunal concluded, by majority, the following:

   (a) that the European state aid regime and the ECT apply concurrently to the investment and form part of the applicable law;

[1] Excerpt from BayWa's Energy Commercial Registry, Exhibit C-0001.
[2] Excerpt from BayWa's Asset Holding Commercial Registry, Exhibit C-0002.

(b) that the Claimants did not have a legitimate expectation that the Special Regime subsidies, notably in terms of RD 661/2007, would continue to be paid for the lifetime of its Plants;

(c) that in the circumstances, the clawing back by Spain, in and after 2013, of subsidies earlier paid at levels in excess of the amounts that would have been payable under the Disputed Measures, had they been in force in previous years, was in breach of the obligation of stability under Article 10.1, first and second sentences, of the ECT;

(d) that there was no other breach of the ECT;

(e) that all other claims must be rejected.

7. In its Decision, the Tribunal instructed the Parties to "seek an agreement [within 3 months] on the impact of the unlawful retroactive application of the Disputed Measures, on the basis that those measures were otherwise consistent with the ECT", while "assuming a 25-year regulatory life for wind plants".[3]

8. The Tribunal further determined that if the Parties were unable to "reach an agreement on the amount payable…either [Party] may request the Tribunal to decide the outstanding issues in dispute, in accordance with a prompt briefing schedule", including "any residual issues identified, including costs".[4]

9. On 2 March 2020, Claimants informed the Tribunal that the Parties' Experts were unable to reach a "final agreement on the amount payable to the Claimants". Therefore, Claimants requested the Tribunal to decide the outstanding quantum issues in dispute pursuant to paragraph 631 of the Decision. Additionally, in this communication, Claimants proposed a briefing schedule, "with a view to facilitating the prompt rendering of a decision on the pending damages issues".

10. On 3 March 2020, Respondent confirmed Claimants' statement and proposed four amendments to Claimants' briefing schedule.

[3] Decision, paras. 630, 631, 616.

[4] Decision, para. 631.

11. On 9 March 2020, the Tribunal issued Procedural Order No. 8 on the Damages Briefing Schedule.

12. On 23 March 2020, pursuant to Procedural Order No. 8, each Party filed their Experts' calculations on damages; rebuttals were filed on 6 April 2020.

13. On 24 July 2020, the Tribunal sent a list of questions to the Parties and their quantum experts. The Tribunal also communicated that it would decide later whether to convene a hearing to discuss quantum issues.

14. On 25 August 2020, the Parties submitted their responses to the Tribunal's questions.

15. On 9 November 2020, the Claimants filed their statements on costs, updating their previous submissions of 2 July 2018. On 16 November 2020, the Respondent did the same.

16. On 21 December 2020, the Tribunal declared the proceedings closed pursuant to ICSID Arbitration Rule 38.

III. FINAL DECISION ON DAMAGES

A. BACKGROUND TO QUANTIFICATION AWARD

17. In its Decision of 2 December 2019, the Tribunal found that Respondent had breached Article 10.1 of the ECT, but only to the extent of the claw-back operation of the Disputed Measures.

18. In particular, in the Tribunal's view:

> the subsidies paid in earlier years were duly paid and duly taken into account in the operation of the SPVs, in their financing and (presumably) their taxation arrangements. To claw back those profits on the basis of a subsequent judgment that they were 'excessive' was inconsistent with the principle of stability in Article 10.1 of the ECT and has not been shown to have been necessary to resolve the tariff deficit problem, which would have been solved in any event by the Disputed Measures without much further delay and without the element of claw-back of payments earlier lawfully

> made. It may have been reasonable to take into account, in calculating subsidies going forward, the 7.398% that the Plants were deemed to be entitled to under the Disputed Measures. To count against them the amounts previously earned in excess of that threshold was to penalise the Plants for their successful operation during those years. For these reasons, the Tribunal would, if EU law as part of the applicable law so allows, hold that Spain breached Article 10.1 of the ECT by this claw-back operation.[5]

19. The relevant but-for scenario would therefore be a situation where the Disputed Measures came into force, but did not take into account amounts "previously earned in excess of [7.398%]*"*. Thus, the Tribunal is to compute the remuneration owed to Claimants if the Plants are assumed to be operating at a rate of return equal to 7.398% prior to 13 July 2013.

20. RDL 9/2013 of 12 July 2013 came into force on 13 July 2013. It was incomplete insofar as it left specifics of the new remuneration scheme to later enactments. From June 2014, implementing decrees, including RD 413/2014 and MO IET/1045/2014, were published and set out the precise terms of the new regime.[6] The MO IET/1045/2014 particularized the "reasonable return" referred to in RDL 9/2013 at 7.398% (pre-tax).

21. As explained in the Decision, RDL 9/2013 provided for "Specific remuneration" based on "standard" costs per unit of installed power, plus standard amounts for operating costs depending on the type of technology and facility.[7] This Specific Remuneration is comprised of two main components:[8]

    a. **Investment Incentive:** Calculated per MW of installed capacity. This is designed to compensate investors for capital expenditure (CAPEX).

    b. **Operating Incentive:** Calculated per MWh of electricity production. This is designed to compensate facilities for the gap between operating costs (OPEX) and the wholesale price of electricity.

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[5] Decision, para. 496.
[6] Decision, para. 199.
[7] Decision, para. 192.
[8] Decision, para. 193.

22. The Plants were classified as belonging to Standard Facility IT-00652 – which is an on-shore wind installation with more than 5W of installed capacity commissioned in 2002, and attributed a CAPEX of EUR 9.47 million, a certain level of operating expenses and a regulatory life of 20 years.

23. However, this classification meant that the Plants were considered to have covered their estimated CAPEX and OPEX and have obtained a rate of return of higher than 7.398% over their regulatory life of 20 years.[9] As a result, these facilities were ineligible for the investment incentive. They were also ineligible for the operating incentive because their OPEX is estimated to be lower than expected market revenues.[10]

24. Claimants' experts KPMG stated that the OPEX of the Plants were indeed 14% lower than those defined in the Disputed Measures.[11] Thus, Claimants have not made any claim for Operating Incentives.

25. The Tribunal gave the following direction in its Decision:

> Consequently, the Tribunal decides (by majority) that the Parties, with the assistance of their experts, shall seek to reach an agreement on the impact of the unlawful retroactive application of the Disputed Measures, assuming a 25-year regulatory life for wind plants, but otherwise on the basis that those measures were consistent with the ECT.[12]

B. NO CLAW-BACK SCENARIO

26. The damage to which Claimants are entitled is the economic impact on them of the retroactive claw-back as applied to the Plants. If the amounts earned by the Plants from 2003 to July 2013 which exceed the 7.398% threshold are not taken into account, the Plants would be entitled to incentive payments in the period July 2013-2028 since the income according to the regulatory framework from selling electricity at market price would

[9] Decision, para. 204.

[10] Decision, para. 204.

[11] Decision, para. 344.

[12] Decision, para. 616.

achieve a return less than 7.398%. The deficit would be made good by way of additional remuneration or Specific Remuneration.

27. The loss caused to the Plants as on 13 July 2013 is the present value of the future payments which Claimants have been deprived of as a result of the claw-back operation. This can be calculated in the following way:

Step 1: Start with the Standard Net Asset Value (NAV) of the Plants as on 13 July 2013. Calculating the Standard NAV on 13 July 2013 is necessary to determine the total economic return the Plants were guaranteed in the subsequent years.

Step 2: Calculate a 7.398% annual target return for all subsequent years. That would represent the total economic return to which Plants were entitled to for each year until 2028. From this target return, subtract the estimated returns it will receive by selling electricity at market price. This would lead to losses per year of the remuneration which the Plants will no longer receive as a result of the claw-back operation of the Disputed Measures.

Step 3: Translate the annual losses to the Plants into damages to Claimants. In doing so take into account the relevant taxes, the shareholding of Claimants in the Plants and the fact that future losses are being compensated ahead of time.

Step 4: Calculate the amount of interest.

C. STEP 1 – CALCULATING THE 2013 STANDARD NAV

28. At the outset, it is important to recall that the Standard NAV used for purposes of this decision or the Disputed Measures is not the same as the actual NAV of the Plants. Instead, the Standard NAV is simply a variable used in the Disputed Measures to determine Specific Remuneration. Claimants' definition of the Standard NAV therefore appears acceptable. It is as follows:

> The net asset value (NAV) reflects the investment value of the Standard Facility at the beginning of each regulatory semi-period, and thus corresponds to the investment value pending to be remunerated by the renewable scheme at each moment.[13]

29. This is obviously different from the real value of the Plants. That much is also evident from the fact that at the end of the regulatory life the NAV becomes nil, while the Plant itself obviously has some residual value.

30. RDL 9/2013 provides the following specific formula to calculate the Standard NAV at any given point of time.[14]

$$VNA_{j,a} = \left[\underbrace{VI_a(1+t_{j-1})^{p-a}}_{\text{The initial investment (VI) is capitalized with the target rate of return (t)}} - \underbrace{\sum_{i=a}^{p-1}(Ing_{i,j-1} - Cexp_{i,j-1} - Vajdm_{i,j-1})(1+t_{j-1})^{p-i-1}}_{\text{The income (revenues minus expenses minus valuation adjustment) is capitalized with the target rate of return (t)}} \right]$$

31. In simple terms, according to this formula, the Standard NAV at a given time is the difference between capitalized value of initial investment minus capitalized value of income generated in previous years. The capitalization factor (or the compounding factor) is equivalent to the rate of return i.e. 7.398%

(1) Claimants' approach

32. Claimants calculate the 2013 Standard NAV by applying the formula and using the following variables:

    (a) The initial investment for a Standard Facility set at EUR 957,000/ MW.

    (b) Claimants assume that the revenue for the period until July 2013 is equivalent to a 7.398% return (as opposed to the actual returns realized by the Plants). They do not use actual market prices.

[13] CER -7, para. 7.

[14] Annex VI(3) of RD 413/2014.

(c) Parties are in dispute as to whether actual production figures for the Plants between 2003 and 2013 should be used.

(d) For inflation, real data published for 2003 to 2019 is used, and for the remaining years inflation forecast from the Economic Intelligence Unit is used.[15]

(e) The hours of production, remaining costs and the grid access costs are the same as used in the Disputed Measures.[16]

33. The 2013 Standard NAV (i.e. the Standard NAV on 1 January 2013) thus obtained is further adjusted to reflect the Standard NAV on 13 July 2013, by capitalizing the 2013 NAV to that date and deducting the income generated between 1 January 2013 and 13 July 2013 considered in the settlement with the Spanish Competition Authorities.[17] Claimants arrive at the figure of **EUR 741, 546/MW**, which translates into **EUR 73.413 million**.[18]

(2) Respondent's approach

34. Respondent, on the other hand, uses the value of the Plants as it finds it in the audited financial statements of the Plants[19] and determines it to be EUR 40.5 million. It justifies that choice because it is "an objective figure calculated in the ordinary course of business on the basis of normal accounting rules".[20]

35. Respondent also differs from Claimants on the date of valuation – while Claimants use the Standard NAV as on 13 July 2013, Respondent uses the valuation date of 16 June 2014 where the parameters of the Standard Facility were set.

36. Respondent further criticizes Claimants' approach by arguing that the 73.413 million figure is neither reasonable nor consistent with the Decision. In its view, the figure is not

[15] CER-5, para. 23 ii.
[16] CER-5, para. 23 iii, v and vi.
[17] CER-5, para. 25.
[18] CER-5, para. 26.
[19] Second Flores Report dated 6 April 2020, para. 8.
[20] Second Flores Report dated 6 April 2020, para. 8.

reasonable because it leads to a situation where the Plants have 80 per cent of their initial value more than 11 years after commencement of operation.[21]

37. The figure is not consistent with the Decision because it uses actual production figures when, in the Respondent's view, "decision calls for calculating future remuneration disregarding the actual experience of the Wind Farms prior to the enactment of the Disputed Measures."[22]

(3) The Tribunal's analysis

38. The Tribunal makes three key decisions in this step.

a. Method of Calculating Value of Plants

39. In the Decision, the Tribunal endorsed the existence of the Disputed Measures (albeit without the claw-back operation) as being consistent with the ECT. A direct consequence of this is that remuneration determined in accordance with the Disputed Measures would also be consistent with the ECT as long as the effect of the claw-back is adjusted for. For the Disputed Measures, as explained in paragraphs 28 and 29 above, the actual value or the book value of the asset in question is entirely irrelevant. The only NAV that matters is the NAV calculated per the formula set out in RDL 9/2013.

b. Date of Valuation

40. Claimants use 13 July 2013 since that is the date following the date when RDL 9/2013 was introduced. Respondent uses the later date of 16 June 2014 when its parameters were set by subsequent ministerial orders.

41. In the Tribunal's view, 13 July 2013 is the correct date for determination of the NAV since even though the details of the scheme already introduced were not clear, pending regulations setting the parameters of the "on account" payments were made subject to "final regularization and set-off at a future undefined date". Thus, the fact that further

[21] Second Flores Report, 6 April 2020, para. 9.
[22] Second Flores Report, 6 April 2020, para. 9.

implementing decrees set the parameters later did not matter, as they would come into effect on the date RDL 9/2013 was introduced.

c. Use of Actual Historical Production Data

42. Claimants' approach in calculating the Standard NAV, which tracks the formula in the applicable legislation, seems acceptable. Respondent points to the excel model used by Claimants to assert that it uses actual production data.[23] However, Claimants explain that they use the parameters set out for the Standard Facility IT-00652 (to which Claimants' plants correspond) "except for the level of revenue".[24] In place of this parameter, they use "the level of revenue per MWh of production (increased annually in line with inflation) that yields a 7.398% return throughout the regulatory life span of the Standard Facility."[25] This seems to be the case. For instance, the excel model and the figures for hours of production between 2003 and 2013 used by Claimants are an exact match to the figures set out in KPMG's report which it alleges corresponds to the Standard Facility figures sourced from "Ministerial Orders IET/1045/2014, ETU/130/2017 and TED 171/2020".[26] This approach appears also consistent with the Tribunal's findings on liability in that it permits to eliminate the Disputed Measures' retroactive reduction in the allowed return. Accordingly, Respondent's allegation is not persuasive.

d. Conclusion on the Standard NAV

43. In sum, the Tribunal would calculate the Standard NAV of the Plants as at **13 July 2013** to be **EUR 73.413 million.**

D. STEP 2 – CALCULATING THE HARM CAUSED TO THE PLANTS

[23] Second Flores Report dated 6 April 2020, p. 3 (fn. 18).

[24] CER-7 para. 19.i.a.

[25] CER-5, para. 24.

[26] CER-5, para. 36, figure 6. See also MO IET/1045/2014, p. 47325 (until 2017).

(1) The Claimants' approach

44. To calculate the additional remuneration that they would have received each year, Claimants take the following steps: [27]

45. For the period 2013-2016: they assume the investment remuneration that they would be awarded under the MO IET/1045/2014 using forecast prices.

46. For the period 2017-2019: they take the Standard NAV at the end of 2016 (including the difference between forecast prices and actual prices), and then use the parameters set out in MO ETU/130/2017.

47. For the period 2019-2027: they take the Standard NAV at the end of 2019 (including the difference between forecast prices and actual prices), and then use the parameters set out in MO TED/171/2020.

48. The table of these calculations is set out as Figure 8 in KPMG's report of 23 March 2020.[28]

(2) Respondent's approach

49. Respondent is generally in agreement with this approach but points out the following to explain the major difference in its approach with Claimants.

> The vast majority of the difference between the € 3.432 million we calculate and the € 22.006 million KPMG calculates is how to determine the value of the Wind Farms as of 2013. The remainder of the difference, around € 2 million, is due to a difference in the valuation date (KPMG uses 13 July 2013; we use 16 June 2014) and the use of information after the valuation date (KPMG uses some; we do not use any). [29]

50. Only the last "use of information after valuation date" is relevant for Step 2. The key objection appears to be the fact that Claimants use the subsequent Ministerial Orders and actual prices in their calculation.

[27] CER-5, para. 39.

[28] CER-5, para. 40.

[29] Second Flores Report, 6 April 2020, para. 5.

(3) The Tribunal's analysis

51. Both experts agree on the fact that cash due in the future is to be discounted to the present using a discount rate of 7.398%. The difference in their estimations is only on account of: (i) the value of the Plants, (ii) the date of breach and (iii) the use of ex-post information. Items (i) and (ii) have been discussed in the previous section. As to item (iii), *ex-post* data (data that has become available after the breach has occurred) is often a topic of debate in the context of valuation of entities in case of expropriation or non-expropriatory breaches having the effect of significantly impairing the use of an asset. But the issue can arise in other contexts. In this case, the question is whether the Tribunal should ignore events it knows have occurred after the initial breach in 2013 in computing the damage caused.

52. Given that the objective is to compensate the Claimants for losses caused as compared to the counterfactual, the Tribunal should not ignore subsequent developments. Doing so would run the risk of either over- or under-compensating the Claimants as compared to a situation when the breach did not occur. In sum, the Tribunal should take into account events occurring after the date of the breach to the extent that they would, in any event, have occurred under the but-for scenario.

53. Based on this conclusion, Figure 8 of KPMG's Report of 23 March 2020, which sets out the yearly pre-tax amounts that the Plants would have received as additional remuneration/incentive per MW had it not been for the claw-back operation of the Disputed Measures, should be used.

E. STEP 3 – CALCULATING THE HARM CAUSED TO CLAIMANTS

54. In order to determine the harm caused to Claimants (as opposed to the Plants), the pre-tax figures arrived at in Figure 8 of the KPMG report must be subject to the following adjustments:

    (a) The per MW remuneration is multiplied by the capacity of the Plants.

    (b) Generation Tax of 7% applicable from 2013 is applied to reduce the cash flow.

(c) This amount is then subject to a 25% corporation tax.

(d) This figure is then multiplied by 0.74 to reflect the participative value of the Claimants.

55. Figure 9 of KPMG's Report dated 23 March 2020 contains the yearly actual cash flow data for the Claimants.[30] This is then discounted using the 7.398% threshold.

56. As on 13 July 2013, the present value of the damages accrued to Claimants is calculated to be **EUR 22.006 million**.

F. STEP 4 – CALCULATING THE APPLICABLE INTEREST

(1) Claimants' approach

57. This is a topic of significant disagreement between the Parties. Claimants argue that the value of the damages as of 13 July 2013 "has to be capitalised to the actual payment date *using the target rate of return of the Disputed Measures* [i.e. 7.398%], which results in 34,917,355 Euros - if 31 December 2019 is used as the proxy for the payment date -, and 36,580,745 Euros if 25 August 2020 is used as the proxy for the payment date".[31] [emphasis added]. Claimants justify this choice on the basis of the following statement:

> We highlight that capitalising the previous amounts with the target rate of return is the only method to comply with the Tribunal's Decision regarding "the 7.398% that the Plants were deemed to be entitled to under the Disputed Measures" (Decision, § 496).[32]

(2) Respondent's approach

58. Respondent objects to Claimants' approach. It argues that the use of the 7.398% capitalisation rate to extrapolate damages until the date of expected payment is effectively the same as awarding Claimants pre-award interest at an annual compounded rate of 7.398%. The Flores Report of April 2020 states in particular:

[30] CER-5, p.15.

[31] CER-7, para. 22.

[32] CER-5, p. 15, (fn. 10).

> In other words, the KPMG PO8 Report is proposing that pre-award interest should be granted at a rate of 7.398% *per annum*. From an economic perspective, that proposal is incorrect, as it effectively assumes that Claimants would have deposited the proceeds from an award received in 2013 in a savings vehicle with an interest rate of 7.398% *per annum* over the following 6.5 years, with no business or financial risk. The reality is that during the last 6.5 years, there have been no financial products guaranteeing a 7.398% rate of interest to investors, free of any business or financial risk.[33]

59. Using Claimants' proposed approach would mean that in the 6 years since 2013, the value of damages increased by 59%. Instead, Respondent proposes the use of short-term risk-free rate since Claimants are not exposed to any business risk between the 2013 calculation date and the present day.[34]

(3) Claimants' response to Respondent's approach

60. Claimants have a number of responses to these arguments. They can be summarized as follows:

    (a) Respondent's approach does "not allow BayWa's wind farms to achieve the 7.398% target return and, consequently, does not comply with the Decision's instructions."[35]

    (b) Economically, "the discount rate should be equal to the capitalisation rate when the same period and same cash flow are considered. Therefore, the only way to provide the target return is to discount cash flows to the date of payment using the target rate of return (7.398 %)".[36]

    (c) Using a lower rate of interest, would result in a value awarded which is "lower amount than the sum of nominal damage cash flows"[37] Claimants argue that the discounted damage of the cash flows as on 13 July 2013-2019 is EUR 12.44

[33] Second Flores Report dated 6 April 2020, para. 16
[34] Second Flores Report dated 6 April 2020, para. 17.
[35] CER-6, para. 10(iii).
[36] CER-6, para. 25(ii).
[37] CER-6, para. 25 (iii).

million. The simple addition of the cash flow lost is EUR 16.6 million, while using a 3 per cent interest rate gives a figure of EUR 15.070.396 million.[38] To Claimants, this violates the principle of the time value of money.

(d) Using an interest rate lower than 7.398% would "imply that damages suffered by BayWa's wind farms have lost value over time, which does not make any sense as a matter of economics as it contradicts the principle of time value of money".[39]

(4) The Tribunal's analysis

61. None of Claimants' responses stand scrutiny for the following reasons:

(a) The EUR 22.006 million reflects the time adjusted value as on 13 July 2013 of all the remuneration to which Claimants had to forgo on account of the claw back operation of the Disputed Measures. This amount assumes that the compensation to it is based on a target return of 7.398%.

(b) If restitution for the breach took place immediately, it would have resulted in payment of EUR 22.006 million on 13 July 2013.

(c) It is not the case that the investment remuneration received on a yearly basis by Claimants was re-invested such that they would also earn a 7.398% return. . This would ordinarily have been retained by the Plants. In any event, the Standard Facility assumption already provides a fixed investment value/MW of capacity. The remuneration received does not become part of the investment over which Plants are entitled to a 7.398% target return. There is no promise under the Disputed Measures that these amounts would grow at a rate of 7.398%. In that scenario, Respondent is correct to point out that these amounts could not have been invested in any vehicle which would allow for a return of 7.398%.

(d) The fact that the figure arrived at using the lower interest rate would result in a "lower amount than the sum of nominal damage cash flows" is of no relevance. The

[38] CER-6, para. 25(b) and (c).

[39] CER-6, para. 25(iii).

EUR 22.006 million reflects the composite time-adjusted value of all future cash flow as of 13 July 2013. Figure 5 referred to in KPMG's report of 6 April 2020 is misleading because it applies the 3% only to a portion of the principal amounts (to 12 million instead of 22.006 million).

(e) In any event 7.398% is a pre-tax growth figure of the Plant's investment. There is no reason to assume that the post-tax participative shares in those cash flows would have also increased by 7.398% – it would have been decidedly lower.

62. For these reasons, Respondent's proposal to use an interest rate equivalent to the six-month EURIBOR should be accepted. Accordingly, interest shall be payable on the sum awarded, computed at the six-month EURIBOR rate, from 13 July 2013 up to the date of payment of the Award. The Claimants' proposals are otherwise rejected, including their request to have a punitive or moratorium interest applied to pre- and post- award interest.[40]

G. THE TRIBUNAL'S DECISION ON DAMAGES

63. For these reasons, the Tribunal finds unanimously that:

(a) The relevant date of breach is 13 July 2013 (not June 2014).

(b) Claimants' value of the Plants as on 13 July 2013 was EUR 73.413 million.

(c) The value of the damages to Claimants as of that date was **EUR 22.006 million**.

(d) The time between 13 July 2013 and the date of payment of the Award is to be bridged by way of a six-month EURIBOR rate, compounded semi-annually.

[40] See Cl. Reply, paras 1239-1240, and 1241(v).

IV. FINAL DECISION ON COSTS

A. CLAIMANTS' SUBMISSION

64. In their Statements on Costs of 2 July 2018, Claimants contend that the Tribunal should declare "that the Respondent's actions and omissions…amount to breaches of the Respondent's obligations under Part III of the Energy Charter Treaty" and that it should order Respondent to "pay to the Claimants the entire costs of the arbitration and all costs incurred by the Claimants."[41]

65. Claimants have claimed EUR 3,507,950.97 as the costs of representation and related expenses, plus USD 700,000.00 as payments made to ICSID.[42]

66. Regarding interest, Claimants request that the Tribunal order Respondent "to pay the Claimants pre-and post-award interest accrued on all amounts claimed, compounded, until full payment thereof".[43]

B. RESPONDENT'S SUBMISSION

67. Respondent's Submission on Costs of 2 July 2018, states that Respondent should not be "liable for any of the Claimants' arbitration or representative costs" while requesting the Tribunal to "grant an award pursuant to Article 61(2) of the ICSID Convention ordering that the Claimants bear the costs of this arbitration, as well as the Respondent's costs for legal representation (…)".[44]

68. The Respondent has claimed EUR 1,809,434.57 as the costs of representation, plus EUR 700,000.00 as payments made to ICSID as its share of the advances in respect of this case.[45]

[41] Claimants' Statements on Costs of 2 July 2018, paras. 16(ii) and (iii).
[42] Claimants' Updated Statements on Costs of 9 November 2020, p. 7.
[43] Claimants' Statements on Costs of 2 July 2018, para. 16(iv).
[44] Respondent's Submission on Costs of 2 July 2018, paras. 29 and 28.
[45] Respondent's Updated Statements on Costs of 16 November 2020, p. 2.

69. Finally, Respondent argues that the Tribunal has "very broad discretion with respect to the allocation of costs both in terms of the procedural costs and the costs incurred by the parties", pursuant to Article 61(2) of the ICSID Convention.[46]

C. ICSID COSTS

70. The costs of the proceeding, including the Tribunal's fees and expenses, ICSID's administrative fees, and the direct expenses, are as follows:

Arbitrators' fees and expenses	
Judge James R. Crawford	USD 276,557.58
Dr. Horacio Grigera Naón	USD 385,539.48
Ms. Loretta Malintoppi	USD 150,785.92
ICSID's administrative fees	USD 232,000.00
Direct expenses (estimated)	USD 310,814.25
Total	USD 1,355,697.23

The above costs have been paid out of the advances made by the Parties in equal parts.[47]

D. THE TRIBUNAL'S DECISION ON COSTS

71. The Tribunal recalls that Article 61(2) of the ICSID Convention reads as follows:

> "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."

72. Additionally, Rule 28 of the ICSID Arbitration Rules, provides:

"**Rule 28**
Cost of Proceeding

[46] Respondent's Submission on Costs of 2 July 2018, paras. 19-21.

[47] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
>
> (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
>
> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding."

73. In its determination on costs, the Tribunal bears in mind its finding in the Decision that, even though "the Claimants did not have a legitimate expectation that the Special Regime subsidies, notably in terms of RD 661/2007, would continue to be paid for the lifetime of its Plants", "the clawing back by Spain, in and after 2013, of subsidies earlier paid at levels in excess of the amounts that would have been payable under the Disputed Measures, had they been in force in previous years, was in breach of the obligation of stability under Article 10.1, first and second sentences, of the ECT".[48] All other claims were rejected.

74. With regard to the determination on quantum, the Tribunal bears in mind that, even though it followed Claimants' arguments to establish the relevant date of breach as being 13 July 2013 (and the value of the plants was therefore set at EUR 73.413 million), leading to its conclusion that the value of the damages accrued to Claimants amounted to EUR 22.006

[48] Decision, para. 629.

million, it accepted Respondent's proposal to use an interest rate equivalent to the six-month EURIBOR.

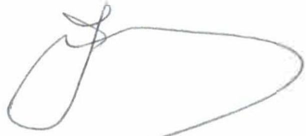
75. As a result of these balanced findings, it would seem only fair that the costs for the proceedings would be equally balanced, being an equal sharing of the ICSID costs, while each Party bears the costs of its own legal representation.

V. AWARD

76. Incorporating in this Award the Decision dated 2 December 2019, and for the reasons set forth above and in that Decision, the Tribunal here decides, unanimously, as follows:

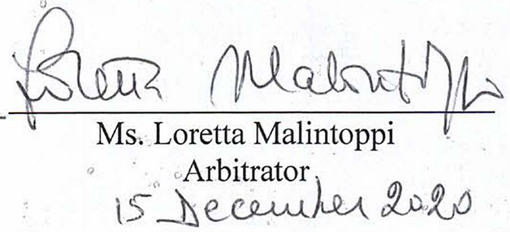
(a) Respondent shall pay the Claimants **EUR 22.006 million** in compensation. Interest shall be payable on the sum awarded, computed at the six-month EURIBOR rate, compounded semi-annually, from 13 July 2013 up to the date of payment of this Award.

(b) Each party carries its own legal representation costs, while the ICSID costs are to be shared equally between the Parties.



Dr. Horacio A. Grigera Naón Arbitrator 14 December 2020	Ms. Loretta Malintoppi Arbitrator

Judge James R. Crawford
President of the Tribunal

Dr. Horacio A. Grigera Naón Arbitrator	 Ms. Loretta Malintoppi Arbitrator 15 December 2020

Judge James R. Crawford
President of the Tribunal

Dr. Horacio A. Grigera Naón
Arbitrator

Ms. Loretta Malintoppi
Arbitrator

7 Jan 2021

Judge James R. Crawford
President of the Tribunal