

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**NEXTERA ENERGY GLOBAL HOLDINGS B.V. AND
NEXTERA ENERGY SPAIN HOLDINGS B.V.**

Claimants

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/14/11

AWARD

Members of the Tribunal

Professor Donald M. McRae, C.C., President of the Tribunal
The Honourable L. Yves Fortier, P.C., C.C., O.Q., Q.C., Arbitrator
Professor Laurence Boisson de Chazournes, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

Date of dispatch to the Parties: 31 May 2019

REPRESENTATION OF THE PARTIES

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and

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Representing Respondent:

Mr. José Manuel Gutiérrez Delgado
Mr. Javier Castro López
Mr. Pablo Elena Abad
Mr. Antolín Fernández Antuña
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Ms. Patricia Fröhlingsdorf Nicolás
Ms. Mónica Moraleda Saceda
Ms. Elena Oñoro Sainz
Ms. Almudena Pérez-Zurita Gutiérrez
Ms. Amaia Rivas Kortazar
Ms. María José Ruíz Sánchez
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Mr. José María Alonso

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TABLE OF SELECTED ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Cl. Bif.	Claimants' Observations on the Request for Bifurcation dated 2 October 2015
Cl. Costs	Claimants' Statement of Costs dated 28 September 2018
Cl. Costs Update	Claimants' Updated Statement of Costs dated 11 April 2019
Cl. C-Mem. Jur.	Claimants' Counter-Memorial on Preliminary Objections dated 8 August 2016
Cl. Mem. Merits	Claimants' Memorial on the Merits dated 22 May 2015
Cl. Rej. Jur.	Claimants' Rejoinder on Preliminary Objections dated 14 November 2016
Cl. Reply Merits	Claimants' Reply on the Merits dated 10 August 2016
Cl. Skeleton	Claimants' Skeleton Argument dated 9 December 2016
Cl. PH Mem.	Claimants' Response to Tribunal's Post-Hearing Question dated 27 February 2017
Cl. PH Reply	Claimants' Reply to Spain's Submission of 27 February 2017, dated 7 March 2017
ECT	Energy Charter Treaty
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

R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Resp. Costs	Respondent's Statement of Costs dated 28 September 2018
Resp. C-Mem. Merits	Respondent's Counter-Memorial on the Merits dated 4 March 2016
Resp. Mem. Jur.	Respondent's Memorial on Preliminary Objections and Request for Bifurcation dated 9 September 2015
Resp. Rej. Merits	Respondent's Rejoinder on the Merits dated 20 October 2016
Resp. Reply Jur.	Respondent's Reply on Preliminary Objections dated 14 October 2016
Resp. Skeleton	Respondent's Skeleton Argument dated 9 December 2016
Resp. PH Mem.	Respondent's Response to Tribunal's Post-Hearing Question dated 27 February 2017
Resp. PH Reply	Respondent's Reply to Claimants' Submission of 27 February 2017, dated 7 March 2017
Request for Arbitration	Request for Arbitration dated 12 May 2014
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing (English) (as revised by the Parties in February 2017)
Tribunal	Arbitral Tribunal constituted on 23 January 2015

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”), on the basis of the Energy Charter Treaty, which entered into force on 16 April 1998 for the Netherlands and the Kingdom of Spain (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 NextEra Energy Global Holdings B.V. (“**NextEra Global**”), and NextEra Energy Spain Holdings B.V. (“**NextEra Spain**”), both limited liability companies incorporated under the laws of the Netherlands (*besloten vennootschap met beperkte aansprakelijkheid*), (together, “**Claimants**”).
3. The Respondent is the Kingdom of Spain (“**Spain**” or “**Respondent**”).
4. Claimants and 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 12 March 2019, the Tribunal rendered its Decision on Jurisdiction, Liability and Quantum Principles. That Decision constitutes an integral part of this Award and it is hereby incorporated as **Annex A**. The Procedural History of this arbitration leading up to the rendering of the Decision on Jurisdiction, Liability and Quantum Principles is summarized at Section II of that Decision.¹ A summary of the procedural steps thereafter follows below.
6. In the Decision on Jurisdiction, Liability and Quantum Principles, the Tribunal ruled:

¹ In addition, it is noted that on 11 March 2019, the Respondent filed an application seeking leave to introduce an additional legal authority to the record, namely, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and Principles of Quantum, 30 November 2018 (“**RREEF Decision**”). Claimants filed a response also on 11 March 2019, opposing the application. The Tribunal dismissed the application by its letter of 12 March 2019.

“The Tribunal decides:

- (i) That it has jurisdiction over this dispute.*
- (ii) That Respondent did not comply with its obligation under Article 10(1) of the ECT to provide fair and equitable treatment in that it failed to protect Claimants’ legitimate expectations.*
- (iii) That Claimants are entitled to damages based on a return on the capitalized value of their assets as of 30 June 2016 on the basis of the WACC of the Termosol Plants plus a premium of 200bps, together with pre-judgment interest on the basis of 5-year Spanish sovereign bonds as at the date of the Award, compounded monthly.*
- (iv) That Claimants are to recalculate their damages claim of EUR 398.4 million in the light of a premium of WACC plus 200 bps and advise the Tribunal and Respondent of this recalculated amount within 10 days of the receipt of this Decision.*
- (v) That Claimants are entitled to post-judgment interest from the date of the Award on the basis of 5-year Spanish sovereign bonds as at the date of the Award, compounded monthly, until payment.”²*

- 7. On 19 March 2019, Respondent filed an application asking that its quantum experts be *“allowed by the Arbitral Tribunal to revise the calculations requested in the Tribunal’s decision, paragraph 682.”*
- 8. On 21 March 2019, the Tribunal wrote to the Parties noting: *“[t]he Decision [...] provided that the Claimants’ recalculation be forwarded to the Respondent and the Tribunal. If on receipt of the Claimants’ recalculated damages the Respondent discovers that there has been an error in calculation then it is free to draw that to the Tribunal’s attention.”*
- 9. Thereafter, on 21 March 2019, Claimants submitted the calculation requested at paragraphs 680 and 682(iv) of the Decision on Jurisdiction, Liability and Quantum Principles, and made submissions concerning the interest rate.

² Decision on Jurisdiction, Liability and Quantum, 12 March 2019, ¶ 682. *See also, id.*, ¶ 680.

10. On 5 April 2019, Respondent informed the Tribunal that it had no observations to Claimants' recalculations of its damages claim of 21 March 2019, and that it did not find it appropriate to revisit the decision on the interest rate at that stage.
11. Following an invitation from the Tribunal, on 11 April 2019 Claimants submitted an updated Statement of Costs. On 16 April 2019, Respondent informed the Tribunal that it did not intend to file an updated Statement of Costs.
12. The proceeding was closed on 9 May 2019.

III. DAMAGES

A. THE PARTIES' POSITIONS

13. The Parties' submissions concerning quantum issues were summarized at Section VIII(A) of the Decision on Jurisdiction, Liability and Quantum Principles.
14. Following issuance of the above referenced Decision, in their letter of 21 March 2019, Claimants (i) submitted that the Tribunal had already heard the Parties' arguments on quantum and determined the applicable quantum principles, with the only issue remaining being an arithmetical reduction of 100 bps from the premium above the WACC;³ (ii) confirmed that "*Claimants' damages figure 'based on a return on the capitalized value of their assets [EUR 720.6 million] as of 30 June 2016 on the basis of the WACC of the Termosol Plants plus a premium of 200 bps' is EUR 290.6 million (excluding interest) as of 30 June 2016;*"⁴ and (iii) opposed any attempt by Respondent to reopen quantum matters pertaining to the alternative but-for scenario.⁵ As to the quantification of interest, Claimants observed that Spain's central bank publishes the Spanish sovereign bond rates daily, and asked that the Tribunal "*specify the figure of the intended applicable rate directly in the Award so that there can be no ambiguity on enforcement.*"⁶ Claimants also requested that a precise interest rate be specified in

³ Cl. Letter, 21 March 2019, p. 1.

⁴ Cl. Letter, 21 March 2019, pp. 2-3.

⁵ Cl. Letter, 21 March 2019, p. 3.

⁶ Cl. Letter, 21 March 2019, p. 4.

connection with the interest awarded on legal costs, and referred to the Parties' prior submissions on the matter.⁷

15. In its communication of 5 April 2019, Respondent stated that "*it ha[d] no observations on the mathematical calculations of the Claimants' recalculation of their damages claim communicated [...] in the Claimants' letter of 21 March 2019.*"⁸ As to quantification of interest, Respondent submitted that the Tribunal had already decided that the interest rate "*will be based on 5-year Spanish sovereign bonds at the date of the Award, compounded monthly*" and that it was not appropriate to revisit the Tribunal's decision on the interest rate at this stage.⁹

B. THE TRIBUNAL'S ANALYSIS

(1) Damages

16. As pointed out above, in its Decision of 12 March 2019, the Tribunal left open the precise quantification of damages in light of its conclusions on the principles applicable to that quantification, and it invited Claimants to recalculate their damages claim in light of the Tribunal's Decision that damages should be calculated on the basis of a premium of WACC plus 200bps.
17. As noted, Claimants responded on 21 March 2019 indicating that the recalculated amount was **EUR 290.6 million**, which had already been anticipated by its expert Compass Lexecon in its Second Report. Respondent raised no question about the accuracy of this recalculation. Accordingly, the Tribunal accepts the amount of **EUR 290.6 million** as the accurate calculation of the damages in this case.

(2) Interest

18. The Tribunal also recalls that in its Decision of 12 March 2019 it concluded that both pre-judgment and post-judgment interest were to be awarded on the basis of 5-year Spanish

⁷ Cl. Letter, 21 March 2019, p. 4 (citing Cl. Costs, ¶ 1, Cl. Mem. Merits, ¶¶ 305-311, Cl. Reply Merits, ¶¶ 602-604 and 606 (4) and (5); Resp. Costs, ¶ 9, Resp. C-Mem. Merits, ¶¶ 896-900 and 901(d), Resp. Rej. Merits, ¶¶ 1238 and 1240 (d).)

⁸ Resp. Email, 5 April 2019.

⁹ Resp. Email, 5 April 2019 (emphasis in original).

sovereign bonds as at the date of the Award, compounded monthly. At the time of making the Decision the 5-year sovereign bond rate was 0.234%. However, if interest were determined on the basis of 5-year sovereign bonds as of the date of this Award, that amount would be essentially zero which is the last rate published by Spain's Central Bank (Banco de España) on the date of the Award.¹⁰ Since an award of zero interest is not consistent with the conclusion of the Tribunal (Decision, ¶ 671) that an award of interest was appropriate in this case, the Tribunal has decided to award interest at the rate of 0.234%, the rate for 5-year sovereign bonds at the date of the Decision. Prejudgment interest is thus to be awarded at this rate from the date of valuation, 30 June 2016, to the date of this Award. Post-judgment interest is to be awarded at this rate from the date of this Award until payment.

IV. COSTS

A. THE PARTIES' POSITIONS

(1) Claimants' Position

19. In the Reply on the Merits, Claimants asked that the Tribunal rendered an Award:

*“(5) Ordering the Respondent to pay the Claimants the full costs of this arbitration, including, without limitations, arbitrator’s fees, administrative costs of the Centre, counsel fees, expert fees, and all other costs associated with these proceedings, together with post-award interest on all such sums so awarded at the rates specified in sub-paragraph (4) above [an appropriate commercial rate, 6.84%, or alternatively, EURIBOR + 3.5%]; [...]”*¹¹

¹⁰ See Banco de España, Interest Rates and Exchange Rates at <https://www.bde.es/webbde/en/estadis/infoest/tipos/tipos.html> under Interest Rates (daily data), 1.3 Interest Rates on the Secondary Market for (Government and Private) Securities, Table TI.1.3 (last consulted on 31 May 2019). The Tribunal notes that the last rate publicly available on 31 May 2019 in the PDF “Table TI.1.3” on this website is the rate of 0.00 for 30 May 2019, and in the Excel “Time Series of Chapter TI.1.3” on this website is the rate of 0.004 for 30 May 2019.

¹¹ Cl. Reply Merits, ¶ 606(5). See also, Cl. Mem. Merits, ¶ 314(6).

20. In their statement of Costs dated 28 September 2018, Claimants reiterated that should their claims succeed, Respondent should bear the total arbitration costs incurred by Claimants.¹²
21. As updated on 11 April 2019, Claimants submit the following claim for legal costs and other expenses (*excluding* the advances made to ICSID to cover the costs of the proceeding):¹³

Description	Amount Claimed	
Skadden professional fees	\$	<u>11,514,359.45</u>
Translation costs	\$	175,714
Other disbursements: copying, travel, lodging	\$	441,556
Cuatrecasas (Claimants' Spanish Law counsel) professional fees and disbursements	€	287,102
Compass Lexecon (Claimants' experts on quantum) professional fees and disbursements	€	<u>2,830,522.90</u>
Henry Price (Claimants' expert on the useful life of the Plants and nameplate capacity) professional fees and disbursements	\$	206,074
Client direct costs (travel and lodging for the merits hearing) No charge is made for the time of in-house counsel.	\$	54,169
	€	6,117
Witness disbursements (travel and lodging for the merits hearing)	\$	49,223
	€	2,664
Totals	\$	<u>12,441,095.45</u>
	€	<u>3,126,405.90</u>

22. In addition, Claimants have also submitted the following claim for the advances made to ICSID to cover the costs of the proceeding:¹⁴

¹² Cl. Costs, ¶ 1.

¹³ Cl. Costs Update, Annex A, Section I.

Description		Amount Claimed
ICSID Registration Fee and share of advance on costs (calculated as a total of \$525,000 less \$41,000 in costs of interpretation that the Centre has paid out of the Claimants' advance and which they have agreed not to seek by way of cost recovery) ¹¹	\$	484,000

23. For the purposes of ICSID Arbitration Rule 28(2), Claimants submit that their costs were “reasonably incurred” because (i) they are consistent with the amounts deemed reasonable in prior ICSID cases; (ii) they are commensurate with the size, duration and complexity of this proceeding; (iii) the pleadings were extensive; (iv) Claimants have tried to reduce the length of the proceeding; and (v) Claimants have had to incur in more costs than Respondent.¹⁵

(2) Respondent’s Position

24. In its Statement of Costs dated 28 September 2018, the Respondent asks:

“As requested in Paragraph 901 d) of the Counter-Memorial on the Merits and in Paragraph 1240 d) of Rejoinder on the Merits, the Kingdom of Spain respectfully asks the Arbitral Tribunal to order the Claimants to pay all costs and expenses arising from this arbitration, including the ISCID [sic] administrative expenses, the arbitrators’ fees and the attorneys’ fees of the Kingdom of Spain, its experts and advisers, as well as any other cost or expenses incurred, including a reasonable rate of interest as of the date on which said costs were incurred to the date of their effective payment, for the [...] costs incurred by Respondent due to this arbitration.”¹⁶

¹⁴ Cl. Costs, Annex A, Section II. Claimants explain that they “do not seek reimbursement of the costs of hiring the IDRC, court reporters, interpreters or catering during the hearings in London, which the Claimants agreed to bear in full, regardless of the outcome of the arbitration, in return for Spain’s agreement to convene the merits hearings in London,” and note that “these costs have been excluded from the Claimants’ disbursements claimed in this submission.” Claimants add that “[f]or the same reason, the Claimants have also deducted the sum of \$41,000 from their claimed share of the ICSID advances on costs, which [...] represent the costs of interpretation paid by ICSID.” Cl. Costs, n. 11.

¹⁵ Cl. Costs, ¶¶ 2-7.

¹⁶ Resp. Costs, ¶ 9.

25. Respondent submits the following claim for its legal costs and other expenses (*excluding* the advances made to ICSID to cover the costs of the proceeding):¹⁷

Description	Amount
Courier	EUR 6,870.15
Editing Services	EUR 61,267.43
Expert Reports	EUR 367,688.86
Hearing	N/A
Other Costs (services from public notaries)	EUR 3,632.50
Translations	EUR 54,561.53
Travel Expenses	EUR 16,216.33
Legal Fees	EUR 2,592,390.00
Total (excluding advances on costs to ICSID)	EUR 3,102,626.80

26. In addition, Respondent submits the following claim for the advances made to ICSID to cover the costs of the proceeding: **EUR 439,422.13**.¹⁸
27. According to Respondent, “*the costs incurred by the Respondent should be paid by the Claimants in the case that the Tribunal decides not to uphold the Claimants’ claim.*”¹⁹ While recognizing that under Article 61(2) of the ICSID Convention the Tribunal has discretion to allocate costs, Respondent submits that the Tribunal’s decision must be well grounded and not be arbitrary, and it should consider the complexity of the proceeding and the Parties’ conduct.²⁰
28. In that regard, Respondent contends that its conduct has been serious, professional, and in good faith, and that Spain has shown willingness to cooperate.²¹ According to Spain, the Tribunal should consider (i) that Respondent submitted its pleadings in a timely manner, in contrast with Claimants’ actions in connection with the timing for submission of the

¹⁷ Resp. Costs, ¶¶ 11-18.

¹⁸ Resp. Costs, ¶ 10.

¹⁹ Resp. Costs, ¶ 23.

²⁰ Resp. Costs, ¶ 22.

²¹ Resp. Costs, ¶ 24.

Reply on the Merits and the Addendum to Second Expert Report of Compass Lexecon;²² (ii) that Respondent refrained from disturbing Claimants' preparation of their pleadings with document production applications, while Claimants did the opposite; (iii) Claimants' conduct during the document production phase including their failure to produce some data ordered by the Tribunal and their refusal to allow Respondent's expert to visit the Termosol Plants; (iv) Claimants' filing of a last minute witness statement by Mr. Arechabala.²³

B. THE COSTS OF THE PROCEEDING

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

Arbitrators' Fees and Expenses	
Prof. Donald M. McRae	USD 213,650.29
The Honourable L. Yves Fortier	USD 148,193.74
Prof. Laurence Boisson de Chazournes	USD 183,884.70
ICSID's Administrative Fees	USD 180,000.00
Direct Expenses	USD 109,505.42
<u>Total</u>	<u>USD 835,234.15</u>

30. The above costs have been paid out of the advances made by the Parties.²⁴ The expended portion of each Party's advances to cover the above costs of the arbitration was: USD 438,127.56 (for Claimants) and USD 397,106.59 (for Respondent).²⁵

²² Resp. Costs, ¶ 25.

²³ Resp. Costs, ¶ 25.

²⁴ The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case account. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

²⁵ The difference in the disbursements from the case fund allocated to each Party relates to the Parties' agreement that the costs of interpretation at the Hearing held 12-19 December 2016 paid from the case fund be covered by the Claimants only. See emails of 27 August 2015, 6 June 2016, and 24 June 2016; ICSID Letter of 8 December 2017. It should also be noted that, in accordance with the Parties' agreement, there were no disbursements from the case fund administered by ICSID for court reporting and venue relating to the Hearing held in London 12-19 December 2016. *Id.*

C. THE TRIBUNAL'S ANALYSIS

31. Article 61(2) of the ICSID Convention provides:

“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.”

32. The Tribunal notes that Respondent lost on essentially all of the jurisdictional grounds and on the merits. However, Respondent's arguments on jurisdiction, particularly relating to the nature of the Dutch investment, were not trivial and Claimants' arguments on the merits were not fully endorsed, in particular their principal basis for assessing damages was rejected. In the view of the Tribunal, this should be reflected in the allocation of costs.

(1) Costs of the Proceeding

33. With respect to the costs of the proceeding, while Respondent should pay the greater part, Claimants should also contribute to those costs. Accordingly, the Tribunal assesses the costs of the proceeding to be divided on the basis of two-thirds to be paid by Respondent and one-third by Claimants. The total costs of the proceeding paid from the case fund as indicated above amount to USD 835,234.15 (*supra*, ¶ 29), but this amount includes cost of the interpretation for the Hearing in December 2016 that Claimants agreed to bear in full regardless of the outcome of the arbitration.²⁶ Accordingly, excluding those interpretation costs (USD 41,020.97), the costs of the proceeding paid from the case fund that the Tribunal is allocating among the Parties amount to USD 794,213.18.

34. Two thirds of the above amount would be USD 529,475.45 (Respondent's share) and one third of that amount would be USD 264,737.73 (Claimants' share). The expended portion of Claimants' advances to ICSID *excluding* what pertains to costs of the interpretation for the Hearing in December 2016 is USD 397,106.59. The difference

²⁶ See *supra*, n. 14; Cl. Costs, n. 11.

between USD 397,106.59 and USD 264,737.73 is USD 132,368.86. Accordingly, the Tribunal orders Respondent to pay Claimants **USD 132,368.86**.

(2) Costs of the Parties

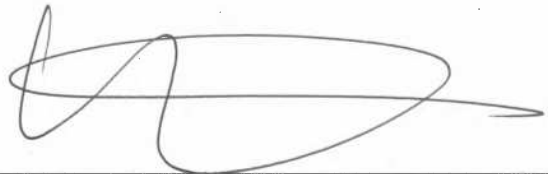
35. With respect to the costs of the Parties, the Respondent should bear its own costs and one third of Claimants' costs.
36. Claimants' costs excluding the item for costs of the proceeding (*i.e.* excluding lodging fee and advances on costs to ICSID) amount to USD 12,441,095.45 + EUR 3,126,405.90 (*supra*, ¶ 21). One third of those amounts are **USD 4,147,031.81 + EUR 1,042,135.3**, which would be Respondent's share of Claimants' costs.

V. AWARD

37. For the reasons set forth above, the Tribunal decides as follows:
 - (1) The Tribunal's Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019, attached as **Annex A** is hereby reaffirmed.
 - (2) Respondent shall pay Claimants the sum of **EUR 290.6 million** in compensation for its breach of Article 10(1) of the ECT to provide Claimants with fair and equitable treatment.
 - (3) Respondent shall pay Claimants prejudgment interest on that amount from 30 June 2016 until the date of this Award at the rate of 0.234%, compounded monthly.
 - (4) Respondent shall pay Claimants the amount of **USD 132,368.86** representing its share of the costs of the proceeding.
 - (5) Respondent shall pay Claimants the amount of **USD 4,147,031.81 plus EUR 1,042,135.3**, representing one-third of the Claimants' costs in this arbitration.
 - (6) Respondent shall pay Claimants post-judgment interest on the amounts owing under this Award from the date of the Award until date of payment at the rate of 0.234%, compounded monthly.

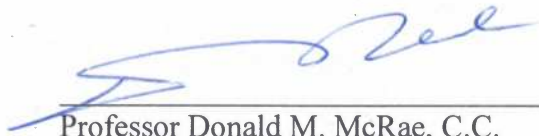


The Honourable L. Yves Fortier, P.C., C.C., O.Q., Q.C.
Arbitrator
MAY 10 2019



Professor Laurence Boisson de Chazournes
Arbitrator

MAY 15 2019



Professor Donald M. McRae, C.C.
President

MAY 30 2019