INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

SolEs Badajoz GmbH
Respondent on Annulment

v.

Kingdom of Spain
Applicant on Annulment

(ICSID Case No. ARB/15/38)
Annulment Proceeding

INDIVIDUAL OPINION BY COMMITTEE MEMBER N. FERNANDO PIÉROLA-CASTRO

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22 February 2022

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I. INTRODUCTION

1. This document sets out the individual opinion of Committee Member N. Fernando Piérola-Castro on the claims brought by the Kingdom of Spain ("**Spain**" or the "**Applicant**") under Articles 52(1)(b) and 52(1)(e) of the ICSID Convention with respect to the Tribunal's determination on damages, as contained in the Award rendered on 31 July 2019 in *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38 (the "**Award**") and the Tribunal's Decision on Rectification of the Award on 5 December 2019 (the "**Rectification Decision**"). Given the sense of this opinion, the Committee Member must also take an individual position on the apportionment of costs. Other than these matters, the Committee Member subscribes fully to the Committee's analysis and rulings in respect of the other matters at issue in these proceedings.

2. Section II *infra* lays out the Committee Member's individual opinion on the claims brought by Spain under Articles 52(1)(b) and 52(1)(e) of the ICSID Convention in respect of the determination of damages. Section III explains the consequences of this position in the allocation of costs. Section IV sets out his conclusion.

II. DETERMINATION OF DAMAGES

3. The Applicant raises two claims: (a) that the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention by granting compensation in excess of the amount due as a result of the Tribunal's findings on liability [1], and (b) that the Award failed to state the reasons for the Tribunal's endorsement of the amount proposed by SolEs Badajoz GmbH ("**SolEs Badajoz**", the "**Claimant**" or the "**Respondent on Annulment**") and its expert, The Brattle Group ("**Brattle**"), in particular, the reliance on the but-for scenario leading to the calculation of that final amount.[2] For the reasons set out *infra*, the Committee Member concurs with the Committee's decision that the first claim should be rejected (albeit for different

[1] Memorial, ¶62(3).
[2] Memorial, ¶172; Reply, ¶323.

reasons), while he dissents with the Committee's decision that the second claim should be rejected, and considers that it should be upheld.

A. Context of the Determination of Damages

4. The underlying arbitration concerned certain measures imposed by Spain that modified the regulatory regime in force under Royal Decree 1578/2008 [3] (the "**Original Regulatory Regime**"[4] and "**RD 1578**", respectively).

5. The Tribunal defined the "**Disputed Measures**" as comprising two sets of measures.[5] The "**First Set of Disputed Measures**" included three measures: (i) Royal Decree Law 14/2010 of 23 December 2010, "which imposed a cap on the number of hours per year during which PV installations could sell electricity under the FIT [feed-in-tariff]"[6] ("**RDL 14/2010**"); (ii) Law 15/2012 of 27 January 2012, "imposing a seven percent tax on electric energy production"[7] ("**Law 15/2012**") and (iii) Royal Decree Law 2/2013 of 1 February 2013, "which changed the inflation index used to update FITs"[8] ("**RDL 2/2013**").

6. The "**Second Set of Disputed Measures**" comprised four measures[9]: (i) Royal Decree Law 9/2013 of 12 July 2013, setting forth "urgent measures to ensure the financial stability of the electricity system" [10] ("**RDL 9/2013**"); (ii) Law 24/2013, which "eliminated the distinction between the Ordinary Regime and the Special Regime and confirmed the changes contained in RDL 9/2013" [11] ("**Law 24/2013**"); (iii) Royal

[3] Royal Decree 1578/2008 dated 26 September 2008 covering the compensation for the generation of electric power by photovoltaic solar technology for facilities subsequent to the deadline for the maintenance of compensation under Royal Decree 661/2007 of 25 May 2007. Award, ¶110.
[4] Award, ¶113.
[5] Award, ¶114.
[6] Royal Decree Law 14/2010 dated 23 December 2010, on the Establishment of Urgent Measures for the Correction of the Tariff Deficit in the Electricity Sector. Award, ¶120(1).
[7] Law 15/2012 dated 27 December 2012 on Tax Measures for Energy Sustainability. Award, para. 120(2).
[8] Royal Decree-Law 2/2013 dated 1 February 2013, on Urgent Measures in the Electricity System and in the Financial Industry. Award, ¶120(3).
[9] Award, ¶125.
[10] Royal Decree-Law 9/2013 dated 12 July 2013, on Urgent Measures to Guarantee the Financial Stability of the Electricity System. Award, ¶126.
[11] Law 24/2013 dated 26 December 2013, on the Electricity Sector. Award, ¶129.

Decree 413/2014 ("**RD 413/2014**")[12] and (iv) Ministerial Order IET/1045/2014 ("**IET/1045/2014**")[13], both of which provided "greater details regarding the new remuneration scheme applicable to renewable energy facilities."[14]

7. The Tribunal found that Spain's adoption of the First Set of Disputed Measures was not inconsistent with the Energy Charter Treaty ("**ECT**").[15] However, it considered that "by enacting the Second Set of Disputed Measures, [Spain] violated its obligation under Article 10(1) of the ECT [the obligation to accord to investors fair and equitable treatment]".[16] Accordingly, the Tribunal proceeded on the basis that it was appropriate to establish the damages arising from the Second Set of Disputed Measures.[17]

B. Whether the Tribunal manifestly exceeded its powers by granting compensation in excess of the amount due as a result of its findings on liability

8. Article 52(1)(b) of the ICSID Convention provides that the annulment of an award may be requested if "the Tribunal has manifestly exceeded its powers". In this case, the Applicant submits that the Tribunal did so by granting compensation beyond what was due on the basis of the measures that it had found to be inconsistent with the ECT. According to the Applicant, for the calculation of damages,

- the Tribunal relied with "blind faith" on the valuation of damages made by Brattle, and in particular on a but-for scenario that assumed that the Original Regulatory Regime under RD 1578 would remain unchanged and that none of the Disputed Measures would be established, including those that were found not to be illegal; and

[12] Royal Decree 413/2014 dated 6 June 2014, which Regulates the Activity of Electricity Production from Renewable Energy, Cogeneration and Waste Sources. Award, ¶130.
[13] Order IET/1045/2014 dated 16 June 2014, Approving the Remuneration Parameters of Standard Facilities for Certain Electricity Production Facilities using Renewable Energy, Cogeneration and Waste Sources. Award, ¶130.
[14] Award, ¶130.
[15] Award, ¶452.
[16] Award, ¶463.
[17] Award, ¶¶488 and 538.

- if the Tribunal was not satisfied with Brattle's valuation proposal (as Professor Sacerdoti's opinion suggests), the Tribunal should have requested additional assistance from the experts, as the discretion of an arbitral tribunal in the determination of quantum does not permit it to exceed its powers to this extent.[18]

9. For the assessment of this claim, the relevant "powers"[19] within the meaning of Article 52(1)(b) are those set out in Article 26(6) of the ECT, which enable a tribunal established under the ECT to "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." As established by the Tribunal, the granting of compensation for a breach of ECT Article 10(1) is governed by the customary international law on State responsibility. This provides that compensation must "wipe out all the consequences of the illegal act" (as far as possible), and that a "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[20] The Tribunal stated that the claimant had the burden of proving the claimed loss. Relying on *Gemplus*, it also noted that "[i]f that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established."[21] On this basis, the Tribunal decided that Spain "has an obligation to compensate Claimant for the reduction in the fair market value of its investment that was caused by the Disputed Measures."[22] The Tribunal thus assumed that it had the power to order the payment of compensation for the injury attributable to the illegal act, and that it could do so to the extent that the losses were not "uncertain", "speculative" or "unproven".[23]

[18] The Parties' arguments are laid out in detail in the Committee's Decision, Sections VI(A)(i) and (ii).
[19] The term "powers" in general refers to the "authority given or conferred" (Oxford English Dictionary, at https://www.oed.com/view/Entry/149167?rskey=UgBoMt&result=1#eid, visited 30 October 2021) upon a tribunal to fulfil its mandate. It is a term that is unqualified in Article 52(1) of the ICSID Convention.
[20] Award, ¶476.
[21] Award, ¶478.
[22] Award, ¶476. The Tribunal's explanation of the legal standard shows that the Tribunal considered that the relevant injury must be "resulting from and ascribable" to the illegal measures. The Tribunal subscribed to the general notion that the compensable damages must have a "sufficient causal link" – "not too remote" – with the illegal act (Award, ¶476, citing ILC Articles on State Responsibility, Commentary on Article 31, ¶ 10). Thus, the Tribunal implicitly assumed that its ability to order the payment of damages was disciplined by the existence of a link between the damages claimed and the measures that were found to the inconsistent with the ECT.
[23] Award, ¶478, (citing, *Gemplus S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4. Award dated 16 June 2010, ¶¶12-56).

10. In addition, as noted above, the Tribunal took its decision on damages in the context of its findings that: (i) the investor had a legitimate expectation to a stable FIT[24], (ii) the First Set of Disputed Measures was not inconsistent with Spain's obligation to accord fair and equitable treatment under the ECT[25] and (iii) that the Second Set of Disputed Measures was inconsistent with Article 10(1) of the ECT.[26]

11. In quantifying the damages, the Tribunal:

(i) chose the discounted cash flow (DCF) method as "well-suited" to the case. It explained that this choice provided a solid basis to quantify damages given the fact that "the Second Set of Disputed Measures … diminished the revenue that Claimant would have received had the Original Regime been maintained". The Tribunal also explained that the DCF method enabled it "to compare the present value of Claimant's investment in the absence of the Disputed Measures to the present value of [the] investment in light of the Disputed Measures"[27];

(ii) noted that "the amount of damages to be awarded to Claimant [had to] be adjusted to take into account … the Tribunal's finding that Spain is not liable as to the First Set of Disputed Measures"[28];

(iii) focused its attention on Appendix C of Brattle's First Quantum Report (Appendix C) and in particular, on the set of calculations that assumed the legality of the 7% TVPEE (the 7% tax). The Tribunal referred to the damages that Brattle had attributed to the Second Set of Disputed Measures (which corresponded to the "**July 2013 measures**" in Appendix C) as distinguished from the damages attributed to the First Set of Disputed Measures[29]; and

[24] Award, ¶444.
[25] Award, ¶452.
[26] Award, ¶463.
[27] Award, ¶488.
[28] Award, ¶538.
[29] Award, ¶539.

(iv) noted that "Brattle calculate[d] that the July 2013 measures reduced the fair market value of Claimant's investment by 40.98 million."[30]

12. There is no indication that in undertaking its quantification efforts to this point, the Tribunal in any way exceeded its powers.

13. The Tribunal then proceeded to reject the argument raised by the Applicant's expert ("**AMG**") to the effect "that Brattle [did] not divide the individual effects of the Measures in its future damages calculation." The Tribunal rejected this argument as it was premised on a part of Brattle's report (Figure 1) that "[did] not isolate the damages attributable to the July 2013 measures from earlier measures, as was done in Appendix C". [31] Whether that rejection might give rise to a sufficient basis for annulment is discussed *infra* under the next section.

14. Following the rejection of AMG's argument, the Tribunal concluded that Spain's "breach of its fair and equitable treatment obligation reduced the fair market value of Claimant's investment by EUR 40.98 million."[32] Based on this conclusion, the Tribunal ordered that "[a]s a consequence of the breach of Article 10(1) of the ECT, Respondent shall pay Claimant compensation in the amount of EUR 40.98 million."[33]

15. The relevant question is whether, by endorsing the amount claimed in Appendix C, and consequently ordering compensation based on this amount, the Tribunal exceeded its powers. As Appendix C ostensibly narrowed the scope of the damage calculation to the losses attributable only to "July 2013 measures" (Second Set of Disputed Measures), the Tribunal would have *prima facie* acted consistently within the boundary of its powers in doing so. However, the Applicant alleges that Appendix C does not *in fact* state only the damages that accrued from the Second Set of Disputed Measures. The assessment of this question requires a deeper assessment of the findings stated in the

[30] Award, ¶539.
[31] Award, ¶540.
[32] Award, ¶541.
[33] Award, ¶576(3). This figure was "replaced with [the figure of] 'EUR40.49'" pursuant to the Rectification Decision of 5 December 2019. Rectification Decision, ¶55(2).

Award in the light of the Applicant's valuation theory and the Tribunal's consideration of Brattle's valuation reports.

16. As such, even if the Applicant's assertion were correct, this does not seem to be a failure that may be characterised as "manifest" or "clearly revealed to the eye" of the reviewer. There are certain elements in the Award that cast doubt on whether the Tribunal properly relied on Appendix C in order to attribute damages only to the measures that it had found to be ECT-inconsistent. The Tribunal endorsed the position that compensation could not be granted if the claimed losses remained "unproven", "speculative" or "uncertain". Thus, it considered that its power to grant compensation implied a duty to verify, inquire into, assess objectively, and to question the certainty or probative value of the amount asserted by the Claimant. However, it is unclear whether the Tribunal conducted an examination and verification of the figure proposed by Brattle in Appendix C as being attributable *in fact* to future damages accruing only from the Second Set of Disputed Measures. Rather, the Award describes the counterfactual scenario used for the damage determination as based on "the absence of the Disputed Measures"[34], as if all the measures at issue – even the First Set of Disputed Measures, which were not found to be ECT-inconsistent – had to be removed. The Tribunal rejected AMG's argument based on the argument's own flaws, rather than on the basis of the probative value of Brattle's proposed figure and calculations.[35]

17. That said, there are also other elements in the Award that show that the Tribunal engaged carefully with the assessment of Brattle's financial model and, in particular, with the following elements: (i) the valuation date[36]; (ii) the periods of operation of the plants as a sufficient basis for the DCF analysis[37]; and (iii) the divergence of the Parties' cashflows estimates and its causes, including their different views on the regulatory risk[38], the illiquidity discount[39], and the inflation rate.[40] The Tribunal thus concluded

[34] Award, ¶488.
[35] The Applicant has presented evidence showing that the question of the impact of RDL 14/2010 and RDL 2/2013 on the Claimant's calculation of future damages was raised and discussed during the cross-examination of the expert at the hearing. R-0386, Hearing Transcript, Fourth Day, pp. 44-50.
[36] Award, ¶527.
[37] Award, ¶528.
[38] Award, ¶532.
[39] Award, ¶¶533-534.
[40] Award, ¶¶535-536.

that "Brattle's DCF analysis provide[d] a sound basis for the Tribunal to determine the reduction in the fair market value of Claimant's investment."[41] Furthermore, a review of the hearing record shows that the Tribunal considered the question of the most appropriate manner in which it could deal with potentially multiple "liability permutations" according to the complexity of combining different valuation factors into a DCF calculation.[42]

18. The standard for annulment under Article 52(1)(b) requires a finding that the Tribunal "manifestly" exceeded its powers. In this case, there is some basis to question the presumption that the Tribunal exercised its discretion and took necessary steps to verify, assess and adjust, if appropriate, the amounts claimed in Appendix C. However, while these indications might raise a valid issue as to whether the Tribunal exceeded its powers, they do not constitute a sufficient evidentiary basis to find that it did so "manifestly" within the meaning of Article 52(1)(b) of the ICSID Convention.

19. Consequently, while there may be some indication that the Tribunal did not take certain steps that were pertinent for the determination of damages under its own legal standard, there is no conclusive evidence that the Tribunal failed to do so. Accordingly, it is not possible to conclude that the Tribunal "manifestly" exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention. Thus, the Committee Member concurs with the Committee's decision, albeit for different reasons, that the Request for Annulment should be rejected with respect to this claim.

C. Whether the Award failed to state reasons on which it is based

20. Article 52(1)(e) of the ICSID Convention provides that the annulment of an award may be requested if "the Award has failed to state the reasons on which it is based". Regarding the determination of the damages or quantum, the Applicant argues that:

[41] Award, ¶538.
[42] R-0386, Transcript of Hearing, Fourth Day, pp. 138-140.

- the Award contains contradictory findings on liability and quantum, which render the decision on quantum incoherent and compel the annulment of the Award.[43] The liability findings recognize that the Applicant may benefit from certain regulatory policy space. However, the quantum finding presupposes that the Original Regulatory Regime, which was in place prior to the introduction of any of the Disputed Measures, should be maintained[44];

- the Award contains no explanation for the rejection of AMG's argument regarding the individual impact of the ECT-consistent measures in the but-for scenario and assumes that Appendix C separates the future damages into those attributable to the ECT-consistent measures and the ECT-inconsistent measures, and discounts the effect of the former[45];

- the Award does not explain the Tribunal's decision to include "provisionally" the measures not found to be illegal in the relevant counterfactual to calculate the loss of value. The Tribunal failed to provide a reason for this despite the fact that the issue was raised in the proceeding.[46] There is no explanation for the Tribunal's adoption of Brattle's quantum approach on future damages, which is accepted as an "act of faith", apparently without the Tribunal realizing that by choosing that model, it adopted a limitation in time of the legal measures.[47]

21. In these circumstances, it must be considered that the decision for which the existence of reasons must be assessed is that, according to which, "[a]s a consequence of the breach of Article 10(1) of the ECT, Respondent shall pay Claimant compensation in the amount of EUR 40.98 million".[48] This order follows the Tribunal's decision "that Respondent's breach of its fair and equitable treatment obligation reduced the fair market value of Claimant's investment by EUR 40.98 million."[49] This decision is based,

[43] Annulment Application, ¶57; Memorial, ¶¶208-209.
[44] Memorial, ¶¶202-209.
[45] Memorial, ¶¶274-276.
[46] Reply, ¶¶428-442.
[47] Memorial, ¶¶143 and 153-154; Reply, ¶440.
[48] Award, ¶576(3).
[49] Award, ¶541.

in turn, on the damages figure proposed by Brattle in Appendix C. As noted by the Tribunal, "Brattle calculate[d] that the July 2013 measures reduced the fair market value of Claimant's investment by 40.98 million."[50] As noted above, this figure was finally "replaced with [the figure of] 'EUR40.49'" pursuant to the Rectification Decision of 5 December 2019.[51]

22. The specific grounds for annulment raised by the Applicant are examined below.

a. Contradiction between the findings on liability and quantum

23. The Applicant argues that the Tribunal's decision on quantum contradicts its previous findings on liability, in which it found that, while the investor could legitimately expect a stable FIT[52], it was also expected that Spain could take measures to counter its tariff deficit. In addition, the Tribunal also found that the First Set of Disputed Measures was not ECT-inconsistent.[53] Nevertheless, the Tribunal's approach to quantum assumed that Spain could not exercise this flexibility and that the Original Regulatory Regime had to remain in place. To support its position, the Applicant invokes Dr. Ripinsky's approach to quantum, in an attempt to show it is improper to make, on the one hand, a finding of liability based on the permissibility of regulatory measures, and on the other, a finding of damages based on the absence of that permissibility.

24. From a careful reading of the Award, it is not evident that the findings on liability and quantum are inherently contradictory or cannot be reconciled. The fact that a tribunal finds that a State may exercise its regulatory powers without affecting legitimate expectations does not preclude a subsequent finding on quantum based on an expectation that the State would not exercise those powers. This could well occur if, for instance, the tribunal finds that this scenario is the most likely one in the light of the evidence at issue. In other words, a liability regime envisaging scope for certain state regulatory activity could well coexist with a compensation model in which it is

[50] Award, ¶539.
[51] Rectification Decision, ¶55(2).
[52] Award, ¶444.
[53] Award, ¶452.

objectively concluded that the most likely future scenario is to assume a hypothetical situation in which any adjustment measure would be removed.

25. Thus, the finding that a remuneration regime may be adjustable (as a result of the exercise of the country's regulatory power) does not preclude a subsequent approach to damages based on the assumption of a stable FIT.[54] In fact, the Tribunal itself found that certain measures that reduced the remuneration could coexist with the expectation of a stable FIT. For example, the cap on hours (under RDL 14/2010) and the modified inflation index (under RDL 2/2013) were found to have "reduced Claimant's revenue during the limited period while the measures were in effect, [but] they did not change the basic features of the Original Regulatory Regime (the FIT) and did not undermine Claimant's legitimate expectation."[55]

26. Furthermore, it is clear that the Applicant's concern relates only to the calculation of *future* damages and the elimination of historical losses linked to measures that were not found to be ECT-inconsistent.[56] Thus, the alleged contradiction would be limited to a portion of the quantum finding, rather than to the finding in its entirety. Moreover, even with respect to that portion of the finding, by referring to Appendix C, the Tribunal intended – whether correctly or not – to limit the compensation only to those damages attributable to the measures found to be inconsistent with the ECT.[57]

27. Regarding the alleged contradiction expressed in Professor Sacerdoti's individual opinion (i.e. that the "Claimant's general approach to liability and quantum" cannot be reconciled with the "Claimant's premise [on valuation] that the Original Regulatory Regime would remain stable for 25 years")[58], one way of reading his statement is as an expression of preference instead of a contradiction. The context makes clear that Professor Sacerdoti would have preferred to have been able to adjust the premise on

[54] Award, ¶440.
[55] Award, ¶450.
[56] AMG's Rebuttal Report on Annulment of Award, ¶34.
[57] Award, ¶¶538-539.
[58] Award, ¶545.

which the counterfactual was based instead of having to assume the Claimant's valuation proposal in its entirety without possible adjustments.

28. Based on the foregoing, the Applicant's argument that there is a contradiction between the findings of liability and damages that prevents the sustainability of both premises should be rejected.

b. Lack of motivation of quantum decision based on rejection of AMG's argument

29. The second ground supporting the Applicant's claim of failure to state reasons is the contention that the Tribunal improperly rejected AMG's argument and that this was the real basis of the quantum finding. The rejection of AMG's argument (paragraph 540) follows the Tribunal's reference to Brattle's proposed amount of damages (paragraph 539) and precedes its conclusion on the amount to be awarded for compensation (paragraph 541). The insertion of a paragraph on this matter at this point in the Award reflects the significance that the Tribunal accorded to the issue. However, the fact that the Tribunal addressed the issue before its conclusion on quantum does not mean that this was necessarily the motivation of the Tribunal's decision. There may be other relevant reasons stated in other parts of the Award.

30. In any event, the allegation that the rejection of AMG's argument was not properly reasoned rests on two points: (i) the Tribunal's alleged error in assuming that AMG's challenge was based on a figure (Figure 1) that did not separate the isolated effects of the measures[59] and (ii) the Tribunal's assumption that Appendix C did discount the forward-looking effect of the measures found to be ECT-consistent.[60] The fact that the Applicant challenges the relevance of the grounds on which the rejection is based implies an acknowledgment that there are reasons to support such a decision. This fact renders the Applicant's arguments baseless.

[59] Memorial, ¶275.
[60] Memorial, ¶276.

c. Failure to state reasons for findings of damages – choice of provisional effect of ECT-consistent measures for the calculation of future damages

31. The Applicant also argues that the Award contains no explanation as to why, in quantifying damages based on a counterfactual scenario, the Tribunal opted for the "provisional" consideration of the ECT-consistent measures and not for their "permanent" consideration in the counterfactual framework, despite the fact that the issue was debated in the arbitration and was critical in the quantification of the compensation to be paid.[61] The question was whether, for the construction of the counterfactual regarding future damages, it had to be assumed that the measures declared lawful: (i) should only be considered in the counterfactual for the period during which they were in force ("provisional" consideration) or (ii) should be considered as part of the permanent regulatory regime despite having been repealed by the Second Set of Measures ("permanent" consideration).

32. SolEs argues, for its part, that the Applicant's allegation that the issue was exhaustively discussed goes too far (as any discussion was very limited); that the Tribunal addressed the substance of the Applicant's argument and rejected it; and that even if there was no discussion of the issue in the Award, that does not justify its annulment for failure to state reasons on this point; in addition to the fact that the Applicant formulates this new angle of the damage analysis only after the issuance of the Award; and that the Applicant cannot pretend to reduce the quantum decision to the question of whether "the legal measures should be applied permanently in the but-for scenario or whether they should be applied on a provisional basis."[62]

33. A reading of the Award shows that the Tribunal did not address the issue as raised by the Applicant in these proceedings. The Tribunal rejected AMG's argument on the basis of AMG's failure to rely on the relevant part of Brattle's report or to put forward an alternative division of individual effects per Disputed Measure. However, the Tribunal did not address the issue of the suitability of the counterfactual scenario assumed by

[61] Reply, ¶¶428-442.
[62] Rejoinder, ¶¶203-206.

Brattle as the starting point for establishing the loss of value caused by the ECT-inconsistent measures.

34. Only Professor Sacerdoti, in his minority opinion, addresses the issue of the suitability of the counterfactual scenario proposed by Brattle in the light of the finding that it was legitimate to expect Spain to take some action to address the tariff deficit, even though this might have reduced the remuneration for existing investors. Professor Sacerdoti's opinion suggests that it would have been appropriate to adjust Brattle's counterfactual "with a shorter time horizon" to avoid the Tribunal assuming a scenario in which the Original Regulatory Regime would remain stable for 25 years. However, the lack of information and submissions on the matter by either party would have meant that this could not be done. Although this explains why Professor Sacerdoti joined the endorsement of the amount proposed by Brattle, his individual views cannot be considered as the reasoning of the Tribunal as a whole.

35. In these circumstances, the questions that arise are whether the issue of the counterfactual structure was considered as relevant to the quantification of damages and whether this issue was timely and sufficiently raised so as to merit being addressed by the Tribunal in its Award. On the first issue, the Tribunal adopted the DCF methodology as "well-suited" to the case.[63] The Tribunal explained that the DCF method enabled it "to compare the present value of Claimant's investment in the absence of the Disputed Measures to the present value of [the] investment in light of the Disputed Measures."[64] Under this methodology, damages are calculated as the difference between the amounts established under a "But-For" scenario and the "Actual" scenario. Thus, the But-For scenario is one of the two key pillars for the establishment of the loss in value of the investment concerned.[65]

36. On the second issue of whether the question of the structure of the counterfactual was timely and sufficiently raised, the Applicant argues that the issue was addressed at the hearing and in its post-hearing brief. SolEs disagrees and argues that this assertion is

[63] Award, ¶488.
[64] Award, ¶488.
[65] Award, ¶491.

exaggerated, and that the issue, as now raised by the Applicant, was only raised subsequent to the issuance of the Award. The Award does not indicate whether the Tribunal paid any particular attention to this issue, as it was instead focused on "the way in which each expert derives the discount rate that is applied to the future stream of cash flows" (in the Tribunal's perception, the difference between the valuations of the Parties was primarily a consequence of the establishment of the discount rate).[66] Moreover, according to Professor Sacerdoti's individual opinion, neither party followed the approach of adjusting the But-For scenario to suggest a different counterfactual, not even as an alternative or subordinate argument.[67] However, the fact that the issue was discussed in Professor Sacerdoti's opinion suggests that the Tribunal as a whole was aware of the matter before it issued its Award.

37. Thus, the issue is not addressed in the Award. However, it had a bearing on the quantification of damages and the compensation to be paid. Moreover, the Parties maintain conflicting views as to the scope of their approach in the underlying arbitration. In these circumstances, it is appropriate to review the record of the proceedings, in particular the hearing and the cross-examination of the experts to which the Applicant refers in its Reply, in order to determine whether it was sufficiently raised and discussed.

38. In this regard, the hearing record shows that during the first day, in its opening statement, Spain questioned SolEs's But-For assumption in the sense that:

> [a] valuation, when it's performed with a but-for versus actual scenario scheme, shouldn't either assume liability or deny liability. It should take reasonable economic assumptions, because it's not a matter of assuming or denying liability; it's a matter of real-life assumptions. And that petrification, that royal decree frozen for 25 or 30 years' time is not a real economic assumption, because if this Tribunal grants or understands that the state has the power to regulate, Brattle's damages calculations are totally useless, because actually they do not consider a real regulatory risk.[68]

[66] Award, ¶530.
[67] Award, ¶546.
[68] R-0397, Transcript of Hearing, First Day, p. 258.

39. The fourth day of the hearing was scheduled for the discussion of quantum issues. On that day, the dialogue referred to in the Applicant's Reply took place.[69] This dialogue occurred after the expert's presentation and in the framework of so-called "liability permutations" as a result of potentially diverse conclusions on liability. In his presentation, Brattle's expert referred to Appendix C in the sense that it contained "the breakdown of the harm relating to each of the disputed measures" and, in response to the Tribunal's questions, gave an explanation of that appendix.[70] Spain's questions to this expert focused on exploring the implications of the DCF methodology for certain measures and, in particular, with regard to so-called "future damages". However, it does not appear from a reading of this exchange that the issue of the "provisional" or "permanent" consideration of specific measures in the structuring of the counterfactual scenario was addressed directly, as the Applicant has argued in these proceedings. It should also be borne in mind that at the time of the cross-examination, there was uncertainty as to the Tribunal's findings on liability, and therefore to which measures the damage caused to SolEs could or should be attributed. Therefore, it seems unlikely that there could have been a discussion on the provisional or permanent inclusion of the ECT-consistent measures into the But-For scenario during this stage of the proceeding.

40. The discussion between Spain and the expert led a Tribunal Member to observe that there were "a number of discussions over the course of today related to chart 21, I think it is called Appendix C", and that Appendix 7 constituted "an effort to explain how the damages valuation might be different" if the 7% tax was excluded from the damages calculation. This Member acknowledged that Appendix C facilitated the task of identifying different damage scenarios according to the outcome of the jurisdictional case. However, the Member also noted the constraints imposed by the damages valuation in general (and described the valuation as a "price-fixed menu").[71]

41. In that sense, the Tribunal Member explored the issue of how to address the possibility of being "persuaded by AMG on one of these components" of the DCF valuation method, considering the level of uncertainty and "less confidence" arising from the

[69] Reply, ¶¶429-435.
[70] R-0386, Transcript of Hearing, Fourth Day, p. 31.
[71] R-0386, Transcript of Hearing, Fourth Day, p. 131.

treatment of multiple liability scenarios.[72] Brattle's expert gave his view that, in the face of "various liability permutations", it would be appropriate to "step into the financial model" and "update" the assumptions in the light of the liability findings. He also noted that the model provided "enough flexibility" to make these adjustments.[73] The Tribunal Member further enquired whether there was any additional document "that would present any of the subcategories" and based on which the Tribunal could make reliable calculations.[74] The expert confirmed that not "every single permutation possible" had been provided. He noted that there were "too many variables to run every single permutation", which would give "a whole suite of numbers that would be confusing". While he was willing to consider providing some additional input, he pointed out that, in the interests of efficiency, it would be for the Tribunal to take certain decisions (on liability), to narrow the scope of discussion, and then to engage in the financial model on the remaining issues.[75]

42. On the other hand, Spain's experts presented "at an illustrative level" a critique of Brattle's calculation of future damages in order to show that a segregation of the impact of different measures was possible, and that this segregation would show a significant reduction of damages if some measures were not declared inconsistent with the ECT.[76] Upon enquiry by the same Tribunal Member as to the feasibility of the Tribunal making these adjustments on its own, taking some of Brattle's and AMG's elements in isolation, one of Spain's experts stated that the "items that made up the difference between their view and ours, are interrelated, so that if we remove one, the effect on the others would most likely change." Therefore, he stressed that it was impossible to take a single element in isolation without assessing the impact or change this could have on the others.[77] The Tribunal Member understood that, in the experts' views, adjustments to the DCF method could not be made on the basis of isolated changes to specific calculation factors without thereby affecting the status of other factors.[78]

[72] R-0386, Transcript of Hearing, Fourth Day, p. 132.
[73] R-0386, Transcript of Hearing, Fourth Day, pp. 133-134.
[74] R-0386, Transcript of Hearing, Fourth Day, p. 134.
[75] R-0386, Transcript of Hearing, Fourth Day, p. 134.
[76] R-0386, Transcript of Hearing, Fourth Day, pp. 160-162.
[77] R-0386, Transcript of Hearing, Fourth Day, p. 227.
[78] R-0386, Transcript of Hearing, Fourth Day, p. 227.

43. From the above, it is clear that while Spain did not raise the issue in the direct and frontal manner as it has in these proceedings, the issue did come up and was discussed before the Tribunal during the session scheduled for the purpose of quantum. The Tribunal made enquiries with a view to getting a more concrete approximation of the damages that would arise under different scenarios of liability. Although Professor Sacerdoti's individual opinion cannot be attributed to the Tribunal, its contents and its inclusion in the Award indicate that the Tribunal was aware of the concern as it has been formulated in these proceedings. It should also be noted that the Tribunal enquired about the possibility of making adjustments on its own and using some factors proposed by one side or the other. The experts' response pointed to methodological constraints that would arise if the Tribunal were to engage in such an exercise.

44. In the very particular circumstances of the case, it is reasonable to consider that the handling of the issue of the structuring of the counterfactual in light of the various findings of liability deserved a proper consideration by the Tribunal in its Award, beyond the mere adoption of the amount proposed by Brattle and the rejection of AMG's argument based on an alleged incorrect reference. The issue was relevant as it had a direct impact on the scope of an international obligation binding upon Spain. The Tribunal took cognisance of it and even raised some questions with a view to exploring the possibility of making the relevant adjustments. The Tribunal's confirmation of Brattle's proposed amount would indicate that the Tribunal either engaged in the adjustment exercise and concluded that there was nothing to adjust, or did not do so because it considered it unnecessary to make such adjustments for reasons that the Tribunal did not articulate. The lack of an explanation in the Award on this point means that it is impossible to know the reasons that led the Tribunal, by a majority, to adopt Brattle's proposed damages amount without exercising its discretion to make appropriate adjustments or, alternatively, the reasons why those adjustments were not appropriate under the circumstances.

45. The need to provide a reason for the adoption of the amount proposed by Brattle based on certain counterfactual assumptions became more relevant in light of the context in which the Tribunal had positioned itself for the assessment of the case. The Tribunal had found:

(i) an applicable legal standard, according to which compensation for the reduction in market value had to be granted in so far as it could be attributed to ECT-inconsistent measures, in the context of a sufficient causal link and on the basis of facts that could be deemed as certain or proven[79];

(ii) the investor's legitimate expectation of a stable FIT was conditional on the fact that Spain could be expected to take certain measures to address the tariff deficit, including measures that may have had the effect of reducing remuneration for existing investors.[80];

(iii) the findings that the First Set of Disputed Measures was not inconsistent with the ECT[81], despite the fact that the cap on hours and change in the CPI reduced investor income, and that these measures could not be characterised as "unreasonable" for achieving Spain's tariff deficit objectives[82]; as well as the conclusion that the Second Set of Disputed Measures was inconsistent with the ECT.[83]

[79] Award, ¶¶475-478.
[80] Award, ¶440.
[81] Award, ¶452.
[82] With respect to the change in inflation indexation, the Tribunal found that "[t]he evidence … establishe[d] that, as of March 2010, there were indications that Spain was considering options for addressing the tariff deficit", and that "[a] prudent PV investor could have anticipated that Respondent might make adjustments leading to modest reductions in the remuneration of existing RE plants, including PV plants operating under RD 1578/2008". As there was no claim "that the regime in place when [the Claimant] invested was immutable, but rather that Respondent had an obligation to retain its essential or core features", the Tribunal found "no basis to conclude that the method for indexing FITs to inflation was … a "core feature" of the regulatory regime" and that "[i]t cannot be said that a prudent investor would have placed particular reliance on that element of the regulatory regime". On this basis, "[t]he Tribunal does not consider that the change in CPI, pursuant to RDL 2/2013, violated Respondent's FET obligation." Award, paras. 447-448.With respect to the cap on hours imposed pursuant to RDL 14/2010, the Tribunal found that it "was superseded by the Second Set of Disputed Measures, effective July 2013." The Tribunal evaluated the evidence before it. It found that "Claimant provide[d] limited information about its consequences (although it does quantify the damages that it associates with this cap). By contrast, in respect of the cap on hours imposed under the Second Set of Disputed Measures (as part of the elimination of the entire Special Regime), Claimant provide[d] considerable detail establishing the loss of the "efficiency premium" that had been available under the Original Regulatory Regime." The Tribunal concluded that "[o]n the record before the Tribunal, there [was] not sufficient evidence to establish that the cap on hours imposed by RDL 14/2010 was a fundamental change to the regulatory regime on which Claimant had relied. Accordingly, the Tribunal conclude[d] that the cap on hours imposed by pursuant to RDL 14/2010 did not violate Article 10(1) of the ECT." Award, ¶449.
[83] Award, ¶¶462-463.

46. Thus, based on several factors, the Award should have provided an explanation of why the amount of damages was adopted based on counterfactual elements that assumed the maintenance of the Original Regulatory Regime, without consideration of any adjustment to account for the likely/expected adoption of measures that could reduce the remuneration derived from the Original Regulatory Regime. These factors include the standards of attributability, certainty or verifiability of damages; the findings of expectations of a stable FIT but also of a possible regulatory adjustment by Spain; and the findings of liability for the Second Set of Disputed Measures but not for the other measures (some of which were even considered as not "unreasonable" to achieve Spain's public policy objective).

47. SolEs Badajoz has submitted that possible changes to the Original Regulatory Regime were taken in account in the structuring of the But-For scenario by the consideration of regulatory risk. However, from the manner in which the Tribunal reflected this risk in the Award[84], the regulatory risk with which the Tribunal was concerned was that of fluctuations and defaults in the tariff levels. There is no indication that the Tribunal considered the regulatory risk in relation to potential changes in measures other than the FIT, such as those that were found not to be ECT-inconsistent (i.e., quantitative limits under RD 14/2010 and inflation-related adjustments under RD 2/2013).

48. Spain presents the problem as one of a lack of explanation of the choice of "provisional" or "permanent" consideration of certain measures in the counterfactual scenario structuring. SolEs Badajoz attempts to downplay the relevance of the issue due to this formulation. However, the key issue is the Tribunal's choice of a likely regulatory scenario from which the level of expected revenue cashflows would be calculated. Regardless of which scenario might have been assumed ("provisional" or "permanent" consideration of ECT-consistent measures), the Tribunal did not explain why it assumed a counterfactual in which Spain would refrain from any measures to deal with its tariff deficit, even from implementing measures that the Tribunal itself considered to be "not unreasonable". The need for this explanation is heightened by the fact that a "but for" scenario presupposes, by definition, the contemplation of a regulatory scenario

[84] Award, ¶532.

in which the relevant measures (the Second Set of Disputed Measures) are not present and in which the other measures that were in place at the time the measures to be removed were introduced (e.g. the cap on hours under RDL 14/2010 and the inflation indexation under RDL 2/2013) would remain in place. Furthermore, the fact that Brattle's expert stated that the choice of a counterfactual scenario for the investment lifetime was a legal question left to the Tribunal[85], and that he recognised that his expertise was not in the legal field[86] reinforces the view that an explanation from the Tribunal as to why it endorsed Brattle's choice of counterfactual scenario was necessary under the circumstances.

49. Based on the foregoing, the Committee Member concludes that the Award failed to state the reasons on which the Tribunal's decision on the amount for damages was based, within the meaning of Article 52(1)(e) of the ICSID Convention.

III. DETERMINATION OF COSTS OF THE ANNULMENT PROCEEDINGS

50. In the light of Article 61(2) of the ICSID Convention and Arbitration Rules 47(1)(j) and 53, the Committee has discretion to allocate the costs of these proceedings between the Parties as it deems it appropriate. In this context, the Parties concur that the principle that "costs-follow-the-event" should guide this task.

51. Given that this opinion concludes that the Request for Annulment should be upheld under Article 52(1)(e) of the ICSID Convention in respect of the determination of damages, it is reasonable to consider that the Request was financially justified. As the Applicant has prevailed on a claim that would warrant the annulment of the Award, while the Respondent on annulment has prevailed on all the other claims, the outcome of this proceedings would suggest an apportionment of costs.

52. It must also be noted that the reason for annulment is not imputable to an action or omission of the Claimant or the Claimant's expert. As a matter of fact, as noted above, the Claimant's expert provided his view on the manner in which the Tribunal could have

[85] R-0386, Transcript of Hearing, Fourth Day, p. 44.
[86] R-0386, Transcript of Hearing, Fourth Day, p. 35.

addressed the question of various liability permutations, and expressed his willingness to cooperate with the Tribunal, which is an offer that, if considered, might have assisted the Tribunal in avoiding the failure to state reasons with respect to the structuring of the counterfactual scenario in the damages valuation process.

53. Based on the foregoing, each Party should bear the costs of their own representation in the proceedings (including their legal and expert fees as well as the expenses for translation, trips and other reasons). With respect to the administrative costs of the annulment proceedings (including the Committee's fees and expenses as well as the ICSID's administrative fees), the Parties should bear these costs, as resulting from the final balance to be issued by ICSID, in equal terms, at the rate of 50 per cent each.

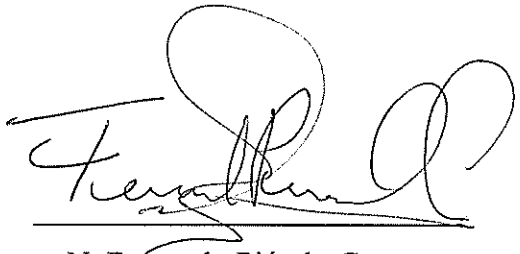
IV. CONCLUSION

54. For the reasons stated above, the Committee Member:

(i) concurs with the Committee's decision that the Request for Annulment must be rejected – albeit for different reasons – in respect of the claim brought under Article 52(1)(b) of the ICSID Convention regarding the determination of damages;

(ii) respectfully dissents from the Committee's decision that the Request for Annulment must be rejected in respect of the claim brought under Article 52(1)(e) of the ICSID Convention regarding the determination of damages; and

(iii) consequently, dissents from the Committee's decision on the allocation of the costs of these annulment proceedings.



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